6192.a.1

A GENERAL ABRIDGMENT OF Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

BY CHARLES VINER, ESQ.

FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY OF OXFORD.

FAVENTE DEO.

THE SECOND EDITION.

VOL. I.

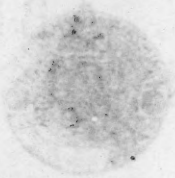
London:

PRINTED FOR

G. G. J. AND J. ROBINSON, T. PAYNE, E. AND R. BROOKE, T. WHIELDON AND J. BUTTERWORTH;

AND L. WHITE, Dublin.

M.DCC.XCI.



ADVERTISEMENT

TO THE

PRESENT EDITION.

THE republication of this work has long been a deſirable object, towards extending the uſeful purpoſes of it to the hands of a very numerous and reſpectable part of the profeſſion, who have hitherto been prevented making that acquiſition from the great ſcarcity of complete copies to be met with, even at the very enlarged price to which, from its acknowledged merit, it had gradually arrived.

This New Edition has, however, been ſuſpended in deference to the intereſts of the Univerſity of Oxford, (to whom the author had bequeathed the remaining copies of his work, as part of a fund for the inſtitution of the Law Lecture in that Univerſity,) on the preſumption that the undertaking might have been deemed eligible, as conducive towards promoting the intentions of the founder of that learned inſtitution.

The preſent undertaking having accordingly been propoſed to the Vice-Chancellor of Oxford, and referred to the delegates of the preſs, it was on the part of the Univerſity relinquiſhed, as incompatible with the ſtate of the Vinerian fund, which determination was obligingly communicated to the preſent proprietors, with the moſt liberal encouragement to proceed with their propoſed republication.

It remains only to explain the plan on which this work is intended to be executed:

The GENERAL ABRIDGMENT OF LAW AND EQUITY of Mr. *Viner*, will be republiſhed from the original edition in

the reduced form of the two firſt volumes now preſented to public notice, with ſuch corrections as appear neceſſary on a careful peruſal, and by occaſionally conſulting the original authorities.

The ſubject matter which was extracted and tranſlated from Lord Chief Juſtice *Rolle*'s Abridgment by Mr. *Viner*, and accordingly diſtinguiſhed in the original edition by the old Engliſh black letter, is in this edition alſo diſtinguiſhed without the uſe of that kind of letter, by placing brackets [ ] at the beginning and end of each *placitum* or paragraph which has been ſo incorporated from the valuable work of Lord *Rolle*.

The reduction of ſize has made ſome alteration neceſſary in the mode of diſtinguiſhing the pages of the original edition, to which all the references in the law books have hitherto of courſe been made: on that account, where the commencement of each page does not coincide with the former edition as uſual at the top of the leaf, it is pointed out by the figures in the margin, and in ſome inſtances more minutely by a mark of reference placed in the text; at the ſame time the convenience is preſerved of finding the number of the page where it is uſually looked for, in the corner of it, agreeable to a method which has been lately adopted and approved in ſome other inſtances.

The Tables of Contents to each volume reſpectively, which in the original edition referred the reader to the general head and ſubdiviſion only, are now improved by the addition of the numbers of the pages, by which the convenient uſe of the work will be much promoted. The like addition will be made to the general Indexes, in which ſeveral other neceſſary improvements will alſo be made.

On the completion of the preſent undertaking, it is propoſed to compile a SUPPLEMENT from the books of Reports of Adjudged Caſes, which have taken place ſince Mr. Viner's time, agreeable to the plan which the learned author appears to have recommended at a future period. Of this part of the undertaking, further information will be given in the courſe of the preſent publication.

A

TABLE

OF THE

Several TITLES, with their Diviſions and Subdiviſions.

Abatement. Page

Of Writs. By

The Plaintiff's own ſhewing. - - A. 1

Act of the Party. - - - B. 2

Other Actions for the ſame Thing. - C. 4

Acceptance, &c. of the Thing ſued for. - D. 4

Seiſin of the Plaintiff, or Demandant. - E. 6

Miſnoſmer. - - - - F. 7

Matter ſubſequent. - - - G. 9

Ceſſion, Depoſition, Deprivation, Reſignation, Tranſlation, &c. - - - H. 10

Nature of the Action being changed. - I. 11

Birth of a nearer Heir pending the Writ. - K. 13

Recovery pending the Writ. - - L. 13

Return of the Sheriff. - - M. 16

The View. - - - - N. 17

Want of

Proper Parties. - - - O. 18

Certainty. And how aided by Intendment or Relation. - - - P. 19

Exception or Forepriſe. - - Q. 22

Suppoſal of Property, and what is ſufficient Suppoſal. - - - R. 23

Setting forth a Title,

Price, or Value of the Thing. - - S. 24

Form. - - - - T. 25

Omiſſions in the

Writ. - - - - U. 26

Proceſs. - - - W. 28

Surpluſage. - - - X. 29

Bis petitum, &c. or Demanding, &c. the ſame Thing twice. - - - Y. 31

A TABLE of the ſeveral TITLES,

		Page
Abatement.		
Naming the ſame Perſon twice. -	Z.	33
Demanding more than it ought, as the whole inſtead of Part. - - -	A. a.	33
Miſtake of the Place where the Lands lie, or the Party dwells. - - -	B. a.	34
Bringing the Action in a Place not Vill nor Hamlet. - - -	C. a.	35
Repugnancy. - - -	D. a.	36
Variance between		
Writ and Declaration. - -	E. a.	37
Writ and Specialty. - - -	F. a.	40
In the Names of Plaintiff or Defendant.	F. a. 2.	41
In the Sum or Value. - -	F. a. 3.	44
In reſpect of the Place where. -	F. a. 4.	44
Writ and Record. - -	G. a.	45
Original and other Writ. - -	H. a.	46
Made good. Variance between Writ and Count made good by Alias dictus - -	I. a.	47
What ſhall be ſaid to be Variance. -	K. a.	47
By Death of		
Plaintiff. - - -	L. a.	48
Defendant. - - -	M. a.	51
Baron or Feme Parties. - -	N. a.	56
Corporations Parties. Where the Writ ſhall abate by the Death of one of them. -	O. a.	58
Of one not Party to the Writ. - -	P. a.	59
At what Time. - - -	Q. a.	61
Abated, or abatable only. - -	R. a.	63
In Part, or in all. - - -	S. a.	64
By Death. - - -	S. a. 2.	68
By Jointenancy, &c. - -	S. a. 3.	69
Where there are ſeveral Places. -	S. a. 4.	69
Where the Action is brought for ſeveral Things.	S. a. 5.	70
Againſt one Defendant, where it ſhall abate againſt the other alſo. - - -	T. a.	72
Abatable Writ made good by what. - -	U. a.	73
Pleadings.		
Order of Pleading. To the - -	W. a.	75
Perſon. See Juriſdiction. Vide Court. Alien. Excommunication. Prerogative (P.a. 5) Recuſancy (O) Villein (R) Utlawry (U. a) &c.		
Writ. - - -	X. a.	76
Action of the Writ. - - -	Y. a.	77
Writ, and over to the Action. - -	Z. a.	78
No Plea in Abatement. In what Caſes. -	A. b.	80
Plea in Abatement what is. And what is in Bar.	B. b.	80
In Reſpect of the Concluſion. - -	C. b.	85
Rules as to Pleas in Abatement, and what is to be done on a Plea in Abatement. -	D. b.	89
Where the Defendant muſt give the Plaintiff a better Writ. - - -	E. b.	90
At what Time. - - -	F. b.	92
After other Plea pleaded. - -	G. b.	95
Several Pleas to the Writ, one after another.	H. b.	97

Abatement. Page

By whom it may be. By Plaintiff, &c. himſelf, Garniſhee, &c. See Voucher, (H. c). - I. b. 99
Ex Officio. - - - - K. b. 100
Where it is only in Delay, or Peremptory. - L. b. 101

Abatement into Lands.

Abatement, Intruſion, &c. on a Dying ſeiſed. - A. 104

Abeyance.

What it is; and the Reaſon thereof. - - A. 104
What Things may be, or ſhall be ſaid to be, in Abeyance. - - - - B. 105

Abjuring the Realm.

In what Caſes, and How. - - A. 108

Abridgment.

Of Plaint or Demand. In what Caſes or Actions. A. 109

Abſence.

What may be done in the Abſence of the Defendants. - - - A. 111
The Effect thereof. In reſpect of Nominees, &c. and the Remedy. - - - B. 112

Acceſſary.

Statutes relating to Acceſſaries. - - A. 113
Who. - - - - B. 114
In what Caſes. - - - C. 116
Before or after. - - - D. 117
Charged. How. - - - E. 117
Forfeiture of what. - - - F. 118
Arraignment of Acceſſary. In what Caſes. - G. 118
Pleadings by Acceſſary. - - - H. 122

Accord.

What Accord ſhall be a Bar of Actions. - A. 122
Pleadable. In what Actions. - - B. 129
The Form and Manner of Pleadings. - C. 131

Account.

Lies.
For what Things. - - - A. 135
In reſpect of his Perſon. - - B. 138
In what Caſes, for Want of Privity of Bailment or Receipt. [By Jointenants, Joint-executors, &c.] - - - - C. 139
Againſt whom. - - - - D. 141
By whom. - - - E. 143
Joinder. Where ſeveral muſt join. - - E. 2. 145
How it ſhall be brought.
As Bailiff. - - - - F.
By what Name. - - - G. 148
As Receiver. - - - - H. 148
By other Hands. What ſhall be ſaid other Hands. I. 150
Count. How. - - - K. 151
Joint Bailiffs. Charged or diſcharged. How. And Pleadings. - - - K. 2. 152
Pleadings.
What Pleas ſhall be in Bar of the Account. - L. 153

		Page
Account.		
What Pleas bar an Account.	M.	156
What a good Plea in Bar.	N.	158
Auditors.		
Diſcharge [or Plea] before Auditors.		
Good.	O.	161
Without Deed.	P.	165
Who ought to plead a Diſcharge before Auditors.	Q.	166
Account. Inforced how. By Statute.	R.	166
Auditors aſſigned by the Party. How. And their Power.	S.	169
Allowance by Auditors. Of what.	T.	169
Proceſs and Pleadings before, or after Judgment to Account.	U.	171
Declaration.	W.	175
Pleadings.		
In Abatement of the Writ.	X.	177
Where one is charged as Bailiff or Receiver.	Y.	178
Suppoſal of the Writ traverſed.	A. a.	180
Actions after Account made, and Pleadings.	B. a.	181
Equity.		
Account in Equity.		
In what Caſes, and againſt whom.	C. a.	182
When, and from what Time. And how.	D. a.	184
Opened.	(D. a)	186
After a former Account made with Strangers.	E. a.	189
Bar of Account in Equity. What is.	F. a.	190
Ac etiam Billæ.	A.	191
Acquittance.		
In what Caſes Payment may be refuſed, without an Acquittance given.	A.	192
Plea of Payment without an Acquittance. Good.	B.	194
Act.		
Where an Act may enure ſeveral Ways, how it ſhall be taken.	A.	196
Actions.		
Tam pro Domino Rege quam pro ſeipſo.	A.	197
Tried where, and by whom, and how.	A. 2.	200
Brought at what Time, and what the Proſecutor muſt do to bring Action.	A. 3.	204
Writ and Count. How.	A. 4.	206
Proceedings in ſuch Actions, and Informations.	A. 5.	209
Pleadings in Actions on Statutes.	A. 6.	210
Bar or Diſcharge What.	A. 7.	211
Puniſhment of Informers, and Coſts, in what Caſes.	A. 8.	203
What ſhall be ſaid a popular Action.	A. 9.	214
Proceedings in General.	A.10.	214
For Fire.	B.	215
Who ſhall have it.	B. 2.	217
Againſt whom it lies.	B. 3.	217
Pleadings, &c.	B. 4.	218
Carriers.		
Againſt a Carrier.	C.	219

Who

Actions.		Page
Who is chargeable as ſuch, and what he is obliged to do.	C. 2.	220
Chargeable or Excuſable.		
In what Caſes.	C. 3.	221
In what Actions, &c.	C. 4.	222
What Actions he may have.	C. 5.	222
Pleadings.	C. 6.	222
Hoſtler.		
Who ſhall be ſaid an Hoſt chargeable.	D.	224
Who ſhall be ſaid a Gueſt to have Action.	E.	225
Where one, in reſpect of Intereſt, though not the very Gueſt, ſhall have an Action.	E. 2.	227
For what an Action lies againſt an Hoſtler.	F.	227
Collateral Matter to excuſe the Hoſtler.	G.	229
Writ and Declaration.	G. 2.	230
Plea by Hoſtler. Good or not.	G. 3.	232
Judgment, &c.	G. 4.	233
Remedy for Hoſtler againſt his Gueſt.	G. 5.	233
Dogs, and other miſchievous Creatures.		
For keeping a Dog accuſtomed to bite. [And how the Action ſhall be brought.]	H.	233
Actions for Miſchief by Beaſts, or other Creatures.		
And who ſhall anſwer for the ſame.	H. 2.	235
Trover, &c.		
Who ſhall have a Trover and Converſion.	I.	236
Lies.		
For what Things.	K.	238
In what Caſes. What ſhall be ſaid a Converſion.	L.	241
Againſt whom.	L. 2.	246
Writ and Declaration good in general.	L. 3.	246
Declaration good. In reſpect of the Certainty therein.	L. 4.	249
Plea.	L. 5.	254
Aſſumpſit.		
What Words [or Act] will make an Aſſumpſit.	M.	261
In what Caſes an Action upon the Caſe lies, where Debt lies. What ſhall be an Aſſumpſit in Law to have an Action.	N.	263
For Monies received to a Man's Uſe.	N. 2.	268
Upon an Aſſumpſit in Nature of Debt it lies not where the Thing is real.	O.	270
In what Caſe Aſſumpſit lies.	P.	276
Conſideration.		
What ſhall be a good Conſideration. Conſideration executed. [At what Time the Promiſe muſt be made to make it good.]	Q.	279
Upon a Collateral Promiſe.	R.	287
Good or not for Default of Certainty.	S.	291
Againſt Law. Good to maintain an Action. And what ſhall be ſaid againſt Law.	T.	293
Good.		
What is in general.	U.	301
Forbearance of Suit.	U. 2.	322
Forbearance of Debt.	U. 3.	324
Promiſe of one Perſon for the Debt of another.	U. 4.	325

		Page
Account.		
What Pleas bar an Account. - -	M.	156
What a good Plea in Bar. - -	N.	158
Auditors.		
Diſcharge [or Plea] before Auditors.		
Good. - - - -	O.	161
Without Deed. - -	P.	165
Who ought to plead a Diſcharge before Auditors.	Q.	166
Account. Inforced how. By Statute. -	R.	166
Auditors aſſigned by the Party. How. And their Power. - - -	S.	169
Allowance by Auditors. Of what. -	T.	169
Proceſs and Pleadings before, or after Judgment to Account. - - -	U.	171
Declaration. - - - - -	W.	175
Pleadings.		
In Abatement of the Writ. - -	X.	177
Where one is charged as Bailiff or Receiver.	Y.	178
Suppoſal of the Writ traverſed. - -	A. a.	180
Actions after Account made, and Pleadings.	B. a.	181
Equity.		
Account in Equity.		
In what Caſes, and againſt whom. -	C. a.	182
When, and from what Time. And how.	D. a.	184
Opened. - - -	(D. a)	186
After a former Account made with Strangers.	E. a.	189
Bar of Account in Equity. What is. -	F. a.	190
Ac etiam Billæ. - - -	A.	191
Acquittance.		
In what Caſes Payment may be refuſed, without an Acquittance given. - - -	A.	192
Plea of Payment without an Acquittance. Good.	B.	194
Act.		
Where an Act may enure ſeveral Ways, how it ſhall be taken. - - -	A.	196
Actions.		
Tam pro Domino Rege quam pro ſeipſo. -	A.	197
Tried where, and by whom, and how. -	A. 2.	200
Brought at what Time, and what the Proſecutor muſt do to bring Action. - -	A. 3.	204
Writ and Count. How. - - -	A. 4.	206
Proceedings in ſuch Actions, and Informations.	A. 5.	209
Pleadings in Actions on Statutes. -	A. 6.	210
Bar or Diſcharge What. - -	A. 7.	211
Puniſhment of Informers, and Coſts, in what Caſes.	A. 8.	203
What ſhall be ſaid a popular Action. -	A. 9.	214
Proceedings in General. - -	A. 10.	214
For Fire. - - - -	B.	215
Who ſhall have it. - - -	B. 2.	217
Againſt whom it lies. - -	B. 3.	217
Pleadings, &c. - - -	B. 4.	218
Carriers.		
Againſt a Carrier. - - -	C.	219

Actions.		Page
Who is chargeable as ſuch, and what he is obliged to do.	C. 2.	220
Chargeable or Excuſable.		
In what Caſes.	C. 3.	221
In what Actions, &c.	C. 4.	222
What Actions he may have.	C. 5.	222
Pleadings.	C. 6.	222
Hoſtler.		
Who ſhall be ſaid an Hoſt chargeable.	D.	224
Who ſhall be ſaid a Gueſt to have Action.	E.	225
Where one, in reſpect of Intereſt, though not the very Gueſt, ſhall have an Action.	E. 2.	227
For what an Action lies againſt an Hoſtler.	F.	227
Collateral Matter to excuſe the Hoſtler.	G.	229
Writ and Declaration.	G. 2.	230
Plea by Hoſtler. Good or not.	G. 3.	232
Judgment, &c.	G. 4.	233
Remedy for Hoſtler againſt his Gueſt.	G. 5.	233
Dogs, and other miſchievous Creatures.		
For keeping a Dog accuſtomed to bite. [And how the Action ſhall be brought.]	H.	233
Actions for Miſchief by Beaſts, or other Creatures.		
And who ſhall anſwer for the ſame.	H. 2.	235
Trover, &c.		
Who ſhall have a Trover and Converſion.	I.	236
Lies.		
For what Things.	K.	238
In what Caſes. What ſhall be ſaid a Converſion.	L.	241
Againſt whom.	L. 2.	246
Writ and Declaration good in general.	L. 3.	246
Declaration good. In reſpect of the Certainty therein.	L. 4.	249
Plea.	L. 5.	254
Aſſumpſit.		
What Words [or Act] will make an Aſſumpſit.	M.	261
In what Caſes an Action upon the Caſe lies, where Debt lies. What ſhall be an Aſſumpſit in Law to have an Action.	N.	263
For Monies received to a Man's Uſe.	N. 2.	268
Upon an Aſſumpſit in Nature of Debt it lies not where the Thing is real.	O.	270
In what Caſe Aſſumpſit lies.	P.	276
Conſideration.		
What ſhall be a good Conſideration. Conſideration executed. [At what Time the Promiſe muſt be made to make it good.]	Q.	279
Upon a Collateral Promiſe.	R.	287
Good or not for Default of Certainty.	S.	291
Againſt Law. Good to maintain an Action. And what ſhall be ſaid againſt Law.	T.	293
Good.		
What is in general.	U.	301
Forbearance of Suit.	U. 2.	322
Forbearance of Debt.	U. 3.	324
Promiſe of one Perſon for the Debt of another.	U. 4.	325

Actions.		Page
By Executor or Adminiſtrator. -	U. 5.	326
Relating to Marriage and Portions.	U. 6.	327
As to granting, releaſing, &c. Intereſts in Lands, &c. - - -	U. 7.	327
Delivering up of Pledges, Securities, &c.	U. 8.	328
Action lies. At what Time. [Before all the Days are paſt.] - -	X.	330
Aſſumpſit. Good. Where Part of the Conſideration is not good. - -	Y.	332
Who ſhall have the Action. [And Pleadings.]	Z.	333
What ſhall be ſaid to be within the Promiſe.	Z. 2.	337
Declaration.		
How the Conſideration ought to be ſet forth.	Z. 3.	338
In Indebitatus Aſſumpſit.		
Not ſaying how much for each, or for what.	Z. 4.	342
Too general, &c. - -	Z. 5.	344
For Money received to the Plaintiff's Uſe.	Z. 6.	346
In Quantum Meruit. - -	Z. 7.	346
Averment of Performance of the Conſideration.	Z. 8.	348
Where the Promiſes are mutual. -	Z. 9.	357
What is good ſetting forth of the Promiſe.	Z. 10.	360
In a Quantum Meruit. And in what Caſes a Quantum Meruit lies. -	Z. 11.	364
Breach. How to be aſſigned of the Promiſe.	Z. 12.	365
Pleadings.		
What ſhall be a good Bar, or Diſcharge of an Aſſumpſit. And Pleading thereof.	A. a.	372
Plea good. And how to be pleaded.	A. a. 2.	374
In Indebitatus Aſſumpſit. - -	A. a. 3.	378
Requeſt.		
Neceſſary in what Caſes, and what amounts to a Requeſt. - -	A. a. 4.	379
When the Requeſt muſt be made. -	A. a. 5.	381
By whom, and to whom Requeſt muſt be made.	A. a. 6.	382
Alleged. How the Requeſt muſt be.	A. a. 7.	382
Specially alleged. In what Caſes it muſt be, and where. - -	A. a. 8.	385
For Words.		
In what Caſes an Action lies for a collateral Reſpect. [Words ſpoke in Evidence in courſe of Juſtice.] - - -	B. a.	387
Actions [for Words ſpoke or Things done] in Courts of Juſtice. - -	C. a.	388
For what Words it lies, for Matters whereof the Spiritual Court hath Conuſance.	D. a.	392
Relating to Religion. - -	D. a. 2.	403
Taking falſe Oath, or being perjured.	E. a.	404
[Perjured and forſworn.] -	F. a.	405
General Words. - -	G. a.	414
Where they touch not Life nor Member.	H. a.	418
Adjective Words. - -	I. a.	425
Interrogative Words. - -	K. a.	429
In the preter Tenſe. - -	L. a.	434
Conditional Words. - -	M. a.	431
Disjunctive Words. - -	N. a.	431

In

Actions.		Page
In reſpect of the Uncertainty of the Time. In futuro.	O. a.	432
In reſpect of the Uncertainty. Where there are not direct affirmative Words. [And what ſhall amount to an Affirmation.	P. a.	433
Where there is but an Intention only.	Q. a.	438
Subſequent Words. Explanatory of the former, in what Caſes.	R. a.	442
In Diſgrace of		
A Profeſſion.	S. a.	448
Attorney.	S. a. 2.	458
Clergymen.	S. a. 3.	460
Counſellors. See (S. a) pl. 14. 16, 17. 22. 25. 37.	S. a. 4.	461
Midwife.	S. a. 5.	462
School-Maſters, &c.	S. a. 6.	462
An Office or Officers.	T. a.	463
Judges.	T. a. 2.	466
Juſtices of Peace.	T. a. 3.	466
Trade, &c.	U. a.	469
By Hearſay, or Way of Report.	X. a.	483
In reſpect of Uncertainty.	Y. a.	485
Relating to the Government.	Y. a. 2.	498
Taken in Mitiori ſenſu.	Z. a.	500
Not well underſtood.	A. b.	507
Repugnant.	B. b.	508
Uncertain as to the Perſon of whom ſpoke.	C. b.	510
Thing.	D. b.	512
Without an Averment.	E. b.	513
Without an Averment.	F. b.	518
With an Averment.	G. b.	519
Averment, ſufficient to aſcertain the Perſon.	H. b. K. b.	520 528
Innuendo.	I. b.	524
Not well known to the Judges; aided by Averment.	L. b.	531
Declaration. Good.		
In general.	L. b. 2.	533
As to the Colloquium.	L. b. 3.	536
Auditors.	L. b. 4.	537
Setting forth the Profeſſion, Office, &c.	L. b. 5.	538
Juſtification or Excuſe.	M. b.	539
Plea in Bar.	M. b. 2.	543
Replication. Good.	M. b. 3.	543
Rules as to Conſtruction of Words.	M. b. 4.	544
Scandalum Magnatum.	M. b. 5.	545
Slander of Title.	M. b. 6.	550
Caſe.		
For Nuſance.	N. b.	554
Againſt whom. Leſſor, Leſſee, Feoffee. At what Time.	N. b. 2.	559
Againſt whom. A third Perſon.	O. b.	560
Diſceit in Nature of Caſe, lies in what Caſes.		
On a Warranty in Law.	P. b.	560
Pleadings.	P. b. 2.	564

Officers,

Actions.		Page
Officers, Judges, Sheriffs, &c. -	Q. b.	566
Principal or Under Officer. -	R. b.	573
Maſter. - - -	S. b.	574
Servant. - - - -	T. b.	575
On an expreſs Warranty. Againſt		
A Servant. - - -	U. b.	575
An Attorney. - -	X. b.	576
In reſpect of the Warranty, and the Time of making it. - -	Y. b.	577
In what Caſes. - -	Z. b.	578
What is a good Warranty. -	A. c.	580
For whom it lies. The Maſter. -	B. c.	581
For or againſt the Servant. -	C. c.	582
At what Time. - -	D. c.	583
Againſt Officers. On an Eſcape. -	E. c.	583
The Maſter. - - -	F. c.	584
In what Caſes it lies. - -	G. c. / I. c.	585 / 595
Upon legal Proceedings in Courts. -	H. c.	589
Pleadings. - - -	I. c. 2.	596
Caſe.		
Gift of the Action. - - -	K. c.	598
Caſe not Aſſiſe. - - -	L. c.	598

Abatement.

(A) Of Writs. By Plaintiff's *own ſhewing.*

1. *TRESPASS upon the caſe* againſt a miller. The writ was quod cum præd' quer. &c. *molere debuerunt ſine multura*, &c. prædict' def. prædictum querentem *ſine multura molere vi & armis impedivit*, &c. and was abated; for it appears that he ought to have general writ of treſpaſs of his corn carried away by force and arms. Thel. Dig. 117. lib. 10. cap. 27. S. 3. cites Mich. 41 E. 3. 24. Vide 43 E. 3. 29. 44 E. 3. 20.

2. In general writ of treſpaſs of a *horſe taken*, it appeared by the replication of the plaintiff, that it was taken *in the high ſtreet* of the king; upon which the opinion was, that the writ ought to abate, and that the plaintiff ought to have ſpecial writ, &c. Thel. Dig. 117. lib. 10. cap. 27. S. 6. cites Mich. 43 E. 3. 30.

He ought to have a ſpecial writ upon the ſtatute of Marlbr. cap. 15. which prohibits the taking diſtreſſes by any but the King or his officers, having ſpecial authority, out of his fee, or in the King's highway, or in the common ſtreet. 43 E. 3. 30. a. pl. 16. But the Reporter cites 11 R. 2. that in replevin ſuch writ was maintainable, notwithſtanding he might have his writ upon his caſe.——Fitzh. Avowry, pl. 87. cites Trin. 11 R. 2. accordingly.

3. *Præcipe* quod reddat *againſt two*; the *one diſclaimed*, the *other vouched him*. The *demandant confeſſed that he, who diſclaimed, had nothing, and counter-pleaded, that he nor his anceſtors*, &c. And upon the confeſſion the writ was abated. Br. Brief, pl. 151. cites 21 E. 3. 33.

4. *Aſſiſe of land in* 2 *vills*, and makes his *plaint of all the land in one vill*, all the writ ſhall abate; per Cur. Br. Brief, pl. 16. (bis) cites 9 H. 6. 42.

5. Detinue of charters *incloſed in a cheſt*. The *defendant came by exigent*, and the *plaintiff declared of one charter in ſpecial*; and the *defendant of the reſt waged his law*, and did it *immediately*; and *of the charter in ſpecial he ſaid, that he did not detain*, and the others e contra. And Paſton J. held clearly, that the writ ſhall abate by the declaration of the plaintiff himſelf, becauſe he declares *of a charter concerning frank-tenement, of which exigent does not lie*; for a man cannot join in one and the ſame writ a *thing whereof of parcel the proceſs ſhall be diſtreſs infinite, and of the reſt exigent*; and if this had been apparent in the writ, the writ ſhall abate clearly; and ſo where it appears in the declaration by him. But

quære of this opinion; for this is often permitted elſewhere. Br. Brief, pl. 236. cites 14 H. 6. 1.

6. Where the writ abates *in part* of the plaintiff's own ſhewing, there it abates in the whole; per Frowike Ch. J. Kelw. 56. M. 20 H. 7. pl. 5.

7. In maintenance *againſt two*, the *one pleaded that he was the party's attorney, and retained counſel for his client, and gave* 10 s. *of his maſter's money*; and the *plaintiff ſaid that he gave* 40 *d. to the jury*, &c. and the others e contra; and the *other pleaded not guilty*, and *all found for the plaintiff*. And per tot. Cur. except Needham, becauſe the action is brought of joint maintenance, and the *plaintiff in pleading has confeſſed of record that it was of ſeveral maintenances*, the writ ſhall abate by his confeſſion, where by the law, *if ſuch matter had been found by verdict, the plaintiff ſhould have recovered; or if part had been found for him, and part againſt him*; and ſhould have been amerced for the reſt; as in *treſpaſs againſt* 2, who *plead not guilty*, the *one is found guilty of part, and acquitted of the reſt*; and the *other is found guilty of the reſt, and acquitted of the firſt part*; or *in decies tantum it is found that they took money ſeverally*, the plaintiff ſhall recover. Br. Brief, pl. 245. cites 36 H. 6. 27.

[2]

8. *Where* the *King granted to thoſe of P. conuſance of pleas ariſing in P. and that no burgeſs of P. ſhall be impleaded, unleſs in P. of any act done there*, in an action againſt a burgeſs he pleaded it to the writ, by which the writ was abated by award, becauſe by the count it appeared that the treſpaſs was in P. Br. Brief, pl. 323. cites 9 H. 7. 12.

7 Mod. 89. Arg.

9. If a man *demands a debt of* 20 *l.* and *confeſſes he has no right to* 10 *l. of it*; or demands 100 acres, and confeſſes he has no right to 50 of them, no doubt the Court, ex officio, or the party, either by plea in abatement, or as amicus curiæ at leaſt, might take knowledge, and abate the writ. But if they went on to iſſue, and a *verdict* be given where the ſtatute gives relief, it doth as well when it appears of the party's ſhewing as otherwiſe. Hob. 279. Mich. 13 Jac. in Clanrickard's Caſe.

10. It is regularly true, that if the *plaintiff himſelf diſcovers* to the Court any thing, whereby it may appear *that he had no cauſe of action* when he commenced it, his writ ſhall abate. As if he will demand a debt, or diſtrain for a rent before the day of payment, of his own ſhewing it is againſt him. Hob. 199. Mich. 15 Jac. in Caſe of Brickhead v. the Archbiſhop of York.

As if a man has *cauſe* to have writ *of treſpaſs againſt* 2, and

11. *So* if, of his own ſhewing, though he *had cauſe of action, yet it was in another manner*, it will be againſt him. Hob. 199. in Caſe of Brickhead v. the Archbiſhop of York.

he brings *his writ againſt one* of them, and after *confeſſes the treſpaſs to be done by the two*, his writ ſhall abate. Theloal's Dig. lib. 5. cap. 18. S. 1. cites Mich. 9 H. 6. 36. ——So if he declares, that he with the other did the treſpaſs. Hob. 199. in caſe of Brickhead v. the Archbiſhop of York. ——But if he brought his action againſt one alone, and the defendant had *pleaded that he with others did the treſpaſs*, and that the plaintiff *had releaſed to the other*, and the plaintiff denies the releaſe, whereby he doth in a manner confeſs that the other were joint treſpaſſors, yet this action ſhall not abate. Hob. 199. in caſe of Brickhead v. Archbiſhop of York. ——11 Rep. 5. b. Hob. 164. 261. 9 Rep. 53.

(B) Abatement. By Act of the Party.

1. IF a man brings ceſſavit *againſt N. who aliens to S. pending the writ*, and the *demandant takes the rent and homage of S. and after recovers againſt N.* there *S.* may avoid the recovery; for by the acceptance of the rent and homage the writ is abated, and the action extinct. Quære. Br. Ceſſavit, pl. 15. cites 21 E. 3. 18. per Stone.

If a *lord brings ceſſavit*, and the *tenant infeoffs a ſtranger*, and the *feoffee does homage to the lord pending the writ*, and after the lord recovers, the feoffee may falſify the recovery; for the writ was abated by the taking of the homage. Br. Faux de Recov. pl. 15. cites 36 H. 6. 32.

2. It ſeems that a *ſuſpenſion of the action for a time, by the act of the plaintiff* himſelf, pending the writ, is an abatement of the writ. Br. Brief, pl. 308. cites 42 Aſſ. 21. [3]

3. *Aſſiſe of rent againſt W. and R.* R. made default, and W. appeared, and anſwered as tenant of the land and pernour of the rent. (Quære how he can be tenant and pernour; but he may be tenant and deforceor,) and that the land was given in tail to A. his anceſtor, and conveyed by deſcent to his mother; and that the mother died, and the land deſcended to him pending the writ, judgment of the writ. The plaintiff ſaid that *R. father of W. had the land by the curteſy the day of the writ purchaſed, and ſurrendered to W. pending the writ, to which W. agreed*, by which W. became tenant, and yet is; and W. not knowing of the ſurrender, demurred in law; and *the truth was, that R. ſurrendered to W. pending the writ, and died pending the writ.* And per June Ch. Baron, the writ is good; for the taking of the ſurrender is the *act of the tenant pending the writ*, which *makes it good, as a purchaſe pending the writ makes the writ good*; for if the tenant by the curteſy had charged the land, he ſhould have held charged. But Rolf contra; for if writ of entry be brought againſt W. after the ſurrender, *he ſhall be ſuppoſed in by the mother; and* if the *ſon diſſeiſes a man to the uſe of his father*, and aſſiſe is brought againſt father and ſon, if the father dies, the writ ſhall abate. Paſton ſaid, in præcipe quod reddat againſt the ſon, after the ſurrender, he ſhall have his age and all advantages, as if he had come to the poſſeſſion by deſcent, and therefore the writ ſhall abate; quod Hulſe conceſſit. And all the ſerjeants denied it, by which the tenant was awarded to anſwer. Quod nota. But Rolf had his challenge thereof. Quod nota. And quære; for it is a good caſe. Br. Brief, pl. 240. cites 1 H. 6. 1.

4. In cui in vita *of* 3 *acres*, it was agreed, that if the *demandant by another action recovers one of the* 3 *acres, and enters*, it ſhall abate all the writ, becauſe it is the act of the demandant to recover it, and to enter, and therefore ſhe ſhall abate her cui in vita. Quod nota, that recovery in aſſiſe of parcel of the land ſhall abate the cui in vita for all the 3 acres. Br. Brief, pl. 338. cites 1 E. 4. 3. 4. and 2 E. 4. 10.

5. Every *diſcontinuance of proceſs* abates the original, but not a *miſcontinuance*. Bulſt. 143. Arg. cites 1 H. 7. 1. b. and 21 H. 7. 10. b.

6. If the plaintiff in *quare impedit* be *nonſuit after appearance*, *diſcontinue* his ſuit, or be *made a knight* pending the writ, theſe are his own acts, and ſhall abate the writ. 7 Rep. 27. b. Paſch. 40 Eliz. Sir Hugh Portman's Caſe.

Yelv. 96. Hill. 4 Jac. S. C. adjudged for the plaintiff.—Cro. J. 147. pl. 6. Bagshaw and Goward, S. C. adjudged for the plaintiff.

7. B. brought *treſpaſs* vi & armis, *for taking his horſe* the 14th of October. The defendant *juſtifies as baily, &c. for an eſtray;* and that he delivered it to the plaintiff the 16th of October. And the plaintiff *replies, That the defendant* himſelf ſaid that the 16th day of October, *before the re-delivery, he had* uſed and *worked the ſaid horſe*. Reſolved, on demurrer, that by his *acceptance* of his horſe, be it before or hanging the action, the plaintiff has not abated his writ. Noy 119. Bagſhaw v. Gawen.

8. In *action for words againſt baron and feme*, the *baron died*, and pending the ſuit the *feme took another huſband;* the Court inclined, that the writ was abated, becauſe the defendant by her marriage had changed her name; but took time to adviſe. Sty. 138. Mich. 24 Car. White & Ux. v. Harwood and Ux.

See tit. Other Action.

(C) Abatement. By other Action.

[4]

1. IT is ſaid, That if *tenant by elegit* be *ouſted*, and he *brings aſſiſe*, and *he in reverſion brings another* aſſiſe, as to the one the writ of the other ſhall abate. Thel. Dig. 192. lib. 12. cap. 30. S. 27. cites Mich. 12 H. 6. 4. and Mich. 48 E. 3. 21. where it is ſaid, That the law is *ſo in all the caſes where two may bring action for the ſame thing ſeverally.*

2. *If ſeveral perſons bring ſeveral actions for the ſame thing* to which they have all *equal right*, and the *writs are all returned on the ſame day*, they ſhall all abate, becauſe it is uncertain to the Court (if the tenants confeſs the actions) to whom they ſhall award ſeiſin, ſince their titles are all alike, and all returned at one and the ſame day; for the *date* in this caſe is not material; for they are not of record before the return; and for the *uncertainty* all the writs ſhall abate. Arg. Pl. C. 10. b. in Manſell's Caſe.

Whenever it *appears on the record, that the plaintiff has ſued out two writs againſt the ſame defendant for the ſame thing*,

3. Two actions were brought at the ſame time againſt the defendant for the ſame thing, with ſome *little immaterial variation* in the duty preſcribed for. The defendant averred, that both were for the ſame duty, and ſo pleaded the one in abatement of the other, mutually; and they were both abated. Freem. Rep. 491. pl. 526. Trin. 1675. The Mayor, &c. of London, v. B.

the firſt not being determined, the ſecond writ ſhall abate; for the law abhors multiplicity of actions; and will not allow that a man ſhall be twice arreſted, or twice attached by his goods for the ſame thing; for if ſo, he might ſuffer in infinitum. G. Hiſt. of C. B. 205, 206.——New Abr. 13. has the ſame words, and ſo goes on tranſcribing for a long way.

4. An *action* brought *in the Marſhalſea* was *ſtaid by habeas corpus, and removed into B. R.* where the *plaintiff delivered a declaration varying from the former plaint.* The defendant pleaded the plaint in the Marſhalſea, and the removal thereof, and that it was for one and the ſame cauſe of action. Upon demurrer it was held, That the habeas corpus does not remove the cauſe of the inferior court; and a plaint pending in an inferior court is no plea to an action brought in the courts at Weſtminſter; and there is difference between a recordari, certiorari, and a habeas corpus. And judgment was, that the defendant ſhould anſwer over. 2 Ld. Raym. Rep. 1102. Hill. 3 Ann. Seers v. Turner.

(D) By taking, &c. the Thing ſued for, or in Diſpute.

1. IN debt of 10 l. the defendant *ſaid, That the plaintiff has received* 5 *l.* of it *pending the writ;* and no plea, but ſhall anſwer to the debt; but *acquittance of part* ſuffices to diſcharge all the action. Br. Dette, pl. 137. cites 3 H. 7. 3. S. P. Br. Dette, pl. 2. cites 5 H. 7. 41. per Cur. and 15 H. 7. 10—

Debt upon *obligation* of 20 *l.* upon *condition to pay* 10 *l.* &c. the defendant *pleaded payment of part of the* 10 *l. pending the writ*, this is a good plea to the writ, per Brian; and per Cur. it is a good plea to *plead payment of the ſum in the condition*; and this *by reaſon of the condition*; for otherwiſe payment is no plea in debt, unleſs it be by reaſon of the condition: and ſo is 15 H. 7. 10. But *acquittance of the receipt of part pending the writ goes to all the writ.* Br. Dette, pl. 222. cites 5 H. 7. 41.—And *in debt againſt leſſee for years, payment of part in a foreign county, is a good* plea *to all the writ.* Ibid.—*And* by 9 H. 5. 2. *where payment is a good plea*, as in the caſe of the leaſe and condition, the *receipt pending the writ is a good plea without acquittance.* Contra where payment is no plea in bar; there it is no plea to the writ; quod nota, by all the 3 books. Note a good diverſity. Ibid.—In *debt upon an obligation*, the defendant ſaid that the plaintiff had *received parcel* of the debt *pending the writ*, and thereof *ſhewed acquittance*, and demanded judgment of the writ; ſed non allocatur; but was compelled to anſwer to the reſt. Thel. Dig. 188. lib. 12. cap. 22. S. 1. cites Hill. 15 E. 2. Brief 819. and 34 H. 6. 2. Per Priſot. And Hill. 39 H. 6. 45. Contra it is held 1 E. 4. 4. 2 E. 4. 11. See 5 H. 7. ultimo, inaſmuch as the plea is to the action for parcel. And it was held there, that ſuch plea is not good without ſhewing acquittance; but Moyle e contra. And ſee as to this point, that the Juſtices were in diverſe opinions Mich. 5 E. 4. 139, 40. But the opinion of the Juſtices, Trin. 7 E. 4. 15. is, that the plea is not good without ſhewing acquittance; and ſo it is agreed 22 E. 4. 50. in writ of annuity, and Trin. 15 H. 7. 10. [5]

It was ſaid by Needham, That ſuch a *plea by acquittance ſhewn goes to all the writ*, if the plaintiff does not deny his acquittance; but if he denies it, and it be *found by inqueſt for the defendant*, the writ is good for the reſt. Thel. Dig. 188. lib. 12. cap. 20. ſ. 2. cites Mich. 4 E. 4. 35.

In debt upon *obligation*, with condition *to pay a leſs ſum*, it is a good plea to plead *receipt of parcel of the leſs ſum* in abatement of the writ; but the receipt ought to be *after the laſt continuance.* Thel. Dig. 188. lib. 12. cap. 22. ſ. 3. cites 5 H. 7. fol. ult.

In *debt, upon obligation of* 80 *l.* the defendant *pleaded that plaintiff had*, by the cuſtom of London, *attached (pending the bill)* 40 *l. in the hands of J. S. in ſatisfaction of the debt*; and prayed the bill might abate. It was objected, that this amounted only to an acceptance of part pendente billa, and is in bar, and not in abatement. And all the court (except Popham) conceived that it is a plea in bar, but not in abatement; for the plaintiff for this part is to be barred for ever; and this receipt of parcel is a lawful act. Cro. E. 342. pl. 21. Mich. 36 & 37 Eliz. B. R. May v. Middleton.———Mo. 598. pl. 820. Moy v. Middleton, S. C. accordingly.———S. C. cited by Holt Ch. J. 12 Mod. 542. in caſe of Pearce v. Paxton.

In *debt, upon a ſingle bill* of 50 *l.* the defendant after imparlance pleaded, That after the laſt continuance the defendant had *paid* the plaintiff 5 *l. parcel* of the 50 *l.* and demanded judgment of the bill. Whereupon the plaintiff demurred; and becauſe the defendant did *not allege* that he had *an acquittance*, which he ought to produce, judgment was given againſt the defendant, that he ſhould anſwer over, &c. All. 63. Paſch. 24 Car. B. R. Loder v. Hampſhire.

In *debt on a ſingle obligation*, the defendant *pleaded payment of part* ſince the action brought. Per Cur. This is a good plea in abatement of the writ, but not in bar of the action. Sty. 212. Paſch. 1649. Hollingworth v. Whetſtone.

If in debt the defendant pleads, that ſince the purchaſing the writ, the plaintiff has received part of the debt, the whole writ ſhall abate, becauſe it *appears the whole money is not due, as by the writ is demanded*, which he had already begun in a court of juſtice. G. Hiſt. of C. B. 203.

But in debt on an *obligation to deliver* 20 *quarters of barley*, it is no plea in abatement to ſay, that *pendente placito the plaintiff had received* 15 *quarters*, for it is *collateral*, and not the ſum contained in the obligation And if it be a plea, it is in bar. And judgment for the plaintiff. Cro. E. 253. pl. 23. Mich. 33 and 34 Eliz. B. R. Stone v. Radiſh.——G. Hiſt. of C. B. 203. cites S. C. and ſays, That the condition not being fulfilled, the penalty is ſtill in force.———Cro. E. 260. pl. 44. in the ſame Term, ANDREWS v. KIRKE, S. P. And there being a verdict for the plaintiff, it was reſolved that it was helped by the ſtatute; and the plaintiff had judgment, though it was moved to be no plea, and ſo no iſſue; and no deed was ſhewn.

It was moved in debt upon *contract*, that receipt of parcel is no plea, and that in *debt upon leaſe for years*, payment of parcel in another county ſhall abate all the writ. Thel. Dig. 188. lib. 12. cap. 22. ſ. 4. cites Hill. 3 H. 7. 3. Quære.

2. In every action where one *demands land, or other thing expreſsly* by his writ, if he comes to the ſame thing pending the writ, the plaintiff abates his own writ; but where a writ is brought for a tort done, as writ of raviſhment of ward, wherein the ward is not demanded; ſo that it is only an action of treſpaſs in its nature, by the common law; and alſo in treſpaſs for goods taken, it is no plea for the defendant to ſay, that plaintiff is ſeiſed of the goods; for he does not demand any goods by his writ; and yet, if he has not the goods again before verdict, he ſhall recover the value of them, but if he has, the damages ſhall be aſſeſſed for the treſpaſs only; but in *detinue*, *replevin*, or *quare impedit*, ſuch plea is good, becauſe it is a falſification of his own writ. Keilw. 20. b. pl. 6. Hill. 12 H. 7. Canterbury (Archbiſhop) v. Conway.

3. In *debt*, *receipt of part*, hanging the writ, abates all the writ; per Foſter J. 2 Brownl. 130. Peto v. Checy. Keilw. 20. b. pl. 6. Arg. S. P. *But* in *treſpaſs* for goods taken, *coming to the goods hanging the writ* does not abate the writ; for he does not demand any goods by his writ; and yet if he has not the goods again before the verdict, he ſhall recover the value of them: but in *detinue*, *replevin*, or *quare impedit* coming to the thing hanging the action, is a good plea in abatement; per Fineux Ch. J. and Rede. Keilw. 20. b. pl. 6. Hill. 12 H. 7. Archbiſhop of Canterbury v. Sir Hugh Conway.

[6] ## (E) By Seiſin, &c. of the Demandant or Plaintiff.

1. IN *replevin* it is no plea to ſay, *That the plaintiff was ſeiſed of the beaſts the day* of the writ purchaſed. Theloall's Dig. 149. lib. 11. cap. 36. ſ. 3. cites tempore E. 1. Replevin 28.

2. In *Mortdanceſter by three, two were ſummoned and ſevered*; and *as to the* 3*d, the tenant ſaid that the demandant himſelf was ſeiſed of that which belonged to his purparty the day* of the writ purchaſed, &c. and held a good plea, without pleading over to the points of the writ. But it is not ſo of non-tenure. Theloall's Dig. 149. lib. 11. cap. 35. ſ. 18. cites 8 E. 2. It. Kanc. Mortdaunc. 40. And ſeiſed at his will in aſſize. 22 Aſſ. 19.

A man may *plead that* the demandant is *ſeiſed of the moiety*

3. In writ of land, to ſay that the demandant himſelf was *ſeiſed of parcel the day of the writ purchaſed*, is a good plea to *of the land demanded, without ſhewing how* he is ſeiſed. Theloall's Dig. 148. lib. 11. cap. 35. ſ. 6. cites Mich. 8 E. 3. 440.

the

the writ for all. Theloall's Dig. 148. lib. 11. cap. 35. ſ. 4. cites Paſch. 4 E. 3. 132. contra 32 E. 3. Brief 345. in Waſte 162. 25 E. 3. 39. 27 E. 3. 82. 28 Aſſ. 50. and 5 H. 7. 7. notwithſtanding that he could not have other writ of this parcel againſt any other.

4. In writ of waſte againſt tenant for life, it is a good *plea* to the writ to ſay, *that the demandant himſelf was ſeiſed* of the land the day of the writ purchaſed. Theloall's Dig. 148. lib. 11. cap. 35. ſ. 5. cites 4 E. 3. 147. and 11 E. 2. Waſte 114. and in aſſize, 27 Aſſ. 30. 51.

5. Where 2 *parts of a manor are in demand*, it is a good *plea* to the writ to ſay, *that the demandant is ſeiſed of an advowſon and* 2 *acres of land parcel* of the whole manor. Theloall's Dig. 148. lib. 11. cap. 35. ſ. 6. cites Mich. 4 E. 3. 162.

6. In *formedon of rent ſervice*, if the defendant *pleads that the plaintiff is ſeiſed of parcel of the land* out of which the rent iſſues, this is to the action for the portion, and not to the writ Theloall's Dig. 148. lib. 11. cap. 35. ſ. 3. cites Mich. 17 E. 3. 57.

7. In writ by E. againſt F. it was pleaded that E. *was tenant the day of the writ* purchaſed, &c.; to which it was *replied, that before the writ purchaſed, F. recovered the land againſt E. by a dum fuit infra ætatem, and had ſued execution, and is now ſeiſed, &c.* Upon which the writ was adjudged good. Theloall's Dig. 146. lib. 11. cap. 35. ſ. 19. cites Trin. 22 E. 3. 8.

8. In *formedon*, the tenant pleaded *that he brought an aſſiſe of the ſame land againſt the demandant and recovered, and before execution ſued this writ is purchaſed*, &c. And held a good plea, and the demandant compelled to maintain his writ that the tenant was ſeiſed the day of the writ purchaſed. Theloall's Dig. 148. lib. 11. cap. 35. ſ. 8. cites Paſch. 27 E. 3. 80. but ſays, that in the ſame caſe the contrary was adjudged, becauſe the *tenant by the recovery in aſſiſe was tenant and ſeiſed in law.* Mich. 28 E. 3. 95.

9. In *falſe judgment againſt* him who was *party to the recovery*, the tenant *pleaded that the plaintiff was ſeiſed of the franktenement the day*, &c. *and yet is*, &c. And held a good plea by Finchden; but Knivet contra, quære. Theloall's Dig. 149. lib. 11. cap. 35. ſ. 11. cites Mich. 38 E. 3. 41.

10. In *ſcire facias* the tenant *pleaded that the demandant was tenant the day of the writ purchaſed, and yet is.* And held a good plea. Theloall's Dig. 149. lib. 11. cap. 35. ſ. 13. cites Mich. 39 E. 3. 37.

11. In writ of *forcible entry* upon the ſtatute of 8 H. 6. it is no plea to *ſay that the plaintiff was ſeiſed the day of the writ purchaſed*, and if it be a plea it is to the action. Theloall's Dig. 149. [7] lib. 11. cap. 35. S. 16. cites Hill. 22 H. 6. 42. per Newton.

12. In writ of *right of advowſon*, to ſay *that the demandant is ſeiſed of the ſixth part of the advowſon the day of the writ purchaſed*, is a good plea to all the writ, and ſo it is of a manor and ſuch entire thing, &c. But it is otherwiſe if the demandant be of acres, and the tenant ſays that the demandant is ſeiſed of one acre parcel, &c. Theloall's Dig. 149. lib. 11. cap. 35. ſ. 17. cites Mich. 5 H. 7. 7. quære.

[F] By Miſnoſmer.

1. ENTRY, that the tenant *entered by W. and K. his feme*, the *tenant ſaid that her name is J.* Priſt, and the *demandant ſaid* that ſhe is *known by the one name and by the other*; & non allocatur, but was compelled to maintain that her name is K. Br. Brief, pl. 155. cites 21 E. 3. 47, 48.

2. In aſſiſe *againſt A. and B. and Margery his feme*, the baron ſaid that before the writ purchaſed he had a feme named Margery, who died before the writ, and now he has another feme named *Margaret*. Judgment of the writ, and the writ abated; quod nota. Br. Brief, pl. 300. cites 30 Aſſ. 16.

S. P. for he himſelf may plead it. Br. Miſnoſmer, pl. 10. cites 35 H. 6. 50, 51.

3. It was held by Seton, that *in treſpaſs* the *one defendant ſhall not plead the miſnoſmer of the other. But in writ of ward* againſt two they may join in pleading miſnoſmer of the one of them. Theloall's Dig. 123. lib. 11. cap. 5. ſ. 8. cites Mich. 30 E. 3. 22.

S. P. Br. Miſnoſmer, pl. 24. cites S. C.

4. *Quare impedit by the King againſt the Provoſt of the Houſe of C.* the *defendant ſaid that the ſame King gave leave to T. B. to give the manor of P. to found a chauntery of a Provoſt and* 10 *Chaplains*, and that he ſhould be *named Provoſt of the Chauntery of C.* Judgment of the writ which calls him *Provoſt of the Houſe* of C. And therefore the writ was abated notwithſtanding that the King *averred that he is known by the name of Provoſt of the Houſe*, &c. The cauſe ſeems to be becauſe the King ſhall take conuſance of the name, which he himſelf appointed, by his writ. Br. Brief, pl. 137. cites 38 E. 3. 14.

5. *Scire facias* was maintained *againſt executors* out of a recognizance *without naming them by their proper names*. Theloall's Dig. lib. 6. cap. 2. ſ. 4. cites Hill. 41 E. 3. Brief, 539.

Br. Miſnoſmer, pl. 12. S. P. cites 40 E. 3. 22.

6. In formedon *of the manor of A. juxta K.* the tenant demanded judgment of the writ, becauſe *parcel of the manor of A. is in K.* where the writ is A. *juxta K.* and in truth the name was A. *beſide K.* Finch. ſaid where one is *named W. ſon of John, where his father's name is Richard*, and *brings writ by name of W. Filius Johannis in Latin*, it is a good plea to ſay that his father's name is Richard; judgment of the writ. And ſo in this caſe becauſe it is put in Latin, by which by reaſon of the opinion of the court, the demandant ſaid that A. is juxta K. Priſt and the others e contra. Br. Brief, pl. 67. cites 44 E. 3. 12.

But where one Walter Blake was indicted of treaſon, and one brought to the bar ſaid his name was Walter Blakeford, &c. Notwithſtanding, he was put to anſwer to the treaſon, inaſmuch as it is the ſuit of the King; but otherwiſe it is in appeal at the ſuit of the party. Thel. Dig. 123. lib. 11. cap. 6. S. 14. cites Trin. 1 H. 5. 5.

7. *John* Abbot of Colcheſter *was indicted of treaſon*, who came and *ſaid that his name is Roger*, &c. which was witneſſed by the Biſhop of London, and not denied by the King's Attorney, by which he went ſine die. Theloall's Dig. 123. lib. 11. cap. 5. S. 12. cites Hill. 11 H. 4. 41.

8. *M. de T.* & *M. T.* cannot be intended one and the ſame perſon, per three Juſtices; but Hanke contra, and adjudged accordingly againſt Hanke. Br. Miſnoſmer, pl. 22. cites 11 H. 4. 70.

9. *Covenant againſt the parſon of D.* he *ſaid that he is parſon of S. and not of D.* Judgment of the writ. Hanke ſaid if he was parſon of D. at the time of the covenant, and after made parſon of S. the writ ſhall be *parſon of S. late parſon of D.* And ſo of a biſhop, it ſhall be biſhop of W. late biſhop of D. &c. Br. Brief, pl. 126. cites 12 H. 4. 5. Br. Variance, pl. 35. cites S. C.

10. An *executor cannot plead miſnoſmer of his companion, but* he may plead *that he has a co-executor* in full life who has adminiſtered and is *not named*, &c. *and name him*, who is miſnamed, *by his true name.* Theloall's Dig. lib. 11. cap. 5. ſ. 15. cites 14 H. 6. 3. and 21 H. 6. 29.

11. Account *againſt R. S. of L. merchant, Nuper attorney of Peter Medices, and of the Society of Merchants of Florence in the court of Rome.* Choke prayed judgment of the writ; for the defendant's name is R. S. of L. merchant only, abſque hoc that his name is R. S. attorney, &c. Priſt, and no plea by judgment; for *that which comes after the Nuper is void, and is not traverſable unleſs where the action is founded upon it, as* in action *againſt J. S. late ſheriff*, late *eſcheator*, cuſtomer, or the like, *of an act when they were officers;* there *it is a good plea, that never ſheriff, eſcheator*, or cuſtomer. *Contra where he counts of other matter which does not touch the office.* Note the diverſity. Br. Brief, pl. 252. [256.] cites † 38 H. 6. 23, 24. and 4 E. 4. 10. accordingly. Br. Traverſe per Sans, &c. pl. 161. cites S. C.

12. Debt againſt *A. and E. and E. ſon and heir of the ſaid A.* Choke prayed judgment of the writ; for E. cannot be heir to A. in his life; and yet good per Danby; for treſpaſs lies quare filium & heredem ſuum rapuit & abduxit. Br. Brief, pl. 481. cites 3 E. 4. 12.

13. *Decies tantum againſt J. N. of D.* where *he was of S.* and iſſue was thereof taken, as miſnoſmer at common law, though proceſs of outlawry does not lie in this action. Br. Brief, pl. 439. cites 21 H. 6. 54.

14. In treſpaſs againſt Jo. Strayt, the defendant came and ſaid, you have here Jo. Strete in proper perſon, who is impleaded by the name of Jo. Strayt, and defend' &c. and ſaid that his name was Jo. Strete, and not Jo. Strayt, &c. And held good by the Court, and that *Strayt and Strete* are not all one. Theloall's Dig. Lib. 11. cap. 5. ſ. 21. cites Mich. 5 E 4. 57.

15. *Miſnoſmer* of one defendant ſhall abate the writ againſt all the defendants. 2. Le. 162. pl. 196. 21 Eliz. C. B. in an Anon. Caſe. 4 Le. 205. per 2 Juſtices in an Anon. Caſe. —But in *treſpaſs* againſt two *miſnoſmer of one of the defendants* ſhall not abate the whole writ, but it ſhall be good as to him who is rightly named. Mich. 8 Jac. 8 Rep. 159. b. in Blackamore's Caſe.

16. After the death of an obligor his ſon and *heir*, was *ſued by the name of Son and Heir apparent* of the obligor, and judgment being

being given againſt him, was reverſed for that reaſon. Owen. 17. Paſch. 35. Eliz. B. R. Audley's Caſe.

Hob. 249. pl. 327. Coppledike v. Tirwhite, Trin. 16 Jac. S. C. Where it is

17. *Quare impedit againſt Richard biſhop of Lincoln* the patron and incumbent, who *pleaded that at the day* when the writ was brought *there was no ſuch Richard biſhop of Lincoln*; and this was held a good plea in abatement. 3 Nelſ. Abr. Quare Impedit 38. pl. 19. cites Hutt. 31. Coppledike v. Tanſey.

ſaid, that no opinion was given by the Court upon this matter.—— And in Hutton's Reports of this caſe, not any mention is made of the Court's opinion as to this point; but Hughes's Abr. Tit. Amendment 5. pl. 15. has it as Nelſon, and Nelſon ſeems to have copied it from Hughes.

18. An *indictment* may be abated by miſnoſmer. Carth. 299. Hill. 5. W. & M. in B. R. Ld. Banbury's Caſe.

19. Demurrer to a plea in abatement, where the defendant ſaid ſhe was baptized by the name of *Mary* and *not* of *Patience*, but ſhe does *not ſay* that *ſhe was ſo called at the time of the bill ſued*; [9] and adjudged that ſhe *ought to give the plaintiff a better writ*. Skin. 620. Mich. 7 W. 3. B. R. Nichols v. Shepherd.

20. The *bail* cannot plead the miſnoſmer *of the principal* in abatement, though the principal may. 8 Mod. 289. Trin. 8 Geo. Addiſon v. Paterſon.

(G) By Matter Subſequent.

In *præcipe* quod reddat *againſt tenant of the King who aliens pending the writ*, by which the *King ſeiſes*, yet the *writ ſhall not abate*; for the King ſhall not have the land, but ſhall retain for a fine. Br. Brief, pl. 541. cites tempore E. 3. Itin. Not.

1. IF *aſſiſe or præcipe* quod reddat is brought *againſt J. N.* and *he aliens pending the writ*, the writ ſhall not abate. Br. Brief, pl. 271. cites 15 Aſſ. 8.

2. *Account upon receipt in Newcaſtle* upon Tyne, brought in the county of Northumberland. The defendant demanded judgment of the writ; for Newcaſtle is a county in itſelf; and becauſe it was *made a county after the teſte of the writ*, therefore the writ was awarded good. Br. Brief, pl. 530. cites 2 H. 4. 18.

S. P. 7 Rep. 27. Paſch. 40 Eliz. in Sir Hugh Portman's Caſe.

3. Where a *man who brings an action is made a knight, pending the writ*, the writ ſhall abate. Br. Noſme, pl. 18. cites 7 H. 6. 15.

But if he in *reverſion prays to be received*, and *ſhews how he leaſed to the two, and that they are in full life*, he ſhall have the plea. Br. ibid.

4. If a *leaſe* be made *to two for life*, and *præcipe* quod reddat *is brought againſt the one* of them, and *pending the writ the other releaſes to him all his right*, if he pleads jointenancy with the other who releaſed, the writ ſhall not abate. Br. Brief, pl. 380. cites 18 E. 4. 25.

5. In *præcipe quod reddat*, if they are at *iſſue upon plea for ſaving the default of the tenant*, which *paſſes for the tenant*, the writ in this caſe ſhall abate by judgment. Quod nota. Br. Judgment, pl. 154 cites 10 H. 7. 21.

6. In

6. In *writ of annuity*, if the *term expires pending the writ*, the writ ſhall abate, and the plaintiff ſhall have debt of the arrears. Br. Brief, pl. 220. S. P. per Shute J. Sav. 28. in Caſe of Booth v. Lord Cromwell.

7. *Adminiſtration granted to executor de ſon tort*, pending an action againſt him, ſhall not abate the writ. Arg. Ow. 69. Trin. 42 Eliz. in Caſe of Malloy v. Jennings.

8. In treſpaſs, where ſeveral are *joint defendants*, if *verdict finds one guilty, and the others not*, upon joint plea, or ſeveral pleas by them pleaded, plaintiffs ſhall have judgment, for ſuch verdict in treſpaſs, in ſuch caſe, does not abate the writ; for the treſpaſs may be ſeveral, or it may be joint, and plaintiff does not confeſs any thing contrary to his writ. Jenk. 101. cites 11 Rep. Sir J. Heydon's Caſe.

9. If *proceſs* be ſued *againſt feme covert as feme ſole*, ſhe cannot avoid it by writ of error; and if ſhe pending the writ *takes baron*, this ſhall not abate the writ; but the recovery againſt her upon the firſt writ is good. But per Doderidge J. If after the original proceſs ſued, and before the return, ſhe takes baron, this ſhall abate the writ. Quære. 2 Roll. Rep. 53. Mich. 16 Jac. B. R. Haydon v. Miller. *But if* feme covert *be plaintiff* at the time of the action brought, it is pleadable in abatement, and ſhall not be aſſigned for error in fact. 10 Mod. 166. Trin. 12 Annæ, B. R. Groſvener v. Stephens.

[10]

10. In *debt againſt the defendant as a feme ſole* in the Palace Court, *ſhe pleaded, and afterwards married, and then removed the cauſe by habeas corpus* into B. R. and there the *plaintiff declared againſt her in cuſtodia mariſchalli. She pleaded* in abatement, *that ſhe was married at the time of the habeas corpus brought.* Upon demurrer this was ruled a good plea; for here the proceedings are de novo; but the courſe had been for the plaintiff to move upon the return of the habeas corpus, and the Court would grant a procedendo; for though it is a writ of right, yet the Court may refuſe it, where it is brought to abate a rightful ſuit. 1 Salk. 8. pl. 20. Mich. 6 Annæ, B. R. Hetherington v. Reynolds. 11 Mod. 142. pl. 14. ETHERINGTON v. REYNOLDS, the Court was inclined to give judgment for the defendant; but as an indulgence *for the equity of the cauſe, it was adjourned to Hill. Term next.

(H) By Depoſition, Deprivation, Ceſſion, Reſignation, Tranſlation, &c.

1. WRIT *by an abbot* ſhall abate by his *depoſition* pending, &c. Thel. Dig. 186. lib. 12. cap. 17. ſ. 5. cites Tempore, E. 1. Treſpaſs 242. and Mich. 27 E. 3. 84. Mich. 8 H. 6. 3. and 9 E. 4. 25. And that this exception goes in bar, cites 16 H. 7. 17.

2. But writ *againſt an abbot* * *ſtood*, notwithſtanding he *was depoſed pending the writ*; but afterwards his ſucceſſor ſaid that he, who was depoſed, died, by which the writ was abated. Thel. * S. P. for if it ſhould abate by his depoſition a man ſhould never have a good writ againſt an abbot. Thel. Dig. 186. lib. 12. cap. 17. ſ. 3. cites Trin. 4 E. 2. Cui in Vita 22. 15 E. 3. Brief 320. 15 Aſſ. 8. 22 H. 6. 51. 18 E. 4. 19. 15 E. 3. Error 7. 18 E. 3. 24. But that contra it is ſaid 10 H. 6. 11.

Dig. 186. lib. 12. cap. 17. ſ. 2. cites 30 E. 1. Brief 885. Treſpaſs 242.

3. In *aſſiſe by the warden of an hoſpital*, it was pleaded in bar of aſſiſe that the plaintiff was viſited, and *deprived by the ordinary* of the place, &c. And it was held good, inaſmuch as he has loſt his name. Thel. Dig. 186. lib. 12. cap. 17. ſ. 4. cites 8 E. 4. 437. 451. 8 Aſſ. 29. 31.

The *plaintiff*, by name of J. D. *Prior*, &c. *reſigned*, and was *re-elected pending the writ*.

4. If aſſiſe or præcipe quod reddat be brought againſt a *parſon of a church*, *warden*, *prebendary*, or ſuch like, and he *reſigns pending the writ*, the writ by this ſhall not abate. Br. Brief, pl. 272. cites 15 *Aſſ.* 8.

And yet the beſt opinion was, that the writ ſhall abate upon the reſignation pleaded to the writ after the laſt continuance. Br. Nonabilitie, pl. 14. cites 9 H. 5. 1.

In *annuity againſt a vicar*, who *ſaid that he had reſigned*, judgment of the writ, & non allocatur; for he *ought to ſay that he had reſigned before the writ purchaſed*; for reſignation pending the writ ſhall not abate the writ. Br. Brief, pl. 406. cites 10 H. 6. 10.

Deprivation, &c. *on the part of the tenant*, is cauſe to abate the writ, becauſe the *ſucceſſor comes in by the law*. *Contra of tenant who purchaſes pending the writ*.

5. *So* per Thorp, if he be *deprived* pending the writ. Br. Brief, pl. 272. cites 15 Aſſ. 8. but cites 9 H. 5. 1. contra.

Br. Brief, pl. 417. cites 15 E. 3.

6. In writ *againſt a prior*, if he be *depoſed* pending, &c. quære if he himſelf may plead after as party or not. Thel. Dig. 186. lib. 12. cap. 17. ſ. 6. cites 18 E. 3. 24. and 29 E. 3. 39. Quære.

7. Writ brought *by a biſhop* ſhall not abate by his *tranſlation* to another biſhoprick. Thel. Dig. 186. lib. 12. cap. 17. ſ. 7. cites Mich. 22 R. 2. Brief 936.

[11]

8. Writ ſhall abate by *reſignation* of the plaintiff, notwithſtanding that he be *re-elected* afterwards; per Opinionem. Thel. Dig. 186. lib. 12. cap. 17. ſ. 8. cites 9 H. 5. 1.

In *ſcire facias on a recovery in* writ of *annuity againſt a parſon*, he ſaid, that before the writ purchaſed, he had *reſigned* to the hands of the ordinary, &c. and held no plea, without ſaying, *and ſo not parſon*, &c. Thel. Dig. 186. lib. 12. cap. 17. ſ. 11. cites Trin. 7 E. 4. 16. and ſee Hill. 9 E. 4. 52.

9. Writ of *annuity againſt a vicar upon title of preſcription*, ſhall not abate by the *reſignation* of the vicar pending the writ. Thel. Dig. 186. lib. 12. cap. 17. ſ. 10. cites Mich. 10 H. 6. 11.

But if he be named J. N. mayor, ſheriff, bailiff, &c. and *the office ceaſes pending the writ*, the writ ſhall not abate; for he had the office tempore, &c. and he has *ſufficient name* which *remains*, ſcilicet, his proper name and ſirname in the laſt caſe; but in the firſt caſe he was named by his proper name and name of office, without the ſirname. Contra in the laſt caſe. Br. ibid ——— But Brooke ſays, This is *not* to be underſtood *where he brings the action as mayor*, ſheriff, bailiff, &c. *but* where he brings the action *in jure proprio*, and names himſelf as above. Br. ibid.

10. If writ be *brought by name* of *J. Mayor of D.* ſheriff, bailiff, &c. and he is *removed pending the writ*, the writ ſhall abate; for his name is determined pending the writ. Br. Brief, pl. 415. cites 32 H. 6. 28, 29.

11. In pleading of depoſition, divorce, and deraignment, he ought to *ſhew before whom, and for what cauſe*, &c. Thel. Dig. 186. lib. 12. cap. 17. ſ. 12. cites Trin. 9 E. 4. 25.

In detinue againſt the Prior of E. præcipe the prior of the houſe and

12. If a *prior* be *impleaded by his name of corporation*, and not by his proper name, *and after is depoſed pending the writ*, the writ ſhall not abate; for *it is by his own act*. Br. Corporation, pl. 31. cites 15 E. 4. 1. per Littleton.

church of St. Croſs of E. quod reddat, &c. Huſſey pray'd judgment of the writ; for one John was

prior

prior the day of the writ purchas'd, and *after was depos'd* before L. Biſhop of E. ordinary there; *and after this defendant was elected prior*; judgment of the writ. And per Pigot and Choke, this writ is abated in fact by the depoſition. And after the defendant pleaded in bar, but not by coertion of the Court, for it is not adjudged if the writ ſhall abate by the depoſition, or not; but it was ſaid there, that the writ ſhall be good, by reaſon that the *prior is not named by proper name, but by name of corporation.* But quære inde. Br. Brief, pl. 739. cites 18 E. 4. 18. 19.

13. *Contra*, if he be *made a biſhop*; for this is the act of the Pope. Br. Corporation, pl. 31. cites 15 E. 4. 1. per Littleton. Where an *abbot defendant is made a biſhop pending the writ*, there the writ ſhall not abate; Per. tot. Cur. Br. Brief, pl. 379. cites 18 E. 4. 18. 19.

(I) Nature of the Action being changed.

1. IN writ of *annuity*, *upon a grant* made *by the defendant to the plaintiff till* the defendant had *procured to the plaintiff a benefice*; the defendant pleaded, *that he* being patron of ſuch a church, *preſented the plaintiff* to the ſame church, being void, &c. *which preſentment he received.* And it was held a good plea to the writ, and that the plaintiff ſhould be put to his writ of debt for the arrearages incurred before the preſentment. Thel. Dig. 182. lib. 12. cap. 18. ſ. 1. cites Hill. 4 E. 3. 123. And it is held, That the tender of a benefice pending the writ, determines ſuch annuity. Ibid. cites 14 H. 7. 33. and Hill. 19 H. 6. 54.

2. *Tenant by ſtatute merchant, who had land by extent for a ſum which might incur in ten years, brought aſſiſe*, and *pending it the ten years expired*; and it was doubted if he ſhall recover, or not. Br. Brief, pl. 411. cites 11 H. 6. 6. S. P. And ſo if tenant by *elegit* [12] *brings aſſiſe*, and the term or *extent expires pending the writ*, the writ ſhall abate. Br. Brief, pl. 220. cites 9 E. 4. 50. per Choke and Danby. ——S. P. per Clench J. as to the tenant by ſtatute merchant. Sav. 28. in caſe of Booth v. Lord Cromwell. ——If *tenant by ſtatute merchant brings aſſiſe*, and the *frank-tenement deſcends to him pending the writ*, the writ ſhall abate. Br. Brief, pl. 415. cites 32 H. 6. 28. 29.

It is held, That *aſſiſe* brought *by tenant by ſtatute merchant*, ſhall abate, if the *term* of the extent be *paſs'd pending the aſſiſe*. Thel. Dig. 186. lib. 12. cap. 18. S. 2. cites Mich. 11 H. 6. 8. and adds, Quere; but ſays, it is agreed there, that writ of *waſte*, or of *covenant*, or *quare ejecit infra terminum*, ſhall not abate by the expiration of the term pending the writ; and that ſo agrees Hill. 9 E. 4. 53. and 14 H. 8. 14. for the waſte.——So if *one has execution of a ſtatute merchant againſt his father, and* after *is ouſted* of this land, *and ſues aſſiſe, and his father dies pending the aſſiſe*, his writ ſhall abate, inaſmuch as the deſcent comes upon him by courſe of law. Thel. Dig. 186. lib. 12. cap. 18. S. 4. cites Hill. 32 H. 6. 5.

3. When an action is well begun, and *part of the action determines by act in law*, and yet the *like action for the reſidue is given*, there the writ ſhall not abate, but proceed; but where by the determination of part the like action remains not for the reſidue, there the action well commenced ſhall abate. Co. Litt. 285. a. *As* if an action of waſte be brought *againſt tenant pur auter vie*, and hanging the writ *ceſty que vie dies*, the writ ſhall not abate; but the plaintiff ſhall recover damages only, becauſe if ceſty que vie had died before any action brought, the leſſor might have an action of waſte for the damages. Co. Litt. 285. a.——It was agreed, that *if* action of *waſte be brought*, and the term expires pending the writ, yet the writ is good. Br. Brief, pl. 411. cites 11 H. 6. 6.—S. P. Per Choke and Danby. Br. Brief, pl. 220. cites 9 E. 4. 50.——If an action of *waſte* be brought *by baron and feme in remainder in ſpecial tail*, and hanging the writ the *wife dies without iſſue*, the writ ſhall abate, becauſe every kind of action of waſte muſt be ad exhæredationem. Co. Litt. 285.

By *act in law*, the nature of the action may be changed; as if a man make a *leaſe for term d'auter vie*, and the leſſee does *waſte*, and then ceſty que vie *dies*, an action of waſte ſhall lie for damages only, becauſe the other is determined by act in law. Co. Litt. 285. a.

So

4. So where the term expires pending writ of *ejectment within the term*. Br. Brief, pl. 411. cites 11 H. 6. 6.

The plaintiff cannot have judgment to recover the land, but he may have judgment of damages. Per Manwood Ch. B. Say. 28. in case of Booth v. Lord Cromwell. ——Co. Litt. 285. a. S. P. because ejectment lies after the term for damages only. —— S. P. by Warburton J. 2 Brownl. 133. ——S. P. resolv'd 8 Mod. 382. Pasch. 1 Geo. Shaw v. Weigh.

5. *But if the heir comes to full age, or dies pending a writ of ward*, yet the writ shall stand; per Cott. and Paston, by the statute. Quære. Br. Brief, pl. 411. cites 11 H. 6. 6.

S. P. by Manwood Ch. B. Sav. 28. pl. 66. that at common law the writ shall abate.

6. *In assise by tenant per auter vie*, if *cesty que vie dies*, the assise shall abate. Br. Brief, pl. 411. cites 11 H. 6. 6.

S. P. accordingly. Co. Lit. 285. a. because assise is not maintainable for damages only. —— *So in præcipe* quod reddat *against tenant pur auter vie*. Br. Brief, pl. 220. cites 9 E. 4. 50. per Choke and Danby. —— S. P. *If he in reverſion enters pending the writ*. Br. Brief, pl. 192. (bis) cites 15 E. 4. 4. —— In formedon against one, the case was such, that *A. was tenant for life*, the *remainder over to B. in fee*, and *A. granted his estate to C. the tenant in the formedon, and died pending the writ*. And by all the justices except Littleton, and by divers serjeants, the writ is not abated, if he in *remainder has not entered*. Br. Brief, pl. 380. cites 18 E. 4. 25.

The *King leased* land *to E. for life, who leased his estate to A. against whom N. brought præcipe* quod reddat; the *tenant said, that the King leased to E. for life, who granted his estate to him; and that E. died pending the writ*, judgment of the writ; for now the franktenement is determined in the tenant; and because the demandant could not deny it, therefore nihil cepit per breve; for the franktenement is devolved to the King. Br. Brief, pl. 195. cites 24 E. 3. 24. —— And yet 18 E. 3. 24. the writ is *good till the reverſion enters*. Per. tot. Cur. ibid.

7. Where an *annuity is granted for* a term of *years*, if the *term* be *incurred pending the writ* of annuity, it shall abate. Thel. Dig. 186. lib. 12. cap. 18. s. 3. cites Mich. 34 H. 6. 20. and 15 H. 7. 1.

S. P. And the writ fails for ever, because no like action can be maintained for the arrearages only, but for the annuity and arrearages. Co. Litt. 285.

[13] (K) By Birth of a nearer Heir pending the Writ.

1. THEL. Dig. 185. lib. 12. cap. 14. s. 1. says, see 11 Ass. 6. That mention is made that *assise* brought *by an heir against a guardian*, was abated because another nearer heir was born after the writ purchased, &c.

Br. Brief, pl. 415. cites 32 H. 6. 28. 29. S. P.

2. And *so where a man has a daughter, and dies, his feme privement enseint with a son*, if the daughter sues assise of Mortdancester, and after the son is born, the writ shall abate. Thel. Dig. 185. lib. 12. cap. 14. s. 1. cites 32 H. 6. 35.

(L) By Recovery pending the Writ.

In *writ of ward*, it was pleaded *that a stranger by writ* of ward *of elder date recovered the same ward against him pending this writ by verdict found against the defendant upon jointenancy in the services*

1. IN *writ of ward of the body*, it is no plea for the defendant to *say that a stranger of whom the father of the infant held by service of chivalry, brought writ of ward against him, to whom he rendered the body* of the infant *out of court, before he knew* any thing *of the suit of this demandant* now, &c. Thel. Dig. 190. lib. 12. cap. 30. s. 1. cites Trin. 2 E. 2. Brief, 781.

vices pleaded by the defendant: and held a good plea with allegation that the ſtranger was ſeiſed by force of the ſame judgment, otherwiſe not. Thel. Dig. 192. lib. 12. cap. 30. S. 22. cites Hill. 40 E. 3 7. Where it is ſaid that in plea of land, recovery pending ſhall not abate the writ if execution be not ſued, &c. And that ſo agrees 7 H. 4. 30. 17.

2. Recovery by a ſtranger *of parcel pending the writ ſhall* not *abate* the writ but *only for this parcel.* Thel. Dig. 190. lib. 12. cap. 30. ſ. 2. cites 3 E. 3. Itin. North. Briefe 739. Paſch. 9 E. 3. 452. Trin. 15 E. 3. Brief 285. 18 E. 3. 28. 20 E. 3. Br. 687. and 22 E. 4. 8.

3. In *writ of entry, in which* the *tenant had not entry unleſs by Jo.* &c. The tenant *ſaid that his mother had recovered the third part* of the tenements *againſt the ſaid Jo. by writ of dower, and* thereof *ſued execution* againſt the tenant *after this writ purchaſed,* &c. And held no plea, inaſmuch as the recovery was againſt a ſtranger to the writ. Thel. Dig. 190. lib. 12. cap. 30. ſ. 3. cites Trin. 5 E. 3. 203. Brief 723.

4. In *writ of right* after the miſe joined, and at the day that the *four knights were come to chooſe the grand aſſiſe;* the *tenant ſaid that one Alice, after the miſe joined, had recovered againſt him the third part by writ of dower by his default,* &c. And adjudged no plea, but the four knights were ſworn. Thel. Dig. 190. lib. 12. cap. 30. ſ. 5. cites Paſch. 7 E. 3. 311.

5. In *formedon againſt A. B. and C.—A. made default after default,* and *B. and C. took the entire tenancy and pleaded to iſſue,* &c. and after *C. made default, and at the petit cape another default,* upon which the demandant prayed ſeiſin of the moiety, and *B. being an infant, came by guardian, and ſaid that he himſelf pending this writ brought aſſiſe againſt the ſaid A. and C. of all the tenements now demanded, and recovered* againſt them *by verdict of aſſiſe, and ſo their tenancy deſtroyed,* &c. Yet the demandant had judgment to recover. But it was ſaid by Stone, that otherwiſe it ſhould be if B. had produced the record of the aſſiſe. Thel. Dig. 190. lib. 12. cap. 30. ſ. 4. cites Paſch. 7 E. 3. 320. quære.

6. In *formedon* of a manor, the tenant *pleaded that one Jane, pending the writ by writ of dower, had recovered* againſt him *the third part by action tried,* &c. the demandant replied, *that the tenant, before the writ of dower* purchaſed, *had rendered to Jane her dower of the ſame manor, and after by* conſent and *colluſion between them,* the ſaid *Jane brought her writ of dower, and recovered, &c. to abate this writ.* And adjudged a good replication. Thel. Dig. 191. lib. 12. cap. 30. ſ. 6. cites Mich. 7. E. 3. 358. and the writ awarded good. [14]

7. Recovery *by the tenant againſt the demandant by default* ſhall abate the writ. Thel. Dig. 191. lib. 12. cap. 30. S. 7. cites 7 E. 3. 360.

8. In *aſſiſe* the *tenant ſaid that a ſtranger recover'd againſt him pending the writ by action tried,* &c. to which the plaintiff replied *that the tenant was tenant the day of the writ purchaſed, and this eſtate continues and is yet tenant,* &c. And upon this to iſſue, and it was *found that the recovery was had by conſent between them, and the livery made by the bailiff, but the tenant and his goods remained always there,* &c. Upon which the opinion of the Court was to abate the writ beauſe the

the interruption is found, and ſo the reverſe of the iſſue is found. Thel. Dig. 191. lib. 12. cap. 30. S. 8. cites 7 E. 3. 368. & 43 E. 3. 21.

So it is of the re-entry of the feoffee without recovery in ſuch caſe. Ibid. cites Mich. 15 E. 4. 5.

9. If the *tenant pending the writ infeoffs a ſtranger, and after diſſeiſes his feoffee*, and his *feoffee recovers againſt him*, ſuch recovery ſhall not abate the writ. Thel. Dig. 191. lib. 12. cap. 30. S. 9. cites Paſch. 9 E. 3. 452. & 11 H. 6. 56.

10. In *writ againſt J. and M.—J. ſaid that he was tenant of the whole the day of the writ purchaſed*, &c. *and that M. recover'd all againſt him pending the writ*, &c. judgment of the writ, and *M. ſaid* that *ſhe had nothing the day of the writ purchaſed, and that ſhe recovered againſt J. pending the writ*, &c. judgment of the writ. But Hurle held the writ good againſt M. Thel. Dig. 191. lib. 12. cap. 30. S. 10. cites Paſch. 9 E. 3. 355.

Recovery had by a ſtranger againſt the tenant pending the writ by nient dedire, *or by render or* by *default*, ſhall not abate the writ. Ibid. S. 16. cites Trin. 18 E. 3. 28. and ſays ſee 9 H. 6. 42. quære, and that ſo agrees Trin. 7 H. 4. 15.——*But* it is held that writ ſhall abate for recovery had by a ſtranger againſt the tenant pending the writ upon *miſpleading of the tenant, where the tenant has other better matter to plead.* Thel. Dig. 191. lib. 12. cap. 30. S. 16. cites Trin. 18 E. 3. 28.

11. Thel. Dig. 191. lib. 12. cap. 30. S. 11. ſays it ſeems by the opinion of Hill, 10 E. 3. 486. That *recovery had by a ſtranger pending the writ upon nient dedire in a writ purchaſed after the writ pending* ſhall not abate the writ. But ſays, quære, if it was purchaſed before, and cites 5 H. 7. 40. quære.

12. In writ againſt D. he *pleaded to the writ, that before this writ purchaſed, one C. brought writ againſt B. of other lands*, the which *B. vouched D. now tenant*, and *D. entered into the warranty and loſt*, upon which *C. recovered againſt B. and he over in value againſt D. before this writ purchaſed, and after* this writ purchaſed *execution was ſued by B. againſt D. of the land now demanded, which B. after infeoffed one A. thereof, who is now tenant* thereof, &c. And held a good plea. But the demandant maintained that D. was now tenant, &c. and iſſue thereupon. Thel. Dig. 191. lib. 12. cap. 30. S. 12. cites Trin. 15 E. 3. Brief, 285.

13. *After verdict and before judgment* the *tenant ſhall not plead recovery* had *againſt him by a ſtranger before the inqueſt taken*, notwithſtanding the inqueſt was taken in Pais at the Niſi Prius. Thel. Dig. 191. lib. 12. cap. 30. S. 13. cites Mich. 17 E. 3. 55.

14. In *formedon* the *tenant pleaded to the writ that a ſtranger recovered* the tenements *againſt him by aſſiſe and action tried pending the writ*, &c. And held and adjudged a good plea *without ſaying that the diſſeiſin was done before this writ purchaſed*, and the demandant was not received to falſify this recovery by covin or conſent, and by traverſe that the diſſeiſin was done before this writ purchaſed. But *otherwiſe* it ſhould be *if ſuch recovery had been pleaded in bar.* Thel. Dig. 191. lib. 12. cap. 30. S. 14. cites Mich. 17 E. 3. 72. but cites 33 E. 3. Maint. de Brief, 65.

[15]

15. In *writ of eſcheat* the *tenant ſaid that it was found by office for the King, that he, by whoſe felony the land is claimed, adhered himſelf to the enemies of the King, by which the land was ſeiſed into the hands of*

the king, upon which the tenant ſued to the king by petition, and proceſs ſued in B. R. which was found for the king, by which it was awarded, that the land remain in the hands of the king, and this after the laſt continuance, and ſo has the *king recovered by action tried* judgment of the writ; and adjudged a good plea. Thel. Dig. 191. lib. 12. S. 15. cites Trin. 18 E. 3. 26.

16. But writ ſhall abate for the parcel by *recovery* had *againſt the tenant by a ſtranger, by writ of dower of later date, by render of the tenant, with monſtrans that ſhe who recovered had right to recover.* But it is held there, that the demandant *may falſify* this recovery, *by ſaying, that the baron* of the feme *had nothing; but not* to ſay *that the recovery was by covin and conſent, without counterpleading the right.* And it is ſaid there, that writ ſhall abate by the *recovery in writ of dower of* * *elder date, had by default of the tenant, with monſtrans that ſhe had right* as above. Thel. Dig. 191. lib. 12. cap. 30. S. 17. cites Trin. 20 E. 3. Br. 687. but cites 31 E. 3. Brief 323. contra. Quære.

* *But in aſſiſe* it is adjudg'd that the *writ ſhall not abate by recovery* had *againſt the tenant by default, by writ of elder date.* Thel. Dig. 191. lib. 12. cap. 30. S. 18. cites Mich. 22 E. 3. 12. —— *Nor* by ſuch recovery had *by reddition.* Thel. Dig. 191. lib. 12. cap. 30. S. 18. cites 22 Aſſ. 2. *and* ſays, that he *ought always to plead ſuch recovery certainly.*

Writ ſhall abate by recovery had pending the writ *by writ of elder date by default, notwithſtanding demandant ſaid that it was upon falſe and faint title,* and ſo adjudg'd. Thel. Dig. 192. lib. 12. cap. 30. S. 20. cites Mich. 28 E. 7. 96.

17. Where an *intire manor is in demand,* the *writ ſhall abate for all, by recovery had of the 3d part by writ of dower.* Thel. Dig. 191. lib. 12. cap. 30. S. 19. cites Hill. 26 E. 3. 57. And ſee 3 E 3. ſup.

But aſſignment of dower *in the Chancery ſhall* not *abate the writ,* but *only for the parcel* in ſuch caſe; and ſo note, that ſuch aſſignment in the Chancery ſhall abate the writ for the parcel as well as recovery. Thel. Dig. 191. lib. 12. cap. 30. S. 19. cites 26 E. 3. and ſays, ſee 10 H. 5. 1.

18. Writ brought *of a caſtle, and of other land. As to the caſtle the tenant vouched, and to the land he pleaded to the writ, that, pending this writ, the demandant had recovered againſt him the manor* of Tatſal, *of which the land is parcel,* &c. by which the writ abated for the land. Thel. Dig. 192. lib. 12. cap. 30. S. 21. cites Trin. 38 E. 3. 16.

19. *Execution ſued by tenant by ſcire facias* pending the writ, ſhall not abate the writ. Thel. Dig. 192. lib. 12. cap. 30. S. 22. cites Hill. 41 E. 3. 5. Brief 532.

20. Thel. Dig. 192. lib. 12. cap. 30. S. 30. ſays, ſee *recovery* had *againſt the tenant pending the writ pleaded by the vouchee.* Paſch. 41 E. 3. 11.

21. *Where recovery* had, *and execution had pending the writ, is pleaded in abatement, it is good maintenance* of the writ *to ſay, that the tenant was tenant the day of the writ purchaſed, and yet is,* &c. Thel. Dig. 192. lib. 12. cap. 30. S. 31. cites Trin. 43 E. 3. 21.

22. Writ of *detinue of charters* ſhall not abate by *recovery had by a ſtranger againſt the defendant of the ſame charters, by another writ* of detinue pending the writ. Thel. Dig. 192. lib. 12. cap. 30. S. 24. cites Hill. 8 H. 6. 23.

But Cotteſmore ſaid, that if *A. delivers a charter concerning his land to B. to re-bail to him,* and *B. delivers it to C. to re-bail to him,* and after *A.* recovers the charter by *writ*

writ of detinue againſt C. If *A. brings another writ* of detinue *againſt B.* upon the firſt bailment, B. may plead this recovery had againſt C. Thel. Dig. 192. lib. 12. cap. 30. S. 24. cites Trin. 9 H. 6. 17.

[16] 23. A man may *falſify a recovery pleaded to the writ by action tried*, by ſaying, that it was *by covin* and conſent, *and by traverſe to the iſſue tried, and* by *ſhewing of the cauſe of the covin.* Thel. Dig. 192. lib. 12. cap. 30. S. 25. cites Mich. 9 H. 6. 41.

24. In ſcire facias it was pleaded to the writ, that a *ſtranger had recovered againſt the tenant by verdict of aſſiſe pending the ſcire facias*, the which ſtranger was *ſeiſed by force of the judgment, and leaſed to the tenant for* term of *years, which term yet continues*, &c. To which the demandant replied, *that the tenant was ſeiſed after the ſcire facias purchaſed, and infeoffed the plaintiff in aſſiſe, who was ſeiſed till by the tenant diſſeiſed, of which ouſter he brought the aſſiſe; abſque hoc that the plaintiff in* the aſſiſe *had ever any thing before the ſcire facias purchaſed*, &c. And it was held by 3, that the writ ſhould abate. But Martyn held the contrary. Thel. Dig. 192. lib. 12. cap. 30. S. 26. cites Trin. 11 H. 6. 57. ſee 9 E. 3.

25. It is no good form in pleading a recovery of parcel to the writ, to *ſay, that a ſtranger recovered* 100 *acres of the ſaid acres inter alia; but* he ought to ſay, *that ſuch a one recovered* 200 *acres, of which* 20 *acres now in demand are parcel*, &c. Thel. Dig. 192. lib. 12. cap. 30. S. 28. cites Paſch. 22 E. 4. 8.

26. In *formedon* the *tenant vouched one A. who vouched one B. an infant*, by which the *parol demurred*; and after *reſummons was ſued againſt the tenant and the firſt vouchee, but not againſt B.* And now the *tenant pleaded, that after the parol was put ſine die by the nonage, a ſtranger recovered the land againſt him in formedon by confeſſion of the tenant, by force of which he entered, que eſtate the tenant now has*; and he ſaid further, *that the eſtate of the demandant was meſne between this judgment and the title of the ſtranger*, &c. judgment of the writ, &c. And *adjudged no plea to the writ* in the mouth of the tenant, *but* it ſhall be *good in bar* in his mouth. And Brian held that the plea was not good, becauſe *covin* appeared by the confeſſion; but Townſend held the contrary, with the averment. Thel. Dig. 192. lib. 12. cap. 30. S. 29. cites Trin. 5 H. 7. 40. but ſays, it is agreed, Mich. 10 H. 7. 1. that ſuch recovery by confeſſion, and without ſhewing title in the recoveror, is not covin or colluſion apparent, before that the covin be alledged by the demandant; and that ſuch recovery by confeſſion, in writ of elder date, is good enough in abatement of the writ, without affirming title in the recoveror, and cites 18 E. 3. 20 E. 3. 7 H. 4. 15. 22 E. 3. Quære.

(M) Writ abated by Return of the Sheriff.

1. THELOALL ſays, we find in our books, that when exception was taken that the writ was not ſerved, ſometimes the defendant was put to anſwer before the return was amended, and

and ſometimes ſicut alias was awarded; but *rarely* that *any original writ was abated for any default in the return. But judgments have been arreſted* for defaults apparent in the returns, and judgments have been reverſed alſo by error for ſuch cauſe, and *eſpecially where ſuch* judgments have *paſſed by default.* Thel. Dig. 218. lib. 16. cap. 1. S. 14.

2. *Upon diſtreſs*, the *ſheriff returned mainpernors, and that non ſunt exitus*, &c. and adjudged good. Thel. Dig. 218. lib. 16. cap. 1. S. 5. cites 7 H. 6. 10. Quære. Hill. 29 E. 3. 7.

3. In *ſcire facias againſt Elen, prioreſs of W.* the ſheriff *returned ſcire feci prioreſſæ de W. without ſaying Elenæ prioreſſæ*, and held good. Thel. Dig. 217. lib. 16. cap. 1. S. 1. cites Paſch. 29 E. 3. 33.

4. In *præmunire* facias *againſt ſeveral*, the ſheriff *returned, that they were warned; but* he did *not* return *at what day* they were warned, and held an inſufficient return; becauſe by the ſtatute they ſhould be warned 2 months before the day in court, and upon this ſicut alias was awarded. Thel. Dig. 218. lib. 16. cap. 1. S. 2. cites Hill. 42 E. 3. 7. and 39 E. 3. 8. [17]

5. In *treſpaſs againſt an abbot and his commoigns*, the ſheriff *returned pledges for the abbot, and that the commoigns had nothing*, &c. And it was held good, without putting the abbot to find pledges for his commoigns. *But* the ſheriff ought to return pledges, as well *for feme covert as* upon *her baron.* Thel. Dig. 218. lib. 16. cap. 1. S. 4. cites Mich. 48 E. 3. 26. but adds, Quære. But ſays, it is held, the feme ſhall not be attached by the goods of the baron.

6. Upon *ſcire facias againſt ſeveral tenants*, the ſheriff *returned ſcire feci quod ſint*, &c. *modo & forma* ſecundum quod iſtud br' exigit, &c. And held good, *without ſaying ſeparatim.* Thel. Dig. 218. lib. 16. cap. 1. S. 6. cites Hill. 2 H. 4. 13. and ſays, ſee 3 H. 4. 19.

7. It ſeems, per opinionem, that if the ſheriff *returns more than* 24 *recognitors in aſſiſe*, the writ ſhall abate. Thel. Dig. 218. lib. 16. cap. 5. S. 7. cites Hill. 8 H. 4. 20. Hill. 10 H. 4. 8. and adds, Quære; for the ſtatute of Weſtminſter 2. cap. 38. is quod de cætero non ſummoneantur in una aſſiſa plures quam 24.

8. The *ſcire facias* was *againſt G. K.* and the ſheriff *returned ſcire feci G. K. without ſaying infranominat' nor infraſcript', but* it was *prout iſtud breve in ſe exigit*, &c. *ſecundum formam brevis*, &c. adjudged good. Thel. Dig. 218. lib. 16. cap. 1. S. 9. cites Mich. 1 H. 6. 7. and 11 H. 7. 28.

But it is ſaid, that it is *amendable, if it be not good.* Ibid. cites 12 H. 7. 19.

9. It is ſaid by Priſot, that *after the tenant has appeared* in court, he *ſhall never have advantage of default of form of the return*; and if it be not good, it may be *amended* by diſcretion, &c. Thel. Dig. 218. lib. 16. cap. 1. S. 11. cites Mich. 33 H. 6. 31.

(N) Writ abated, or made good by the View.

1. WHERE a man *pleads nontenure of parcel* of the tenements demanded, the demandant may maintain that the tenant is fully tenant of the tenements put in view; for the demandant by the view may bring the quantity to his demand, and so amend his writ, or falsify his writ by the view. Thel. Dig. 218. lib. 16. cap. 2. S. 1. cites Mich. 3 E. 3. 107. and Pasch. 4 E. 3. 132.

But where the writ was of two parts of the moiety of a manor, the tenant said, that the demandant himself was seised of a wood, parcel of the whole manor, &c. To which the demandant *replied, that the tenant was fully tenant of the tenements put in view*, and was not received without maintaining his writ of the tenements demanded. Thel. Dig 219. lib. 16. cap. 2. S. 5. cites Mich. 4 E. 3. 162.

2. Where one *demands*, by his writ, *a house, and* 10 *s. rent*, and *puts nothing in view but only a house*, it shall abate his writ. Thel. Dig. 218. lib. 16. cap. 2. S. 2. cites Trin. 5 E. 3. 193. and Pasch. 11 E. 3. Dower 63.

3. It is said, that where a man *demands a carve* of land, he may *put in view the moiety of a carve, or 2 carves;* and yet it shall not abate the writ. Thel. Dig. 218. lib. 16. cap. 2. S. 3. cites Pasch. 6 E. 3. 265.

[18] 4. If the *demand be of a manor*, and the *tenements put in view are only one house and one carve of land of another name* than the manor is of, the writ shall abate. Thel. Dig. 218. lib. 16. cap. 2. S. 4. cites Pasch. 6 E. 3. Brief 727.

5. *But* where the manor of S. was in demand, the *tenant said, that the tenements put in view are only one house and ten acres of land parcel of another manor, and that such a one held one acre of the tenements put in view*, &c. And held no plea without pleading the non tenure of the tenements demanded; for though the demandant *puts more in view than he demands*, yet his writ shall not abate. Thel. Dig. 218. lib. 16. S. 4. cites Trin. 18 E. 3. 22. Br. 357. Quære; but says, the contrary is held Pasch. 19 E. 3. Brief 468. where it is granted by the court, that the demandant ought to maintain his demand according as he has demanded, and according as it is put in view; and that so agrees Mich. 20 E 3. Brief 373. 375.

(O) By Want of proper Parties. Plaintiffs or Defendants.

1. ACTION against J. N. who *said, that he had nothing in the land, unless in right of his wife;* judgment of the writ, and if, &c. nul tort, &c. the exception was found; by which the plaintiff took nothing by his writ. Br. Brief, pl. 285. cites 25 Ass. 10.

2. Fine was levied *to a feme sole;* she *took baron*, and *brought quid juris clamat* against the tenant *in her name alone;* and he went without day, by not naming of the baron. Br. Brief, pl. 522. cites 11 H. 4. 7.

3. It

3. It was argued arguendo, that *in debt by one upon a leaſe for years*, it is a good plea to the writ, *that he and another leaſed, who is alive, not named*; judgment of the writ. Br. Brief, pl. 37. cites 36 H. 6. 38.

Br. Brief, pl. 188. contra, that it is no plea to the writ, that the *leaſe was made by the plaintiff, and one A. who is alive, not named*; for the leaſe of one coparcener is good to the tenant, if the other does not enter; but it is a good plea to the writ, that the plaintiff and one A. made the leaſe, who is alive not named, *abſque hoc that the plaintiff leas'd alone*, judgment of the writ; cites 22 H. 6. 24.

4. *Or that* the leaſe *was made to the defendant, and another, who is alive*, &c. Br. Brief, pl. 37. cites 36 H. 6. 38.

5. *Or of buying a horſe*, &c. to ſay *that the defendant and another in full life bought*, &c. *or that* the *plaintiff and another in full life ſold*, &c. and this *without traverſe*. Br. Brief, pl. 37. cites 36 H. 6. 38.

6. *Contra, to ſay that the plaintiff leaſed this and other land for the ſame rent*, &c. For there he *ought to traverſe*; for the leaſe of one thing is not the leaſe of two. Br. Brief, pl. 37. cites 36 H. 6. 38.

(P) By Default in the Count. Want of Certainty. And how aided. By Intendment or Relation. [19]

1. IN *treſpaſs by an abbot of goods taken in the time of vacation*, and the writ was *ad exhæredationem eccleſiæ prædict.* and adjudged good, notwithſtanding that no church is named; for it ſhall have relation to the abbot who was named before. Thel. Dig. 102. lib. 10. cap. 10. S. 17. cites Mich. 18 E. 2. Treſpaſs 237. and ſays, ſee 38 E. 3. 9.

2. In writ of *treſpaſs by an abbot againſt the parſon of the church of C.* the writ was *ad deteriorationem eccleſiæ prædict.* and it was abated, becauſe there was *not any church mentioned before* to which the prædict. might have relation, but only to the church of the defendant. Thel. Dig. 101. lib. 10. cap. 10. S. 1. cites Mich. 18 E. 2. Brief 828.

3. In *cui in vita* by Helena, who was wife of William de C. *againſt J. de N. in quæ idem J. non habet ingreſſum niſi per prædictum Will.* quondam virum, &c. and it was held certain intendment enough, that J. had entry by the other. Thel. Dig. 99. lib. 10. cap. 9. S. 2. cites Hill. 4 E. 3. 122.

4. The writ was *quod reddat maner' de W. cum pertin' except' uno meſuagio & advocatione eccleſiæ ejuſd. manerii.* It was held, that *ejuſdem manerii* ſhall have *relation* only to the advowſon, and not to the houſe, by which the writ was abated, becauſe the houſe was not in any place. Thel. Dig. 101. lib. 10. cap. 10. S. 2. cites Hill. 4 E. 3. 117.

5. In *formedon in remainder, by the ſon and heir of him in remainder*, he *need not ſuppoſe the death of his father*; for he cannot

And where he is *made heir to his*

grandfather, he ſhall *not ſuppoſe the death of his father*. be intended heir to his father if he be not dead. Thel. Dig. 99. lib. 10. cap. 9. S. 1. cites Mich. 5 E. 3. 206.

Thel. Dig. 94. lib. 10. cap. 6. S. 2. cites 23 E. 3. 22. —— But ſuch writ was *abated by omiſſion* of this clauſe, *eo quod præd' les donees obierunt ſine hæred'*, &c. Thel. Dig. 94. lib. 10. cap. 6. S. 2. cites Trin. 10 E. 3. 515. and Mich. 39 E. 3. 34. and 3 H. 6. 1. and Paſch 11 H. 6. 34.

As in *treſpaſs* the writ was *quare averia ſua cepit & imparcavit & ea detinuit* without paſture, &c.

6. When a *word of a writ has double intendment*, the *one according to law, the other againſt law*, a man ſhall take the intendment which is according to the law. Thel. Dig. 99. lib. 10. cap. 9. S. 11. cites Trin. 5 E. 3. 197.

Ita quod 30 *eorum perierunt*, &c. it ſhall not be intended that by thoſe words the defendant ought to give paſture to the beaſts; but it ſhall be *intended that the defendant would not ſuffer the plaintiff to give them paſture*, &c. Thel. Dig. 99. lib. 10. cap. 9. S. 11. cites Trin. 5 E. 3. 197.

7. In writ of *intruſion* by Ro. *againſt W. in which W. had not entry unleſs by abatement, after the death of Simon the ſon of Thomas Upholl*, that the tenant held for term of his life of the leaſe of Thomas Upholl, grandfather of the demandant, and made the deſcent from Thomas to Simon, and from Simon to the demandant, yet it ſhall not be intended that Simon the tenant for life, and Simon the father of the demandant, are the ſame perſon; for it may be that Thomas had two ſons of the ſame name. Thel. Dig. 99. lib. 10. cap. 9. S. 3. cites Hill. 7 E. 3. 301.

8. *Feoffavit* in a writ ſhall be intended of feoffment *in fee*, if other eſtate be not expreſſed. Thel. Dig. 99. lib. 10. cap. 9. S. 4. cites Paſch. 8 E. 3. 392. Mich. 18 H. 6. 24.

9. In *treſpaſs de* domo proſtrata, & *maheremio* inde *aſportato*, &c. this ſhall be intended the timber of the plaintiff. Thel. Dig. 99. lib. 10. cap. 9. S. 12. cites Hill. 9 E. 3. 442.

[20]

10. In attaint of a verdict paſſed of one meſſuage cum pertinentiis, and after there was in the writ de tenementis prædictis cum pertinentiis, and yet held good; for *ſeveral tenements may be intended to be in this word houſe*, with the appurtenances. Thel. Dig. 99. lib. 10. cap. 9. S. 13. cites Mich. 9 E. 3. 468.

* This is miſprinted, and ſhould be (nunc), and ſo is the year-book.

11. In *ſcire facias againſt a prior*, out *of a recovery* had *againſt his predeceſſor*, the *writ ſuppoſed that the recovery was had againſt the then prior*; and adjudged a good writ, without putting a diverſity in the name of baptiſm of the defendant and of his predeceſſor; for by the tunc priorem, and * hunc priorem, they ſhall be intended diverſe perſons. Thel. Dig. 99. lib. 10. cap. 9. S. 14. cites Hill. 17 E. 3. 1.

Thel. Dig. 104. lib. 10. cap. 12. S. 4. cites S. C.

12. Quare impedit *ad præbendam de Moreton majorem in eccleſia*, &c. It is adjudged, that *majorem* ſhall have *relation* to præbendam, and not to Moreton. Thel. Dig. 101. lib. 10. cap. 10. S. 6. cites Trin. 18 E. 3. 29.

13. The writ by *one præcipe* was *of land in Brugh near Wingfield*, and the *other præcipe of land in eadem villa*, &c. The opinion of the court was, that it ſhall abate; for *eadem villa* ſhall have *relation* to Wingfield. Thel. Dig. 101. lib. 10. cap. 10. S. 7. cites Trin. 20 E. 3. Brief 371.

14. The writ was *in villa de Pontefracto W. and C.* And held good without ſaying villis; for *villa* ſhall have *relation* to Pontefracto only, and not to the other vills. Thel. Dig. 101. lib. 10. cap. 10. S. 8. cites Trin. 30 E. 3. 3.

15. In *formedon*, the writ was *of a gift made to Jo. and Ja. his feme, and that after the death of the aforeſaid Jo. and Ja.* without ſaying his feme, and yet adjudged good; for it cannot have relation to any other. Thel. Dig. 101. lib. 10. cap. 10. S. 9. cites Hill. 31 E. 3. Brief 326.

16. *Scire facias out of a recognizance againſt a tertenant*, the writ was *quare præd' ſumma de terris ſuis levari non debeat*, and held good; for ſuis ſhall have relation to his lands which were the conuſor's, and ſo it ſhall be intended. Thel. Dig. 101. lib. 10. cap. 10. S. 16. cites Mich. 30 E. 3. 30.

17. Treſpaſs the writ was *pone per vadios abbatem de N. & A. & B. converſos ejuſdem domus*, where *domus is not in the writ before;* judgment of the writ, becauſe *it is not converſos ejuſdem abbatis.* Finch. ſaid, all is one, and awarded the writ good. Br. Brief, pl. 135. cites 38 E. 3. 8. Thel. Dig. 101. lib. 10. S. 10. cites S. C. and 18 E. 3. 3. and 18 E. 2.

18. In *treſpaſs by an abbot of goods taken in the time of vacation*, and the writ was *ad exhæredationem eccleſiæ prædict.* And adjudged good, notwithſtanding that no church is named; for it ſhall have relation to the abbot who was named before. Thel. Dig. 102. lib. 10. cap. 10. S. 17. cites Mich. 18 E. 2. Treſpaſs 237. and ſays, ſee 38 E. 3. 9.

19. A *feme* ſhall be *intended to be of the ſame vill which her baron is of*, and ſo ſhall a *commoign of an abbot*, and *parſon of a church.* Thel. Dig. 100. lib. 10. cap. 9. S. 20. cites 3 H. 6. 31. 7 H. 6. 1. and 10 H. 6. 8.

20. By default in the count the writ ſhall abate per Cotteſmore, and not denied, quod nota. Br. Count, pl. 7. cites 3 H. 6. 41. S. P. Br. Count, pl. 12. cites 20 H. 6. 18. & 4 E. 4. 14. accordingly, and not denied, quod nota. Br. Count, pl. 7. cites 3 H. 6. 41.——S. P. Br. Count, pl. 12. cites 20 H. 6. 18. & 4 E. 4. 14. accordingly.——Br. Count, pl. 24. cites S. P. 35 H. 6. 40.——S. P. Br. Brief, pl. 247. cites 38 H. 6. 1.——S. P. Br. Brief, pl. 254. cites 39 H. 6. 7.——S. P. in writ of right, quare impedit, or other actions, per Forſcue and Hengeſton & nullus negavit, and it ſeems to be clear matter, for there is no other judgment for default in the count, but quod petens or querens *nihil capiat per breve, and* the other that *eat inde ſine die*, quod nota bene. Br. Brief, pl. 413. cites 31 H. 6. 15.——S. P. Br Count, pl. 8. cites 9 H. 6. 10.——S. P. Br. Brief, pl. 38. cites 35 H. 6. 36.——S. P. Br. Brief, pl. 395. cites 21 E. 4. 63, 64.——S. P. And he ſhall not make a new count. Br. Brief, pl. 488. cites 17 E. 4. 7.——S. P. Nor ſhall he amend his count. Br. Count, pl. 74. cites 31 H. 6. 15. *As* in *monſtraverunt*, where *ſeveral join*, as they may, and they alſo join in count, and *ſome are able to bring the action*, they being frank, *and others not*, by reaſon they are villeins, there the count ſhall abate the writ, quod nota, per Belk. J. quod non negatur. Br. Brief, pl. 223. cites 39 E. 3. 6.

21. Writ was *againſt Margaret, who was wife of T. S. of Norton Davy*, &c. And it was held by Babbington, that the vill of *Norton Davy ſhall have relation to the feme* who is ſued, *and not to T. S.* Quære. Thel. Dig. 101. lib. 10. cap. 10. S. 12. [21] cites Mich. 4 H. 6. 4. but ſays the contrary is adjudged in an indictment, Hill. 9 E. 4. 50.

22. The *writ* was *of land in A. B. and C. in inſula de W.* and held that *C. only ſhall be intended to be in inſula de W.* Thel. Dig. 100. lib. 10. cap. 9. S. 19. cites Mich. 7 H. 6. 8.

23. And the *Chancellor of Oxford* ſhall be *intended commorant there.* Thel. Dig. 100. lib. 10. cap. 9. S. 20. cites 8 H. 6. 38.

24. *Scire facias out of a fine againſt Richard Abbot of W.* and by the writ the *demandant intitled himſelf by one Richard Stile*, and afterwards in the percloſe he *made himſelf coſin and heir to the ſaid Richard*, and held ſufficient intendment enough that the ſaid Richard ſhall have relation to Richard Stile, and not to Richard Abbot, who is alive. Thel. Dig. 100. lib. 10. cap. 9. S. 30. cites Hill. 8 H. 6. 29.

25. In treſpaſs of *battery* of his ſervants, *ita quod negotia ſua remanſerunt infecta at ſuch a place*, &c. without ſaying in what county, and held good; for it ſhall be *intended in the ſame county where the battery was.* Thel. Dig. 100. lib. 10. cap. 9. S. 26. cites Mich. 20 H. 6. 15.

26. Treſpaſs of *goods carried away in D. and S.* and *did not ſhew what was carried away in the one, and what in the other*, and yet well. Br. Faux Latin, pl. 4. cites 20 H. 6. 9.

27. *So* of *præcipe quod reddat in A. and B.* and did not ſhew how much in the one, and how much in the other, quod nota. Br. Faux Latin, pl. 4. cites 20 H. 6. 9.

28. Where *writ* is brought *of land in* 3 *vills*, parcel ſhall be intended to be in each vill. Thel. Dig. 100. lib. 10. cap. 9. S. 22. cites Mich. 31 H. 6. 13.

29. *So* in *replevin*, the *defendant demanded judgment of the court*, becauſe *no place is ſhewn where the taking was, and a ſpace was left;* and becauſe *it was entered the laſt term*, therefore judgment was, that the writ abate. Br. Count, pl. 24. cites 35 H. 6. 40.

S. P. Br. Count, pl. 12. cites 20 H. 6. 18. & 4 E. 4. 14. accordingly.

—— S. P. Br. Count, pl. 64. cites 4 E. 4. 14.

30. In ſcire facias to execute a fine, the *tenant ſhall be intended party, or privy to the fine*, if he does not alledge the contrary. Thel. Dig. 100. lib. 10. cap. 9. S. 25. cites 36 H. 6. 18.

31. *So* in forcible entry, the *defendant in another term demanded judgment of the count, becauſe the certainty of the land*, as 12 acres of land, 4 acres of meadow, and the like, *is not alledged;* and therefore the writ was abated, and cannot be amended; for it was counted of another term. Br. Brief, pl. 247. cites 38 H. 6. 1.

32. In *replevin*, the *plaintiff in his count ought to ſhew the place where* the defendant took the beaſts, *but not in the writ;* and *if he miſtakes the place*, ſo that the *count ſhall abate*, the *writ ſhall abate;* per Brian Ch. J. quod non negatur. Br. Brief, pl. 395. cites 21 E. 4. 63. 64.

33. A *plaint in a Court Baron* was *againſt two jointly, for taking the plaintiff's goods*, and he *removed* the plaint *by a recordare jointly*, as the plaint is, *and after counts of taking his goods ſeverally;* and ſo varies from the plaint, and the recordare alſo. Adjudged, that the writ abate. Hetl. 76. Hill. 3 Car. C. B. Wimberley v. Taylor & al'.

34. In

34. In a *quod ei deforceat in nature of a writ of right*, the *count was of* 20 *acres of Jampna & Brueria*, which ought to have been ſhewn certainly: And this was aſſigned for error; but held to be well enough, for Jampna & Brueria are not intended lands of ſeveral ſorts, but one and the ſame land. C. Car. 178. pl. 2. Hill. 5 Car. Gryffyth v. Jenkins.

(Q) By Want of a Forepriſe, or Exception. [22]

1. FOREPRISE *ſhall not be made in præcipe* quod reddat, *but of a thing which lies in præcipe*; and therefore where a man *demands the manor aforeſaid, with the appurtenances*, and *an advowſon is appendant*, it needs not any forepriſe; for advowſon does not lie in præcipe. Br. Brief, pl. 421. cites the Regiſter, fol. 229. S. P. Br. Brief, pl. 539. cites the Regiſter, fol. 229. and 4 E. 3. 47.

2. If forepriſe does *not expreſs where the land forepriſed lies*, the writ ſhall abate, as in D. or in the ſame manor. Br. Brief, pl. 539. cites Fitzh. Brief 710.

3. Where a *manor, except* 20 *acres, is in the county of E.* and *the* 20 *acres is in the county of H.* the demandant may demand the manor in the county of E. except 20 acres in S. per Priſot—Quære how the 20 acres ſhall be demanded. Br. Brief, pl. 538. cites 33 H. 6. 4.—and ſee better, 7 Aſſ. 10. ibid.

4. If a man brings *action of a manor, whereof part is in another county*, or in Wales, or in the Cinque Ports, *and does not make forepriſe of this parcel*, all the writ ſhall abate. Br. Faux de Recov. pl. 15. cites 36 H. 6. 30. per Taverner. S. P. Br. Brief, pl. 246. cites 36 H. 6. 32.

5. If *aſſiſe or præcipe* quod reddat be brought *of the manor in A. and B.* the *defendant may ſay, that two acres of it extends into C. not named* in the writ, judgment of the writ; and becauſe he makes no forepriſe, the writ ſhall abate. Br. Brief, pl. 330. cites 5 E. 4. 103. Br. præcipe quod reddat, pl. 12. cites S. C. Brook ſays, quære inde; for it ſeems, that he by this ſhall recover only that which is in the two vills; and ſuch gift by feoffment or fine, ſhall give only that which is in the two vills.

6. Where a *man brings action* againſt me *of the manor of D. in D.* and *he himſelf, or another* man, *is ſeiſed of parcel of the manor in the ſame vill*, there he ought to make forepriſe; *but if he demands the manor of D. in D.* he ſhall not make forepriſe of that which is in another vill; per Brian. The reaſon ſeems to be, becauſe it is not in demand, and it is in vain to forepriſe that which is not demanded. Per Littleton, the writ is not good to demand the manor of D. in D. except an acre in S. And, at this day, Danby, Littleton, and Needham, held that it is no plea; but Moyle and Choke contra. Br. Brief, pl. 216. cites 9 E. 4. 6.

7. Treſpaſs upon the ſtatute of 5 R. 2. ubi ingreſſus non datur, &c. of *entering into the manor of D. in S.* the *defendant ſaid that* 40 *acres parcel of the manor is in D.* judgment of the writ; & non allocatur; for nothing ſhall be recovered but damages, and

and no franktenement; and *forepriſe cannot be made in action of treſpaſs* as in præcipe quod reddat; and therefore he was awarded to anſwer. Br. Brief, pl. 371. cites 10 E. 4. 10.

8. A man brought writ of *waſte*, and *declared of a leaſe of a manor;* and the *defendant ſaid, that the leſſor was ſeiſed of the manor, except three acres, and leaſed*, and ſo he ought to have a writ with forepriſe; & non allocatur, becauſe it goes in bar for this parcel. But Brooke ſays, the reaſon ſeems to be, becauſe *no land is in demand.* Contra where land is in demand. Br. Brief, pl. 316. cites 5 H. 7. 7.

[23] (R) For Default of Suppoſal of Property, &c. in the Writ; and what ſhall be ſufficient Suppoſal.

1. WRIT of treſpaſs of entering into his manor; and that they *took a writing, and tore it*, &c. *without ſaying* ſcriptum *ſuum, nor that it was taken out of the poſſeſſion of the plaintiff;* and yet adjudged a good writ. Thel. Dig. 109. lib. 10. cap. 18. S. 1. cites Mich. 1 E. 3. 24. Regiſt. 106. but ſays, it ſeems Hill. 2 E. 3. 29. that the plaintiff, by his count, ought to ſhew that the remainder of certain land was intailed to him by this writing.

2. In *replevin*, the writ was brought *by an executor de quodam bove ipſius Ro. executoris capto*, &c. and adjudged good. Thel. Dig. 109. lib. 10. cap. 18. S. 2. cites Mich. 24 E. 3. 46.

3. The property of the *thing taken tortiouſly* ſhall be *intended to be in the taker.* Thel. Dig. 109. lib. 10. cap. 18. S. 4. cites 27 Aſſ. 64. and 1 H. 5. 3.

Writ of waſte ad exhæreditationem eccleſiæ was held good.

4. In *waſte by* the *prior* of the hoſpital of St. Jo. the writ was *ad exhæreditationem domus & hoſpitalis prædict.* and held good, without ſaying, hoſp. eccleſiæ prædict. Thel. Dig. 109. lib. 10. cap. 18. S. 15. cites Mich. 42 E. 3. 21. Thel. Dig. 109. lib. 10. cap. 8. S. 6.

Thel. Dig. 109. lib. 10. cap. 18. S. 14. ſays the opinion of Mich. 9. E. 4. 35. is, that writ brought by ſucceſſor of goods taken in the time of the predeceſſor is good with theſe words, quare bona domus & eccleſiæ cepit, &c. As it is uſed of goods taken in the time of vacation, and not to ſay bona prædeceſſoris, &c. and cites Mich. 18 E. 2. Treſpaſs 237. 42.

5. Writ of *treſpaſs* was brought by a prior, *quare bona & catalla domus dictæ eccleſiæ* Sancti Cuthberti & Nicholai prædeceſſoris nunc prioris tempore prædict. Nicholai, &c. Thel. Dig. 109. lib. 10. cap. 18. S. 5. cites Mich. 47 E. 3. 23.

6. And *ſo of trees* cut in the time of the predeceſſor, the writ ought to be quare arbores domus & eccleſiæ, &c. Thel. Dig. 109. lib. 10. cap. 18. S. 6. cites Mich. 2 H. 4. 4. 7 E. 4. 15. 9 E. 4. 35. Regiſter 101. 96. Tempore E. 1. Treſpaſs 242.

Detinue of a bag with 100l. therein contain'd, was maintain'd, with-

7. In *treſpaſs* the writ was *quare quand. bagga'* cum 20 lib. in pecunia numerata in eadem bagga cont' *cepit*, &c. and it was held that the writ was not good, becauſe it is not ſuppoſed to whom the property of the bag was. Thel. Dig. 109. lib. 10. cap.

cap. 18. S. 7. cites Mich. 13 H. 4. 11. But contra, it was held Hill. 19 H. 6. 48. out ſaying that the bag was ſeal'd,

by which it appears that the property of the bag and money is in the plaintiff. And ſo it is not of money bail'd to keep. Thel. Dig. 109. lib. 10. cap. 18. S. 9. cites Mich. 18 H. 6. 20.

8. Writ of treſpaſs by church-wardens, quare *bona & catalla parochianorum* in their cuſtody being, ceperunt, &c. and held a good writ. Thel. Dig. 109. lib. 10. cap. 18. S. 13. cites Trin. 8 E. 4. 6.

9. Writ of treſpaſs was maintained quare domum intravit, and one goſhawk and *one hawk, of the goods of the plaintiff*, taken and carried away. Thel. Dig. 109. lib. 10. cap. 18. S. 16. cites Trin. 16 E. 4. 7.

10. Writ of *treſpaſs* quare clauſum ſuum fregit, and 4 *young goſhawks* in their neſts being, pretii ſo much, &c. *cepit* & aſportavit, &c. adjudged good, without ſaying that they were reclaimed or tame, and held good. Thel. Dig. 109. lib. 10. cap. 18. S. 11. cites 14 H. 8. 1. Regiſter 93. And ſo is writ quare clauſum fregit, and 6 *damas ſuas ibidem inventas cepit*,

&c. But writ quare 6 damas apud B. inventas cepit, &c. is not good, without ſuppoſing the breaking of the cloſe or park, &c. Thel. Dig. 109. lib. 10. cap. 18. S. 11. cites Trin. 22 H. 6. 76. 43 E. 3. 24. [24]

(S) For Want of ſetting forth the Price or Value of the Thing. And what ſetting forth is good.

1. PRETIUM *fœrarum* may be ſhewn in the count, and the count not the worſe; per opinionem. Thel. Dig. 109. lib. 10. cap. 19. S. 2. cites Mich. 5 E. 3. 233.

2. Writ of annuity was maintained of 8 *robes*, without putting the price of them in the writ. Thel. Dig. 109. lib. 10. cap. 19. S. 3. cites 17 E. 3. 48. 73.

3. The writ of treſpaſs was, that he had *arreſted, vi & armis, certain wool*, &c. and detained it till the others were bound to the defendant in 12 l. for the deliverance, &c. and adjudged good, without putting the value of the wool in the writ. Thel. Dig. 110. lib. 10. cap. 19. S. 4. cites Paſch. 29 E. 3. 41. 11 H. 4. 31.

4. A ſack of wool, price 100 s. was demanded by writ, where in the ſpecialty there was not any price, and yet adjudged good; for a man ſhall not have *writ to demand a chattel* without putting the price in the writ. Thel. Dig. 110. lib. 10. cap. 19. S. 5. cites Trin. 29 E. 3. 50.

5. In writ of breaking of a warren, and of *taking partridges or pheaſants*, a man ſhall not put any value to them, nor of a *couple of hounds*, &c. Thel. Dig. 110. lib. 10. cap. 19. S. 14. cites Paſch. 8 E. 4. 5. Paſch. 43 E. 3. 14.

6. In treſpaſs of taking *gold and ſilver*, a man ſhall not put any value. Thel. Dig. 110. lib. 10. cap. 19. S. 7. cites Trin. 46 E. 3. 15.

7. Thel.

7. Thel. Dig. 110. lib. 10. cap. 19. S. 9. says, it is held Mich. 11 H. 4. 30. and Hill. 8 H. 5. 5. that where *goods are taken, and the plaintiff has them back again*, in writ to be brought for this treſpaſs, a man ſhall not put the value of the goods; for the form is quod cepit et detinuit per tantum tempus, &c. and cites the Regiſter 94, 95, 96, 97.

8. In treſpaſs, the writ was *quare cepit* 12 *oxen in one county, and chaſed and impounded them in another* county; *by which 6 of the oxen, price* 3 *l. died of hunger*, &c. And the writ was abated, becauſe the price of all the beaſts was not in the writ. *But* the next day ſuch writ *quare* 112 ſheep *fugavit* from one county into another, & imparcavit, by which 20, price 20 s. interier', &c. was adjudged *good, becauſe there was not (cepit) in the writ*; for in the firſt writ, the property was intended to be out of the plaintiff by the taking, &c. Thel. Dig. 110. lib. 10. cap. 9. S. 8. cites Hill. 1 H. 5. 3. 44 E. 3. 20.

And ſo where the writ is *of things without life*, and inanimate,

9. Where the writ is *de averiis, or of any beaſts certain taken*, it ſhall be *pretii* tantum. And where it is * *de bonis & catallis*, it ſhall be *ad valentiam*. Thel. Dig. 110. lib. 10. cap. 19. S. 10. cites Paſch. 21 H. 6. 43. and ſays, ſee the Regiſter agreeing with this opinion.

by general words, as corn, graſs, trees, hay, germina, &c. it ſhall be *ad valentiam*. *But* if it be *of things certain and ſpecial*, as ſo many quarters of corn, ſo many loads of corn, ſo many oaks, one ſhip taken, one mill-ſtone, and ſuch like, the writ ſhall be *pretii*; and it ſeems that it ſhall be *ſo* where the writ is *for any thing by number, meaſure, and weight*, or a certain mill-ſtone. Thel. Dig. 110. cap. 19. S. 10.

* The writ of *detinue de bonis & catallis*, ſhall be *ad valentiam*. Thel. Dig. 110. lib. 10. cap. 19. S. 6. cites Hill. 33 E. 3. Br. 913.

10. Thel. Dig. 110. lib. 10. cap. 19. S. 11. ſays, the Regiſter, fol. 94. is of a writ de piſcar' in ſeparali piſcaria, &c. & *herbam falcaverunt*, &c. & *herbam illam ac piſcem ad valenc'* 100 *s. ceper'*, &c.

[25]

11. And writ quare clauſum fregit & 3 *pullos eſperviorum ſuorum pretii* ſo much, or tot *cuniculos ſuos pretii*, &c. cepit, &c. Thel. Dig. 110. lib. 10. cap. 19. S. 12. cites Trin. 22 H. 6. 67. 10 E. 4. 15. Regiſter 95.

12. In writ of treſpaſs of *charters and writings in a cheſt* contained, &c. a man ſhall not put any *value of the cheſt*. Thel. Dig. 110. lib. 10. cap. 19. S. 13. cites Mich. 20 E. 4. 29. Regiſter 95.

(T) By Want of Form.

Br. Faux, Latin, pl. 9. cites S. C. per Finch. —S. P. Br. ſcire facias, pl. 129. cites 4 H. 6. 3. —— Br. Faux Latin, pl. 48. (bis) cites S. C. —— Thel. Dig. lib. 10. cap. 12. S. 6. cites S. C. —— And ibid. 116. lib. 10. cap. 26. S. 19. cites S. C.

1. WRIT *original*, which *wants form*, ſhall abate; for it is made in the Chancery, and pleadable here. Contra of *writ judicial*, as ſcire facias; for if this wants form, and has matter ſufficient, it is good; and therefore deſcendere debet, inſtead of executionem habere non debet, is not material. Br. ſcire facias, pl. 18. cites 41 E. 3. 13.

2. In

2. In mortdanceſter of 2 acres of land, and the moiety of an houſe, &c. as the order is to demand the *intire thing before the parts* of any thing, yet in the clauſe to make the view the houſe ſhall be firſt named before the land, becauſe the intire houſe ſhall be put in view. Thel. Dig. 104. lib. 10. cap. 12. S. 3. cites Hill. 16 E. 3. 650. 11 Aſſ. 21. and 12 H. 4. 19.

3. In *formedon*, the writ was, and *that after the death of the aforeſaid Alice and John* the donees, where it ſhould be after the death of the aforeſaid *John and Alice*; and therefore the writ was abated. Br. Faux Latin, pl. 3. cites 3 H. 6. 33. Thel. Dig. 104. lib. 10. cap. 12. S. 5. 6. cites S. C.——Thel. Dig. 116. lib. 10. cap. 26. S. 19. cites S. C.——Br. Faux Latin, pl. 48. (bis) cites S. C.——S. P. 2 Le. 59. Hughes's caſe. ——*But in ſcire facias upon recovery* of damages the *name of the feme was before the name of the baron*; and it was *of a recovery by the feme dum ſola fuit*; and exception taken, & non allocatur; for *writ judicial* ſhall not abate for want of form, if it has matter ſufficient. ——Br. ſcire facias, pl. 129. cites 4 H. 6. 3.——Thel. Dig. 116. lib. 10. cap. 26. S. 19. cites S. C.——*So* in ſcire facias *againſt baron and feme of damages recovered againſt the feme dum ſola* fuit; and yet the writ did not abate. Br. Brief, pl. 206. (208) cites 4 H. 6. 3. 4.

4. In writ againſt heirs, executors, &c. they ought to be *named heir or executor*, &c. *in the firſt name*, and *not in the alias dictus*. And ſo the addition by the ſtatute ſhall be put in the firſt name, &c. Thel. Dig. 104. lib. 10. cap. 12. S. 7. cites 30 H. 6. 5. 32 H. 6. 33. 5 E. 4. 142.

5. Writ *of diſceit* ſhall not abate for form, if it hath matter of ſubſiſtence. F. N. B. 95. (E) Marg. cites 19 H. 6. 50.

6. Though, by good order, the *moſt worthy ſhall have the precedency*, and ſhall be preferred before the leſs worthy, and a *thing intire* ſhall be preferred *before part*, &c. yet if the ſaid order be *not preciſely purſued*, the judges will not abate the writ, or count, for it. 11 Rep. 55. b. Mich. 12 Jac. in Savil's Caſe, alias Hammond v. Savil.

(U) By Omiſſions in the Writ. [26]

1. IN *raviſhment of ward by guardian in ſocage*, the *writ was, cum cuſtodia terr' & hæred', &c. ad ipſum pertinet*, &c. and concluded that he raviſhed the heir only, without ſuppoſing any ejectment of the land; and yet held good. Thel. Dig. 113. lib. 10. cap. 23. S. 4. cites Mich. 4 E. 3. 163.

2. In aſſiſe *of common of turbary in O.* it is no plea, that there *are two O.'s in the ſame county, and none without addition*, judgment of the writ; for the *plaintiff ought to recover by view of the jurors*; ſo that the recovery ſhall be in the vill where the view was made; and ſo the writ was awarded good. Br. Brief, pl. 258. cites 5 Aſſ. 9. *So in treſpaſs* in D. it is no plea to ſay, that there are 2 *D's and none without addition*; for *if he be guilty in the one or the other, it is ſufficient*, and it was pleaded to the writ; and this by reaſon of the *viſne*, as it ſeems. Br. Brief, pl. 13. cites 9 H. 6. 5.——S. P. But if he *has juſtification in any* of the 2, he may plead it, *abſque hoc that he is guilty in the other*; and the ſame in aſſiſe or account. Contra in all other actions. Br. Brief, pl. 341. cites 3 E. 4. 26. And ſays, ſee 2 E. 4. 10. not adjudged; but that 9. H. 6. 5. it is no plea. Ibid.

So it is agreed, that in waſte in A. and B. *it is no plea to the writ, that there are 2 A's, and none without addition*; for he ſhall recover by view of the jury. Br. Additions, pl. 7. cites 9 H. 6. 42.

So in debt upon a bond, the defendant imparl'd, and at the day ſaid, where he is named J. S. of D. that there is Over D. and Nether D. &c. judgment of the writ; and per cur. he is eſtopp'd by his own bond,

bond, and yet attorney ſhall have the plea; for he is compellable to make his warrant according to the writ. Br. Brief, pl. 378. cites 18 E. 4. 9. ——— But M. 21 E. 4. 51. contra. Ibid.

But in *forger* de faits brought *in London of tenements in S. in the county of D.* Over D. and Nether D. and none without addition, is a good plea, by reaſon of the viſne; for if the defendant ſays that the plaintiff was never ſeiſed of the tenements, the viſne ſhall be of S. Br. Brief, pl. 400. cites 10 H. 6. 5.

But writ was abated by omiſſion of an (&) *between the name of 2 wills.* Thel. Dig. 94. lib. 10. cap. 6. S. 7. cites 39 E. 3. 25.

3. *Quare impedit* for the king *againſt electum confirmatum Herford;* and held good, notwithſtanding that an (&) *was wanting* between electum & confirmatum. Thel. Dig. 94. lib. 13. cap. 6. S. 7. cites Trin. 18 E. 3. 29. and ſays, ſee 4 H. 6. 1. accordingly.

4. In *aſſiſe of rent-charge*, if *all the tenants of the tenements charged are not named in the writ*, the writ ſhall abate; and it is a good plea that ſuch a one is tenant of parcel not named, judgment of the writ; and ſo it appears very often elſewhere. Br. Brief, pl. 280. cites 22 Aſſ. 10.

5. Debt upon a bond; a *ſpace was left in the count for the place of the making of the bond*, and the plaintiff would have put it in, in another term, and was not ſuffered, but the writ was abated. Br. Brief, pl. 482. cites 4 E. 4. 14.

6. Præcipe, &c. was *dated* 12th day of May, and *me-ipſo was wanting*, and therefore the writ was abated without being amended by the ſtatute of 14 E. 3. quod nota. Br. Faux Latin, pl. 100. cites 24 E. 3. 69.

Contra if leſs was in the writ than in the ſpecialty; note the diſference; per cur. *For* the ſame year fol. 14. the *bond was that John Prior of D.* was bound, and the *writ was Prior of D. only*, [*without John.*] And the opinion was, that the writ ſhall abate for the variance. Ibid.

7. Annuity. The *writ was againſt J. N. chantor of the chapter of Exeter*, where the *ſpecialty was J. N. chantor of Exeter*, and yet this exception not allowed; for the writ ſhall not abate for the ſurpluſage. Br. Nugation, pl. 6. cites 40 E. 3. 3.

8. In *treſpaſs de averiis carucæ capt'*, this clauſe was wanting in the writ, *& interim averia illa deliberari facias*, &c. and yet held good. Thel. Dig. 94. lib. 10. cap. 6. S. 24. cites Hill. 33 E. 3. Brief 915.

[27] 9. In writ of ſcire facias for the king, (*ibi*) was left out in the clauſe, and *habeas ibi ſom'*, by which it was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 10. cites Mich. 33 E. 3. Brief 918.

10. *Waſt* againſt an executor, the percloſe was, *that the ſame executor did waſt, without a proper name*, and well, and he counted that he leaſed to the teſtator. Br. Brief, pl. 140. cites 38 E. 3. 17.

11. *And* becauſe the writ was *againſt A. as executor of the leſſee*, where he was *executor of the executor* of the teſtator, the writ was abated upon exception thereof. Br. Brief, pl. 140. cites 38 E. 3. 17.

12. *Debt againſt J. H. of C.* and *J. came and prayed, that the plaintiff count againſt him*, and the *plaintiff ſaid, that his ſuit is againſt J. C. the younger, and he who appears is J. C. the elder*, and *after*

after the plaintiff ſaid, that his ſuit is againſt J. H. of South C. and he who now comes is of C. and becauſe *South was not in the writ*, the writ was abated. Br. Default, pl. 48. cites 39 E. 3. 5.

13. Formedon of land *given to J. of B.* &c. and *that after the death of the aforeſaid J. B.* &c. And it was challenged becauſe the premiſes were J. of B. and the ſubſequent is J. B. and *of* is omitted, and yet the writ awarded good; for this word *aforeſaid J. B.* reſolves that it is the ſame J. of B. who is named in the writ before. Br. Brief, pl. 228. cites 39 E. 3. 27.

14. In a writ in the clauſe *niſi fecerit*, *niſi was left out*, by which it was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 13. cites Hill. 46 E. 3. 3. in MS. Brief 595.

15. Treſpaſs upon the caſe upon an aſſumpſit ought to contain the *place where the aſſumpſit was made*, and otherwiſe the writ ſhall abate by plea of the party. Br. Brief, pl. 511. cites 48 E. 3. 6. and that the Regiſter is accordingly.

S. P. Notwithſtanding he alledged it in his count, quod nota.

Br. action ſur le caſe, pl. 24. cites S. C.

16. *Annuity* was brought *by J. M. againſt the provoſt of the college of D.* and the *deed was diſcreto viro magiſtro Johanni*, and theſe words *diſcreto viro magiſtro omitted*; judgment of the writ, and the defendant awarded to anſwer. And it was *granted by name of the provoſt of D. without other name*, and therefore the defendant demanded judgment of the writ. Per Hull, *it ſhall be named in the count what name of baptiſm he has*; and if an abbot be bound in 20 l. with aſſent of his covent, and dies, action may be brought againſt the ſucceſſor accordingly, and he declare the name in the count. Br. Brief, pl. 125. cites 12 H. 4. 5.

Br. variance, pl. 34. cites S. C. —*So in writ of entry of diſſeiſin made to the predeceſſor*, the name of the diſſeiſee ſhall be in the writ, by which Trem. declared the name of baptiſm certain, &c. Br. Brief, pl. 125. cites 12 H. 4. 5.

17. *Aſſiſe by the prior of D.* and *made title* to certain wheat *by preſcription as parſon of P.* and becauſe that he *was not named prior of D. parſon imparſonee of P.* the writ was abated by the opinion of the court, for default of the name of parſon. Br. Brief, pl. 127. cites 12 H. 4. 21.

18. *Præcipe J. maſter or warden* of the college of C. and the percloſe was, & ſummoneas *the aforeſaid maſter without* ſaying *warden*, &c. And well. Br. Brief, pl. 431. cites 7 H. 6. 13.

So of J. Earl of S. and ſuch like. Br. Ibid.

19. In ſcire facias upon a fine, the defendant *pleaded to the writ becauſe it is brought againſt Richard Abbot*, and the *plaintiff conveyed the title to himſelf by Richard S.* and *in the percloſe he was made heir of the aforeſaid Richard*, which may be intended the defendant, *and therefore the ſurname ought to have been named in each place.* Per Cotton Juſtice, *he to whom he makes himſelf heir is dead, and Richard the defendant is alive, and ſo the writ has ſufficient intendment*, and ſo the writ good, quod nota. Br. Brief, pl. 172. cites 8 H. 6. 27.

20. *In waſte in A. and B.* it is a good plea to the writ, that *A. is a hamlet of B. and not a vill by itſelf*; per cur. But per Paſton, he ſhall ſay in this caſe that no ſuch vill. Br. Additions, pl. 7. cites 9 H. 6. 42.

[28]

21. *Re-*

21. *Recordari* fac' loquelam directed *to the mayor and bailiff of D.* is good, *without naming their proper names*, and ſo are all the certioraries in London, to the mayor and ſheriffs, and the writs of right in the huſtings. Br. Brief, pl. 237. (bis) cites 14 H. 6. 21.

So in ſcire facias out of a recovery *of a manor to have execution in A. and B.* the

22. Treſpaſs upon 5 R. 2. that the defendant *entered into the manor of C.* &c. Catyſ. prayed judgment of the writ; for the *manor extends into C. and W.* and therefore ſhall ſay accordingly, and yet the writ is good by award, and ſo in præcipe quod reddat. Br. Brief, pl. 346. cites 4 E. 4. 15.

tenant demanded judgment of the writ; for the *manor extends into A. B. and C.* Per Brian, this is no plea; for it ought to agree with the recovery or fine whence it iſſues. Br. Brief, pl. 315. cites 4 H. 7. 7.

Treſpaſs *againſt J. S. of M.* exception was taken, that *M.* is a great place, *containing in*

23. Debt *againſt J. N. of the pariſh of S.* The *defendant ſaid, that there are* 3 *vills in the ſame pariſh, and he dwelt in one of them*, and a good plea; and yet he *did not ſhew in which* of them he dwelt. And per Moyle, where he ſays, that there is Over D. and Nether D. and none without addition, he ſhall not ſhew in which of them he dwells. Br. Brief, pl. 483. cites 4 E. 4. 39.

ſeveral vills, and therefore the defendant ought to be named of one of them, judgment of the writ; and no plea, per tot. cur. becauſe he *does not name of which vill* he is, ſo that the plaintiff may have a better writ; quod nota. Br. Brief, pl. 353. cites 5 E. 4. 1. ——— Br. Brief, pl. 483. cites S. C.

In debt *againſt J. N. of the pariſh of N.* and there *were* 4 *vills in the ſame pariſh*, and becauſe he did not ſhew of which vill, therefore the writ was abated. Br. Brief, pl. 459. cites 22 E. 4. 2. and 22 H. 6. 41, 42. and 35 H. 6. 30. in treſpaſs.

24. In replevin, if the *defendant in ſcire facias ſays, that the plaintiff in ſcire facias is a knight not named* knight, judgment of the writ he ſhall not have the plea *after a continuance*, though it be a continuance given between the parties by the court, *quia curia nondum adviſatur de judicio ſuo* inde reddendo, ideo dies datus eſt partibus prædict. hic, &c. no more than after imparlance taken by the party. Br. Brief, pl. 331. 5 E. 4. 103.

(W) By Omiſſions in the Proceſs.

1. WRIT *againſt Phi. and Tho. and Ann his feme*, by diverſe præcipes, and *in the ſummons Ann was omitted*, by which the writ was abated. Thel. Dig. 94. lib. 10. cap. 6. S. 1. cites Trin. 2 E. 3. 39. and Paſch. 8 E. 3. 405. and Mich. 10 E. 3. 532. and 27 H. 6. 6. accordingly.

2. Aſſiſe *againſt N. and M. abbeſs of S.* and *in the pone it was* put *the aforeſaid M. omitting* this word *abbeſs*, and by the opinion of the Court the writ ſhall abate. Br. Brief, pl. 286. cites 26 Aſſ. 11.

3. Audita querela was J. S. *parſon of the church of N. near M.* and theſe words *near M. was omitted in the venire facias*, and exception taken, & non allocatur. Br. Variance, pl. 22. cites 47 E. 3. 25, 26.

4. *Præcipe* quod reddat. The *tenant vouched*, and *ſummons* ad warrant' awarded *againſt the vouchee at the ſuit of A. B. and C.* who were demandants; and the writ was ſummoneas J. S. ad warrant' A. B. and C. and *in the percloſe of the writ* was *quem A. & B. vocaverunt* ad warrant' and *C. was omitted*, by which he prayed that the writ abate. Per Thirn. the writ contains other matter ſufficient, notwithſtanding that theſe words quem * A. & B. vocaverunt were omitted, and therefore the writ was awarded good; and ſo ſee he pleaded to the meſne proceſs. Br. Brief, pl. 104. cites 3 H. 4. 11. [29]

* The Year-book is, that the name of one of the vouchees was omitted.

5. *Præcipe* quod reddat *by ſeveral præcipes*, ſcilicet, *præcipe R. A. & J. C. &c. and præcipe J. N. quod juſte*, &c. reddat; and the *ſummons was & ſummoneas prædict. J. & R. and J. N. was omitted*, and it could not be amended; for it did not appear which J. was omitted: for if *one wages his law of non-ſummons*, all the writ ſhall abate; and ſo was the opinion of the court. Br. Brief, pl. 525. cites 27 H. 6. 6.

(X) By Surpluſage.

1. THE writ was by *one præc. quod redd' terram in Dale*, and by *another præcipe* quod redd' terram *in ead' villa de Walle*, which was not named before, by which the writ was abated. Thel. Dig. 96. lib. 10. cap. 7. ſ. 5. cites Mich. 24 E. 3. 35.

2. In *ſcire facias* out of a recognizance againſt tertenant, the writ was *quare prædicta ſumma de terris & catallis ſuis levar' non debet*, and it was abated for the ſurpluſage of *catallis*, &c. For the chattels of the tertenant ſhall not be charged with the debt. Thel. Dig. of Writs, lib. 10. cap. 7. ſ. 17. cites Mich. 30 E. 3. 30.

3. Annuity. The *writ was againſt J. N. chantor of the chapter of Exeter*, where the *ſpecialty was J. N. chantor of Exeter*; and yet this exception not allowed; for the writ ſhall not abate for the ſurpluſage. Br. Nugation, pl. 6. cites 40 E. 3. 3.

Contra if leſs was *in the writ than in the ſpecialty*. Note the difference; per cur. *For* the ſame year, fol. 14. the *bond was that John prior of D.* was bound, and the *writ was prior of D. only*, [*without John*] and the opinion was, that the writ ſhall abate for the variance, ibid.

4. Where one *makes himſelf heir to his father, and to his mother*, where *his title is only as heir to his mother*, his writ ſhall abate, notwithſtanding the name of his *father* is only ſurpluſage. Thel. Dig. lib. 10. cap. 7. ſ. 18. cites Mich. 41 E. 3. 24.

5. Writ ſhall not abate becauſe the *death of one* is *ſuppoſed, which was not neceſſary*. Thel. Dig. lib. 10. cap. 7. ſ. 9. cites 43 E. 3. 12.

As in *formedon* the writ was upon a gift made *Emmæ* de *A. & hæredibus de corpore ipſius Emmæ per Will. procreat. & quæ poſt mortem prædict. Will. & Emmæ* prefat' petenti ut filio & hæredi ejuſdem Emmæ per prædict. Will. procreat', &c. and held good, notwithſtanding that it was *not neceſſary to ſuppoſe the death of William*. Thel. Dig. 96. lib. 10. cap. 7. ſ. 3. cites Mich. 20 E. 3. Brief 377.

Thel. Dig. of Writs, lib. 10. cap. 7. ſ. 10. cites S. C. but ſays the writ was abated, inaſmuch as meadow is not mentioned before.

6. Formedon in remainder; the writ was *præcipe quod reddat one meſſuage and one acre of land*, &c. ſo that if the aforeſaid donee dies without heir, &c. that then the aforeſaid *meſſuage, land, and meadow*, ſhould remain to the demandant, &c. So that there was *more in the percloſe than in the premiſes*, by this word meadow, &c. and therefore Fencot pleaded it to the writ; but per Finch, you have had the view, therefore you are paſſed the advantage, and it *is only ſurpluſage*, which ſhall not abate the writ. Fencot ſaid of falſe Latin, and a thing apparent in the writ, a man ſhall have advantage always before judgment; quod non negatur, and the writ awarded good; and this by reaſon that it is only ſurpluſage, as it ſeems. Br. Brief, pl. 68. cites 44 E. 3. 14.

[30]

7. *Debt* was brought *by J. L. vicar of D. executor* of W. P. and the *teſtament was J. L.* only; and for this ſurpluſage the writ was abated; quod nota. Br. Brief, pl. 100. cites 3 H. 4. 1.

Br. Scire facias, pl. 58. cites S. C.

8. One attainted was reſtored by act of parliament, and brought a ſcire facias, which had this word *reſumi*, and which was *more than was in the act of parliament of reſtitution*, yet it ſhall not abate the writ. Br. Brief, pl. 109. cites 7 H. 4. 20.

S. P. Br. Action ſur le Caſe, pl. 37. cites S. C. —— Br. Nugation, pl. 9. cites S. C. —— Thel. Dig. lib. 10. cap. 7. ſ. 11. cites S. C.

9. In action upon the caſe becauſe the *defendant did not pay toll in the market* of the lord of B. *but carried away the toll, and refuſed to pay it*, [the defendant] demanded judgment of the writ, becauſe toll cannot be carried away, for it cannot be toll till it be paid, but becauſe it was void, and theſe words, he refuſed to pay, are ſufficient, therefore the writ awarded good. Br. Brief, pl. 113. cites 7 H. 4. 44.

10. *Formedon* ſhall not abate, notwithſtanding that *mention is made* in the writ of *one inheritable, who was never ſeiſed.* Thel. Dig. 97. lib. 10. cap. 7. ſ. 19. cites Trin. 11 H. 4. 72.

11. Writ of *treſpaſs*, containing *quare ipſe ſimul cum aliis malefactoribus*, &c. *without naming their names*, is not good, by the opinion of Martyn and Preſton. Thel. Dig. of Writs, lib. 10. cap. 7. ſ. 12. cites Hill. 8 H. 5. 5.

Br. Dette, pl. 78. cites S. C. —— Br. Nugation, pl. 11. cites S. C.

12. Where a *man brings action by name of adminiſtrator*, or executor, or carpenter, or J. N. of B. where he is of L. and *where he is not executor*, adminiſtrator, carpenter, nor of B. *this is no matter of the part of the plaintiff*; for it is not but addition or ſurpluſage. *Contra* it ſeems *of the part of the defendant.* Br. Additions, pl. 22. cites 9 H. 5. 5.

Br. Adminiſtrator, pl. 21. cites S. C.

13. Where a man brings action of *treſpaſs by name of executor of W. P.* and *counts of his own goods taken and carried away*, it is no *plea that he is not executor of W. P.* Per Strange, quod curia conceſſit. Br. Dette, pl. 78. cites 9 H. 5. 5.

14. If the writ be *quod reddat 20 l. quas ei debet & injuſte detinet & quas ad certum diem ſolviſſe debuiſſet*, &c. it ſhall abate for this ſurpluſage; for it paſſes the form. Thel. Dig. lib. 10. cap. 7. ſ. 13. cites Mich. 3 H. 6. 2.

15. Where

15. Where there is *more in the writ than in the ſpecialty*, in the name or addition of the plaintiff, the writ ſhall abate. Thel. Dig. lib. 10. cap. 7. ſ. 14. cites Hill. 3 H. 6. 24. and Tr. 28 H. 6. 9.

Surpluſage *on the part of the plaintiff* ſhall abate the writ. Br. Nugation, pl. 1. cites 3 H. 6. 23.——As in *debt* upon a bond *brought by J. E. Eſquire* in the writ, and the *bond was J. E. without more*; and for this ſurpluſage on the part of the plaintiff the writ was abated. Br. Nugation, pl. 23. cites 28 H. 6. 8.——8 Rep. 161. a. in Blackmore's caſe, cites S. C.——Br. Brief, pl 27. cites S. C.——Br. Variance, pl. 82. cites S. C.——Br. Amendment, pl. 93. cites S C.—— *But* Brooke ſays, it ſeems as if the writ had been *J. E. Eſquire, alias dictus J. E.* then it had been well. Br. Nugation, pl. 23.

But where the *obligee is made a knight after the bond*, he ſhall be named knight, as appears 2 H. 6. 9. for this is now parcel of his name, and is not ſurpluſage; quod nota. Br. Nugation, pl. 1. cites 3 H. 6. 23.

16. *But of the part of the defendant* it is *not* ſo. Thel. Dig. lib. 10. cap. 7. ſ. 14. cites Hill. 3 H. 6. 24. and Trin. 28 H. 6. 9.

S. P. For there ought to be addition. Br. Nugation, pl. 23. cites 28 H. 6. 8.—— As in debt upon a bond, the bond was, that 3 *were bound by names of A. B. and C. yeomen*, and the *writ called every one of them yeomen*, by which they pleaded this to the writ for the ſurpluſage, et non allocatur; for this is of neceſſity by the ſtatute of additions. Br. Nugation, pl. 1. cites 3 H. 6. 23.——Br. Variance, pl. 5. cites S. C.——Br. Additions, pl. 3. cites S. C.

17. Annuity againſt J. abbot of D. alias dictus J. lord abbot of D. and counted by preſcription. Wangford demanded judgment of the writ; for he uſes *alias dictus* where he *counts by preſcription*, and need not; but *otherwiſe* it would be, if he counted *by deed*; but it was well, and only ſurpluſage, by which the abbot was awarded to anſwer. Br. Nugation, pl. 5. cites 32 H. 6. 12. [31]

18. *Entry into the manors of D. and C. and into* 20 *acres in P. where there is no ſuch vill as P.* yet the writ ſhall abate only for the 20 acres; for thoſe ſhall be intended to be in *P.* and the two manors ſhall be intended to be vills by themſelves. Br. Expoſition, pl. 36. cites 19 E. 4. 7.

19. If writ of *falſe judgment* be brought *againſt the ſuitors and the ſteward*, the writ ſhall abate for ſurpluſage; for it ought to be againſt the ſuitors, without the ſteward. Br. Nugation, pl. 22. cites 1 E. 5. 3.

20. *Right of advowſon againſt J. D. dean of S.* the *defendant ſaid that the corporation is diſſolved by act of parliament*; judgment of the writ. Per Wood, this is no matter when it is brought by proper name; for then *dean* is only ſurpluſage. But per Brian Ch. J. the writ ſhall abate clearly. Br. Brief, pl. 313. cites 4 H. 7. 6. 7.

(Y) By his Petitum, &c. or demanding, &c. the ſame thing twice.

1. IN *dower* the demand was of the *third part of a manor of a houſe, and of a carve of land*, &c. And adjudged good, notwithſtanding the *houſe and land were parcel* of the manor. Thel. Dig. lib. 8. cap. 25. ſ. 2. cites Mich. 4 E. 3. fol. 166. and 21 E. 4. 28. it ſhall abate for the parcel.

S. P. ibid. f. 10. cites Trin. 5 E. 3. 193. 11 Aſſ. 6. and Mich. 12 E. 3. Brief 257.

2. But otherwiſe it is of *rent*, for a man cannot demand land and rent out of the ſame land. Thel. Dig. lib. 8. cap. 25. ſ. 2. cites T. 5 E. 3. 193. 11 Aſſ. 6. Hill. 3 H. 7. 3.

——Dower [was brought of] reaſonable dower which happened to her de libero tenemento, &c. *in D. C. and E.* and the *demand was of four manors and* 20 *s. rent*, the *tenant pleaded to the writ that the* 20 *s. rent is parcel of the one manor*, and ſo bis petitus; and per tot. cur. he ſhall anſwer to the reſt, for this does not go to the writ, but for this parcel. Br. Brief, pl. 392. cites 21 E. 4. 24.

In *formedon of an acre of land*; per Brian, it is a good *plea that the demandant has brought another formedon of* 2 *s. rent iſſuing out of the ſame land*; judgment of the writ, but Keeble contra. Br. Brief, pl 463. cites 3 H. 7. 3. 4.——Thel. Dig. lib. 8. cap. 25. ſ. 11. cites S. C. per Brian; and ſo agrees Trin. 5 E. 3. 193.——*But* it was agreed that *in præcipe of a manor and* 10 *l. rent*, it is a good *plea that the rent is parcel of the manor*, becauſe bis petitur, &c. But Brian maintained his opinion that he cannot have the land and rent out of it. Br. Brief, pl. 463. cites 3 H. 7. 3. 4.—— Thel. Dig. 74. lib. 8. cap. 25. ſ. 1. cites Trin. 3 E. 3. 85. and 11 E. 3. Dower 63.

3. And Thel. Dig. lib. 8. cap. 25. ſ. 3. ſays it ſeems by the opinion of Paſch. 6 E. 3. 267. that where a *manor and an advowſon* are demanded, that the writ ſhall abate if the advowſon be *appendant* to the manor; and that ſo agrees Mich. 33 E. 3. Brief 919. But that otherwiſe it is in a *ſcire facias*, which ought to agree with the fine there, 36 H. 6. 18. And that ſo it is adjudged, Mich. 26 H. 6. Brief 104. in ſcire facias of a manor and of a hundred; and 27 H. 6. 2.

Formedon of a manor and 20 *acres of land and a mill*, the tenant demanded

4. In *writ of* ward of a *manor and* 20 *acres of land*, the writ ſhall abate if the land be parcel of the manor, and therefore he abridged the 20 acres. Thel. Dig. lib. 8. cap. 25. ſ. 4. cites Paſch. 39 E. 3. 13.

judgment of the writ, for *the land, mill, and one houſe make the manor*; and he was compelled to ſay that the land and the mill was not parcel of the manor; for otherwiſe he demands one thing twice, and then the writ ſhall abate. nota. Br. Brief, pl. 76. cites 46 E. 3. 26.——Thel. Dig. lib. 8. cap. 25. ſ. 5. cites S. C. and 9 H. 6. 42.

* So in *præcipe quod reddat of the manor of D. and two acres of land in D.* it is a good *plea that the two acres are parcel of the manor*; for he demands one thing twice. Br. Brief, pl. 16. (bis) cites 9 H. 6. 42.

* [32]

Thel. Dig. lib. 8. cap. 25. ſ. 5. cites S. C.

5. Formedon *of the manor of B. cum pertinentiis and* 20 *acres cum pertinentiis*, and ſo there is twice cum pertinentiis, and well per cur. And it was of the manor of B. cum pertinentiis *except* 10 *acres of land*, and *in the forepriſe it was not cum pertinentiis*, and yet good. Br. Brief, pl. 41. cites 40 E. 3. 25.

6. Writ brought *in H. & W.* and becauſe *W. was a hamlet of H.* ſo he demanded one thing twice, therefore he took nothing by his writ. Br. Brief, pl. 50. cites 41 E. 3. 22.

Br. Voucher, pl. 36. cites S. C.

7. *Præcipe* quod reddat *againſt J. N. of* 2 *acres* of land, *and another præcipe in the ſame writ againſt W. S. of* 2 *acres* of land, and *J. N. vouched W. S. who* came and *ſaid* that the land demanded againſt him by one præcipe, and the land demanded againſt J. N. by the other præcipe, *is one and the ſame land*, judgment of the writ; for he demands one thing twice. Per Finch, you who are tenant by the warranty cannot abate the præcipe for this land in the præcipe againſt the tenant who vouched, where *he who vouched has affirmed the writ good*, no more than you who are vouched by him. Br. Brief, pl. 78. [79.] cites 46 E. 3. 33.

8. A man brought 2 *writs of formedon* againſt C. and *demanded by the one the fifth part of the manor* of A. and *by the other* 2 *acres of land*, the tenant demanded judgment of the writ; for *the* 2 *acres are parcel of the ſaid 5th part of the manor*, and ſo he demands one thing twice, & non allocatur, but the writs awarded good. Br. Brief, pl. 98. cites 2 H. 4. 22.

Contra 'tis ſaid *if he had demanded by one and the ſame writ by diverſe præcipes*, but the two writs above were upon diverſe gifts, and therefore can be no plea. Br. Brief, pl. 98. cites 2 H. 4. 22.

9. Præcipe quod reddat *againſt M. and N.* of certain land *by ſeveral præcipes by one and the ſame writ*, and *demanded* 7 *acres againſt M. and* 7 *acres againſt N.* Rolf prayed judgment of the writ; for the 7 acres demanded againſt M. are the ſame 7 acres which are demanded againſt N. and the 7 acres which are demanded againſt N. are the ſame 7 acres which are demanded againſt M. & non allocatur, but the tenants compelled to anſwer; quod nota. And Rolf prayed to have bill of exceptions ſealed, which was granted; but it ſeems that the law is againſt him. Br. Brief, pl. 208. cites 4 H. 6. 14.

10. In formedon of a *ſeigniory, caſtle, and manor*, as to the caſtle, he pleaded that it is parcel of the ſeigniory, and ſo he demands one thing twice, judgment of the writ. Cotteſmore ſaid the caſtle is in groſs by itſelf, abſque hoc that it is parcel of the ſeigniory priſt, &c. Br. Brief, pl. 165. cites 7 H. 6. 36.

Thel. Dig. lib. 8. cap. 25. ſ. 6. cites Paſch. 7 H. 6. 39. That if the caſtle be parcel of the ſeigniory the writ ſhall abate.

11. In treſpaſs of *entering into an houſe and of breaking a cloſe*; it is no plea to ſay that the houſe and the cloſe are all one and the ſame place. Thel. Dig. lib. 8. cap. 25. ſ. 7. cites 22 H. 6. 8.

12. Thel. Dig. lib. 8. cap. 25. ſ. 9. ſays ſee plaint of *office and of the profits of the office* 22 H. 6. 11. and 8 E. 4. 23.

13. Bill againſt R. F. ſervant of the common bank, for *entering into one houſe and* 2 *ſhops* where entry is not given by law; Laicon prayed judgment of the bill, for the *ſhops are parcel of the houſe*, and no plea, for it is only *treſpaſs* in which a man ſhall not recover franktenement but damages only, and therefore *he ſhall recover damages for the houſe by itſelf, and* damages *for the ſhops by themſelves*; but *contra* it ſhall be *in præcipe* quod reddat, for there a man ſhall recover the thing demanded, and have damages twice if it ſhould be ſuffered, and therefore the defendant was awarded to anſwer over; quod nota. Br. Brief, pl. 344. cites 3 E. 4. 28.

S. P. Thel. Dig. lib. 8. cap. 25. ſ. 8. cites Hill. 3. 4. 31. 5 E. 4. 88. & 16 E. 4. 10.

[33]

(Z) By naming the ſame Perſon twice.

1. ASSISE *againſt J. B. and the dean and chapter of D.* who ſaid that *J. B. is one of the chapter*, judgment of the writ; & non allocatur. The ſame law to ſay that he is one of the commonalty in writ againſt J. and the mayor and commonalty. Br. Brief, pl. 51. cites 41 E. 3. 29.

S. P. Thel. Dig. lib. 5. cap. 10. ſ. 1. cites 41 E. 3. 21. 46 E. 3. 23. 8 H. 6 1. 15. & 9 H. 6. 36.——Ibid. 11. cap. 6. ſ. 2. S. P. cites 41 E. 3. 22. and ſo agrees Mich. 46 E. 3. 23. and, ſo

ſo ſeems the opinion of Babington to be, Mich. 8 H. 6. 15. in treſpaſs againſt a mayor and commonalty and againſt one of the commonalty, but Martin held the contrary there, and Mich. 9 H. 6. 36.

2. *Treſpaſs of taking of toll* was brought *againſt the mayor and commonalty of J. and R. P.* where it was pleaded to the writ that *R. P. is one of the commonalty.* And the beſt opinion was that the writ is good; for it is *in diverſe reſpects.* Br. Corporations, pl. 24. cites 8 H. 6. 1. 14.

Br. Nuſance, pl. 6. cites S. C. —— Br. Brief, pl. 455. (454.) cites 46 Aſſ. 9. S. P. ——

3. Aſſiſe of *nuſance* was well brought *againſt the dean and chapter of E. and J. W. which J. W. is one of the chapter*, and ſo by his pretence *twice named*, judgment of the writ, & non allocatur; for the *dean and chapter ſhall render damages of their goods which they have in common, and the third of his proper goods.* Br. Corporations, pl. 13. cites 46 E. 3. 27.

S. P. Thel. Dig. lib. 5. cap. 10. ſ. 1. cites 41 E. 3. 21. 46 E. 3. 23. 8 H. 6. 1. 15. and 9 H. 6. 36. —— S. P. Ibid. lib. 11. cap. 6. ſ. 2. cites ſame caſes.

(A. a) By demanding more than it ought, as the Whole inſtead of a Part only.

1. IN *dower of* 3 *houſes and a mill*, one of the tenants, who had taken the intire tenancy, was *not admitted to ſay that he had not any mill.* Thel. Dig. lib. 8. cap. 27. ſ. 1. cites Mich. 2 E. 3. 58.

2. In *formedon of* 10 *s. rent*, the tenant pleaded that the rent *is only* 12 *d.* and ſaid that *ne dona pas.* Thel. Dig. lib. 8. cap. 27. ſ. 6. cites 3 E. 3. 107.

3. In *aſſiſe of a manor*, the tenant pleaded that the tenements put in view *are only* 2 *houſes and* 2 *carves, and not a manor*, &c. and held a good plea. Thel. Dig. lib. 8. cap. 27. ſ. 9. cites Hill. 6 E. 3. 242.

4. In *dower*, where the demand was *of the* 3*d part of* 5 *houſes*, the tenant was received to *ſay that the tenements put in view are only one houſe, and one piece of land*, &c. and to plead in bar thereto. Thel. Dig. lib. 8. cap. 27. ſ. 2. cites Hill. 10 E. 3. 490. and ſays it is agreed the ſame year, fol. 494. that a man may do ſo where land is in demand. But it was doubted there where 4 *l. of rent* is demanded, if the tenant may ſay that the thing demanded *is only* 40 *s.* of rent, and vouch, &c.

[34]

5. In *aſſiſe of* 40 *acres of land, and* 10 *s. rent*, the tenant *ſaid* that *they are only* 16 *acres of land, and* 6 *s. rent*, and pleaded further, that he was in without tort, &c. and held good; for be the plaint more or leſs the recovery ſhall be by view of the jury, ſo that the plaintiff by more large view cannot recover more than is demanded. Thel. Dig. lib. 8. cap. 27. ſ. 3. cites Trin. 14 E. 3. Aſſiſe 108.

6. In dower of 40 *l. of rent*, the tenant *pleaded that it was only* 10 *marks of rent*, and pleaded in bar; and as to the reſidue he was compelled to ſay that the baron was not ſeiſed of more. Thel. Dig. lib. 8. cap. 27. ſ. 6. cites Mich. 44 E. 3. 32.

7. In

7. In *dower of* 2 *mills*, the tenant pleaded that *at the time of the writ purchaſed he had not any mill, but* 2 *tofts*; and adjudged a good plea to the writ, notwithſtanding that he had mills at the time of the demand made. Thel. Dig. lib. 8. cap. 27. ſ. 7. cites Hill. 13 H. 4. Dower 175. But the contrary is held Mich. 1 H. 5. 11.

8. In *aſſiſe* where the plaint was *of* 4 *houſes*, the tenant pleaded that this which is put in view *are* 4 *tofts, and not houſes*, &c. and held a good plea to the writ. Thel. Dig. lib. 8. cap. 27. ſ. 8. cites Trin. 26 H. 6. Aſſiſe 13. and Mich. 2 H. 7. 4. accordingly, where the *plaint was of rent*, and the tenant *pleaded that the land put in view is an acre*, &c. and the *plaintiff replied that it was an houſe*, &c. and held that the plaintiff may do ſo.

9. If a *manor be demanded*, and the *tenant ſays, that the demandant is ſeiſed of an acre*, this will abate the whole writ; for the manor is intire, and not ſeverable, and he cannot abridge his demand, nor can he recover according to his demand. Br. Brief, pl. 316. cites 5 H. 7. 7.

But otherwiſe it is where the *demand* is *of acres*, and the *tenant ſays that the demandant is ſeiſed of one acre*; for this is ſeverable. But if he *ſays that the demandant has entered into one acre pending the writ, this ſhall abate all the writ*; for this is his own act; per tot. cur. Br. ibid.

(B. a) By Miſtake of the Place.

1. *PRÆCIPE* quod reddat *in Haſton Rekell*, the *tenant ſaid that Haſton is one vill*, and *Rekell* is *another* vill, judgment of the writ, ſuppoſing the 2 to be but one vill, and for this cauſe the writ was abated; and yet if the writ had been in H. and R. it had been good. Br. Brief, pl. 226. cites 39 E. 3. 19. 20.

2. *Ejectment* of ward *of land in E.* The *defendant ſaid that* the land *is in C. and not in E.* judgment of the writ, and the plaintiff prayed leave to inquire a better writ. Quod nota. Br Brief, pl. 128. cites 14 H. 4. 17.

3. If a man be named *J. N. of C.* it is no *plea that he was not of C. the day of the writ purchaſed*; but *ſhall ſay further, nor ever after*; for if he comes and dwells at C. pending the writ, it makes the writ good; as a man who purchaſes land pending præcipe quod reddat againſt him; per Martin. Br. Brief, pl. 167. cites 8 H. 6. 9. But Brooke ſays, quod quære.

4. Debt *againſt J. S. parſon of D.* who *ſaid that he dwelt at S. and not at D.* & non allocatur; for he ſhall be *intended* to dwell there, becauſe he is bound to be reſident there, by which he *ſaid that he had another benefice; and yet non allocatur.* Br. Brief, pl. 401. cites 10 H. 6. 8.

[35]

5. In debt *againſt J. N. of C.* if he *ſays* that he was and is *dwelling at H. and not at C.* it is a good *replication that H. is a hamlet*; for then it is ſufficient to name himſelf of the principal vill, by which the other ſaid that H. is a vill by itſelf. Br. Brief, pl. 402. cites 10 H. 6. 12.

Debt upon a bond *againſt J. N. of C.* Newton ſaid that the *defendant*, the day of the writ purchaſed, *was and is yet dwelling at C. ever*, and *not at C. without addition*, judgment

ment of the writ, and it was said that this is a good plea, per cur. notwithstanding that he *did not say that it is a vill by itself, and C. over is another vill by itself*, and he was and is dwelling at C. over, and not at C. without addition; quod nota, by several there; and after Caund. said that C. over is a hamlet of C. Br. Brief, pl. 238. cites 14 H. 6. 23.

6. Trespass against *W. C. of F.* Foscu prayed judgment of the writ; for *the day of the writ purchased he dwelt at D.* and *did not say, and not at F.* And therefore no plea per cur. by which he *said, that he dwelt at F. before the purchasing of the writ, and after he removed to D. and left two infants at F. at nurse, absque hoc* that he dwelt at F. the day of the writ purchased in other manner; and this was pleaded in person; for attorney cannot plead it, because it is contrary to his warrant. Per Newton, you should traverse that you did not dwell at F. the day of the writ, for the nursing of the infants is not dwelling. Br. Brief, pl. 173. cites 19 H. 6. 1.

7. Where *action* is brought *against J. N. of D.* it is a good plea at this day, *in action in which process of outlawry does not lie, and* in other actions *at common law*, to say that he was known, and *dwelt at S. the day of the writ purchased, and all times after*; judgment of the writ; quod nota. Br. Misnosmer, pl. 33. cites 21 H. 6. 54.

Contra in assise and præcipe quod reddat; for there the *land shall be recovered*, and warranty shall be dereigned. Br. ibid.

8. *Trespass upon* 5 *R.* 2. of entering *in A. B. and C.* where entry is not given by law. Fairfax prayed judgment of the writ; for *all the land is in A. and B.* and none in *C.* And the best opinion was, that it is no plea; for *no land is in demand*, and here is nothing to be recovered but *damages only*. Br. Brief, pl. 350. cites 4 E. 4. 31.

9. Debt *against J. S. of London.* Laken said, London extends into two counties, viz. Middlesex and London, and *he was dwelling the day of the writ, &c. in Middlesex*; judgment of the writ, and good by attorney, per Littleton. Br. Brief, pl. 484. cites 5 E. 4. 2.

10. In trespass upon the 5 R. 2. for entering *into the manor of D. in S. No such vill*, hamlet, nor lieu conus out of vill and hamlet, in the same county, judgment of the writ, is a good plea, by reason of the visne, which shall be of S. in this case; *but* if it had been *for entering into the manor*, there it is no plea that the manor is in S. for the visne shall be of the manor. Br. Brief, pl. 319. cites 6 H. 7. 3.

(C. a) By bringing Action in a Place not being Vill, Hamlet, &c.

1. *ASSISE* was brought in such a *place, which was in the forest of D.* and *out of every vill and hamlet*; and yet well, because the place is out of every vill and hamlet. Br. Brief, pl. 276. cites 17 Ass. 30.

Br. Brief, 221. cites S. C.

2. *Debt in Middlesex, upon an obligation dated in London at Clerkenwell*; and because London is a county in itself, therefore upon

upon plea of the party, the writ was abated; and the reaſon ſeems to be inaſmuch as London is a county known, but *Clerkenwell may be a place in London;* and therefore it ſeems, that he may bring action in London, and *count upon a deed in London made in quodam loco vocato Clerkenwell.* Br. Brief, pl. 102. cites 3 H. 4. 4. [36]

3. *Waſte* ſhall be brought in a vill or hamlet, per opinionem, &c. And per Hank. if the place where, &c. be *manor, or ſuch place*, it ſuffices. Br. Brief, pl. 106. cites 7 H. 4. 8.

4. *Treſpaſs* upon the ſtatute *of foreſtalling*, and *counted* that it was *in portu Ciceſter*. Paſton ſaid, the port is not vill nor hamlet, nor lieu conus out of vill and hamlet, but is a place which extends into the vills of A. B. and C. and an ill plea; for by the firſt he ſays, it is not a place, &c. and by the ſubſequent he ſays, that it is a place which extends into divers vills, and ſo double and repugnant, by which he held to the laſt part of the plea, which was held a good plea to the writ; quod nota, by reaſon of the viſne. And it was agreed, that where a *lieu conus* is in a vill, the writ ſhall be brought in the vill, and not in the lieu conus; quod nota. Br. Brief, pl. 161. cites 7 H. 9. 22. 35.

5. *Præcipe* quod reddat *of tenements in D.* Laken ſaid, *no ſuch vill nor hamlet, nor lieu conus out of vill and hamlet in this county*, judgment of the writ. Needham ſaid, there is ſuch a hamlet, &c. Per Moyle, aſſiſe, *dower, and treſpaſs, may be brought in a hamlet or lieu conus*, but *not præcipe* quod reddat; quod Danby conceſſit, and ſaid that the books are ſo adjudged. And the ſame year, in debt, fol. 1. and 2. Priſot ſaid, that præcipe quod reddat may be brought in a vill or hamlet, &c. or otherwiſe in lieu conus out of vill and hamlet; but *at this day it does not lie in a hamlet, which is in a vill, but ſhall be brought in the vill* Br. Brief, pl. 526. cites 34 H. 6. 18.

Præcipe quod reddat does not lie in a hamlet, but in a vill, or in lieu conus out of a vill; but all *actions perſonal* may be brought in vill, hamlet, or lieu conus. And per cur. aſſiſe, writ of *dower*, and *ſcire facias upon a fine*, may be brought in a hamlet, which was ſaid there that Trin. 8 E. 3. *nuper obiit*, was maintained in a hamlet. Br. Brief, pl. 366. cites 8 E. 4. 6.

Præcipe quod reddat does not lie in a hamlet, but in a vill, per cur. quod nota bene quære in *lieu conus out of every vill*, as in the *Foreſt of Shirwood*, &c. Br. Brief, pl. 219. cites 9 E. 4. 36.

(D. a) By Repugnancy.

1. IN *ſcire facias* out of a recovery *of* 100 *l. debt, and* 80 *l. damages*, the writ was *cum recuperaſſet* 100 *l. de quodam debito* 100 *l. ac etiam* 80 *l. de prædict'* 100 *l. pro damnis*, &c. The writ was abated for the repugnancy; for 100 l. cannot be recovered of 100 l. nor 80 l. of damages of the debt. Thel. Dig. 102. lib. 10. cap. 11. ſ. 11. cites Mich. 24 E. 3. 30.

Br. Brief, pl. 203. (205.) cites S. C. accordingly; and that damages of the principal cannot be recovered, but the principal, and damages for the detainer.

2. Recordari de *loquela between Ro. executor of the teſtament of Jo. plaintiff*, and A. defendant *de quodam bove ipſius Ro. capto;* adjudged no repugnancy, notwithſtanding that it was ſaid, that by the name of executor the property ſhall be intended to be in the

the teſtator. Thel. Dig. 102. lib. 10. cap. 11. ſ. 4. cites Mich. 24 E. 3. 35.

3. In *ſcire facias* out of a *fine*, by which land was *rendered to J. for his life*, the *remainder to P. and his ſeme in ſpecial tail*, and the *writ was ex inſinuatione R. filii & hæredis P.* &c. and after *oſtenſurus quare*, &c. *præfat' R. filio & hæred. prædict' P. and his ſeme remanere debet*, &c. the writ was abated, inaſmuch as it was contrary in itſelf, making the demandant heir to the baron only in one place, and heir to the one and to the other in the other place. Thel. Dig. 102. lib. 10. cap. 11. ſ. 6. cites Trin. 29 E. 3. 47.

Thel. Dig. lib. 10. cap. 11. pl. 19. cites S. C.

* 4. *Scire facias upon rediſſeiſin*, the *writ was, that he had recovered in aſſiſe, and had execution*, and *after was* [*the writ required him*] *to anſwer why execution he ought not to have*, and ſo *contrary* in itſelf, execution and no execution; and therefore the writ was abated. Br. Brief, pl. 453. cites 30 Aſſ. 35.

* [37]

5. In ſcire facias out of a fine, the writ was, *cum quidam finis levatus fuiſſet de maneriis de H. & B.* &c. and after *quare prædictum manerium de H. B.* it was held a repugnancy, becauſe in one place mention is of two manors, and in the other only one, &c. yet the tenant was compelled to aver that they are two manors. Thel. Dig. 103. lib. 10. cap. 11. ſ. 17. cites 31 E. 3. Brief 293.

6. *Scire facias* out of a *fine*, by which land was *rendered to J. M. and Dioniſe his ſeme, and to the heirs of the body of J. the remainder to J. his ſon in tail*, and the *demandant ſued execution as heir to J. M. the ſon, and ſuppoſed by his writ that J. M. the father died without iſſue;* yet adjudged a good writ, and held no repugnancy; for it may be that J. the ſon was born before eſpouſals, or that it was his ſurname, &c. Thel. Dig. 103. lib. 10. cap. 11. ſ. 18. cites Mich. 13 R. 2. Brief 645. and ſo agrees Trin. 17 E. 3. 42.

7. If the writ be *Jo. Tal. ſeniori filio Jo. Tal.* it ſhall not be intended any repugnancy; for Jo. the father may have 2 ſons named Jo. Thel. Dig. 103. lib. 10. cap. 11. ſ. 25. cites Hill. 32 H. 6. 34.

8. In action upon the *caſe*, the writ was *quod cum ipſe habeat quoddam Chiminum ratione tenuræ*, &c. the *defendant levavit murum, per quem le pl' Chiminum habere non poteſt*, &c. And held, per Priſot, that the writ is not good for the repugnancy. Thel. Dig. 104. lib. 10. cap. 11. ſ. 26. cites Trin. 33 H. 6. 26.

(E. a) By Variance between the Writ and Declaration.

1. IN formedon, the writ was, that poſt mortem B. the donee, to the demandant as couſin and heir deſcendere debet, &c. and by the count he made the deſcent from B. to H. as ſon and heir, and from H. to the demandant as ſon and heir, and held good.

good. Thel. Dig. lib. 9. cap. 6. ſ. 3. cites Paſch. 5 E. 2. Formedon 51.

2. In treſpaſs the writ was of 2 *horſes*, and the count was of 2 *mares*, by which it was abated. Thel. Dig. of Writs, lib. 9. cap. 5. ſ. 13. cites 6 E. 3. 249.

3. The writ of ward was *quod reddat cuſtodiam terræ & hæredis*, and the count of land and rent. Thel. Dig. lib. 9. cap. 5. ſ. 22. cites Trin. 22 E. 3. 10. and ſays, ſee 21 H. 7. 39. and 14 H. 6. 24. in quare ſe intruſit maritagio non ſatisf.

4. A man ſhall not have *writ quod catalla cepit*, and *count of money*; for of money there is a ſpecial writ given in the Regiſter. Br. Brief, pl. 478. cites 39 E. 3. 23.

5. Where a man in his *writ alleges divers covenants*, and *alleges the breach but in one* only, yet the writ is good. Quod nota. Br. Covenant, pl. 4. cites 40 E. 3. 5.

6. *So in waſte*, if *the writ rehearſes the waſte in lands, houſes, woods, and gardens*, yet he may *declare waſte in the one thing only*. Br. Covenant, pl. 4. cites 40 E. 3. 5.

7. Treſpaſs *de bonis & catallis*, and counted of 10 *quarters of wheat*, and good. Br. Brief, pl. 509. cites 46 E. 3. 16. So in treſpaſs the writ was quod *bona & catalla ad valenc' cepit*, &c. and the *count was of* 100 *angels pretii*, &c. and held good. Thel. * Dig. lib. 9. cap. 5. ſ. 37. cites Mich. 10 H. 6. 23. But the opinion of 21 H. 6. 42. is to the contrary. Vide 22 E. 4. 12.

But where writ of treſpaſs was quare bona & catalla cepit, &c. and *the count was of a cheſt ſealed, with charters and muniments*, the opinion of the whole court was, that the writ ſhould abate; becauſe charters are not forfeited by outlawry, nor paſs by gift of all chattles. Thel. Dig. lib. 9. cap. 5. ſ. 47. cites Paſch. 22 E. 4. 12.

* [38]

8. In *appeal of mayhem*, if the *count* be *of battery*, the writ ſhall abate. Thel. Dig. lib. 9. cap. 5. ſ. 44. cites Paſch. 12 R. 2. Cor. 110.

9. In *debt againſt* 2 *by ſeveral præcipes*, and by count it appeared that they *were obliged & ſinguli eorum*, &c. and held good. Thel. Dig. lib. 9. cap. 5. ſ. 31. cites Paſch. 21 R. 2. Brief 934.

10. Reſcous *quod cum querens diſtrinxit pro quodam amerciamento. The defendant had made reſcous*, and *counted of amercement of* 6 *d. at a leet-day for his not coming in, and for ſuch another amercement at ſuch another leet-day in another* 6 *d.* The *defendant demanded judgment of the writ, becauſe he has counted of two amercements, and the writ is* of *quodam amerciamento*, & non allocatur; for all is but one amercement. Quod nota. Br. Reſcous, pl. 4. cites 2 H. 4. 15. Thel. Dig. lib. 9. cap. 5. ſ. 33. cites S. C.

11. In mayhem the *writ was contra pacem nuper regis*, and the *count contra pacem regis nunc*, by which it abated. Thel. Dig. lib. 9. cap. 5. ſ. 34. cites Paſch. 8 H. 4. 21. and 2 E. 4. 25.

12. In treſpaſs, the *plaintiff* by his writ *ſuppoſed the treſpaſs to be done at Weſtminſter*, and the *writ was to the ſheriff of Middleſex*, and he *counted of an aſſault* and battery *in the palace of Weſtminſter*; and the court was in doubt, upon not guilty pleaded, to whom the venire facias ſhould iſſue, to the ſheriff or to the warden of the palace; but per Martin, the plaintiff by his count has abated his writ. Br. Brief, pl. 5. cites 2 H. 6. 7. Thel. Dig. lib. 9. cap. 5. ſ. 33. cites S. C.

13. Treſpaſs

Br. General Brief, pl. 9. cites S. C.

13. Treſpaſs quod *cepit piſcem*, and *counted of ſeveral pikes*, &c. *in the plural number*, and well, and the count ſhall not abate the writ; for piſces is nomen collectivum, which has no plural number; and in waſte, quod fecit *waſtum*, and he counts of ſeveral waſtes, and well. Br. Brief, pl. 207. cites 4 H. 6. 11.

14. The writ of the caſe ought to comprehend the ſubſtance of the matter, and ſpecial matter, the which the plaintiff has not done, by which it was awarded that the plaintiff take nothing by his writ. Quod nota; for there *was more in the count than in the writ*. Br. Action ſur le Caſe, pl. 50. cites 7 H. 6. 45.

15. In *quare impedit*, if *ſeveral join in action*, and *vary in their count in conveyance*, the writ ſhall abate, as in *aſſiſe*, *coſinage*, and the like. B. Brief, pl. 359. cites 6 E. 4. 10. per Littleton.

The writ was of *forger de diverſis factis falſis & muni-mentis*, and the *count*

16. In *forger of falſe deeds*, the writ was quod *falſa facta fabri-cavit*, and the *count was only of one deed*; and yet adjuged good. Thel. Dig. lib. 9. cap. 5. ſ. 36. cites H. 8 H. 6. 35 but the con-trary is adjudged Trin. 20 H. 6. 45. And ſo it is held 35 H. 6. 37. 7 E. 4. 30.

was of a deed of feoffment, and of a writing and muniment, by the which one was made attorney to deliver ſeiſin; exception was taken to the variance; and Priſot was of opinion, that the count was not war-ranted by the writ. Quære. Thel. Dig. lib. 9. cap. 5. ſ. 40. cites Mich. 35 H. 6. 37.

17. A man *cannot* maintain, nor *ſupply the default in writ of for-medon* by the count. Thel. Dig. lib. 9. cap. 5. ſ. 49. cites 11 H. 6. 26.

18. In *detinue* the writ was quod reddat *bona & catalla*, &c. and the *count was of* 3 *tallies*, each of 10l. and held good. Thel. Dig. lib. 9. cap. 5. ſ. 38. cites Hill. 21 H. 6. 32.

19. In writ of *debt againſt J. B. of* 20*l.* and upon the count and view of the obligation *it appeared that two others were named* in the obligation *jointly with* the *ſaid J. B.* and yet held good, if the de-
[39] fendant does *not ſay that the two others have ſealed, &c. and are alive.* Thel. Dig. lib. 9. cap. 5. ſ. 42. cites Trin. 28 H. 6. 3. And ſee ſuch a writ held good, where *he who was not named in the writ was within age*. 14 H. 4. 33.

So in *quare impedit by ſeveral*, if they *vary in count*,

20. In *quare impedit* againſt 3, if the *count* be *only againſt* 2, all ſhall be diſcontinued. Thel. Dig. lib. 9. cap. 5. ſ. 39. cites Hill. 31 H. 6. 16.

all ſhall abate. Thel. Dig. lib. 9. cap. 5. ſ. 43. cites Hill. 6 E. 4. 10.

So in treſ-paſs the *writ was* for taking *bona & ca-talla*, and

21. In *treſpaſs* the writ was *of taking bona & catalla*, &c. and the *Count was of a regiſter only*. The opinion of the court was, that the writ ſhould abate. Thel. Dig. lib. 9. cap. 5. ſ. 45. cites Hill. 7 E. 4. 30.

the *declaration was* for taking *a bale of woad*. It was awarded, that the writ ſhould abate; for a bale in the ſingular number cannot be ſaid bona & catalla; and the writ ſhould be one bale of woad. Keilw. 35. pl. 1. Trin 13 H. 7. Anon. ——— ——— See F. N. B. 91. (D) and (E) in principio. ——— So where the count was of taking a 3d part of a diſh of lead-ore, it was moved not to be good; and though it was objected that there was not any original at all (as in truth there was not) yet it was ſaid that the Count was contrary in itſelf; for a particular thing cannot be ſaid to be goods and chattels. Adjorna-tur. Win. 35. Trin. 20. Jac. C. B. Gell v. White.

22. It

22. It was touched, that *in aſſiſe*, if the plaintiff makes his plaint, or *counts of more or leſs than is in the writ*, there the writ ſhall abate, becauſe it is * [not] warranted by the writ; quod nota inde. Br. Brief, pl. 216. cites 9 E. 4. 6. So in annuity, becauſe it appeared by the deed ſhewn in the count, that the plaintiff by the writ *demanded more than he ought to have before the writ purchaſed*, therefore the writ was abated. Thel. Dig. lib. 9. cap. 5. ſ. 4. cites Paſch. 5 E. 3. 185. and 11 H. 6. 68. in repievin.

* The word (not) is not in any of the editions of Brooke, nor in the old Year-books; but it is in the laſt edition of the Year-books.

23. In *annuity* the writ was 10*l.* 6*s.* and *in the count* 6*s.* was omitted, and the plaintiff recovered, and for that cauſe it was reverſed by error; for it is not miſpriſion, for the count is made by the party, and not by the clerk. Br. Variance, pl. 53. cites 9 E. 4. 51.

24. *Treſpaſs in two vills*, and *counted of treſpaſs but in one vill only*, and yet well; for *treſpaſs is ſeveral in itſelf*, and he might have *omitted the one vill in the writ*; but contra of debt; for this is intire. Note the diverſity. Br. Variance, pl. 100. cites 16 E. 4. 11.

25. Where there is *no other form of writ* but the common writ, there the *writ ſhall be general, and the count ſpecial*. Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Co. Litt. 52. b. 53. *But where a man may have a writ according to his caſe*, if the writ and declaration vary, the writ ſhall abate. Arg. 2. and 96, 97. pl. 56. Hill. 38 Eliz. in caſe of Arden v. Darcy.

26. *As in warrantia chartæ unde chartam ſuam habet*, yet he *may count of homage anceſtrel*. Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Br. General Brief, pl. 8. cites 24 E. 3. 35.

27. *And in* writ of *waſte quod tenet ad terminum annorum*, yet he may *count of leaſe for half a year*. Br. General Brief, pl. 13. cites 7 H. 7. 2. S. P. Br. General Brief, pl. 6. cites 8 H. 6. 34. ——— The count in this caſe ſhall not abate the writ, becauſe he cannot have any other writ upon the matter. Co. Litt. 52. b. 53.

28. In *reſcous*, where it *appears by the count that parcel of the rent ſuppoſed to be in arrear was not yet due*; the opinion was that the count was not good. Thel. Dig. lib. 9. cap. 5. ſ. 5. cites T. 9 H. 7. 3.

29. In debt the *writ demanded* 165*l.* 13*s.* 4*d.* and the *count was of* 171*l.* 10*s.* and judgment was reverſed for this variance. Cro. E. 198. pl. 17. Mich. 32 & 33 Eliz. B. R. Berkenhead v. Nuthall. [40]

30. *George* in the writ and *Geo.* in the count is a good plea in abatement. 2 Roll. Rep. 232. Trin. 8 Jac. B. R. in caſe of Yarley v. Turnock.

31. Caſe againſt the ſheriff, for that the plaintiff having good cauſe of action againſt A. ſued out a latitat againſt him, and the defendant being ſheriff arreſted him, and ſuffered him to eſcape, and returned non eſt inventus. At the trial before Hale, the plaintiff was nonſuit, becauſe he *declared upon a latitat in placito trangreſſionis*; and the *writ itſelf was in placito tranſ. ac etiam billæ*

for

for 20*l.* which the chief juſt held incurable. 2 Lev. 85. Paſch. 25 Car. 2. B. R. Gunter v. Cleyton.

32. Writ of formedon is of 20 *meſſuages* inter alia; the count is that a *fine* was levied of the tenements aforeſaid inter alia per nomen of 16 *meſſuages*. The reporter ſays, the defendant cannot recover according to his writ, and by conſequence he has falſified and *abated the writ by the count*. 2 Lutw. 974. Hunlock v. Petre.

33. In replevin, &c. the writ was for taking avaria, and ſo was the declaration with a viz. one mare. And upon a demurrer it was objected that a mare could not be avaria; and judgment for the defendant. 2 Lutw. 1179. Hill. 9 W. 3. Gins v. Dams.

(F a) By Variance between the Writ and Specialty.

r. Variance, pl. 93. cites S. C.

1. IN aſſiſe, a *clauſe was in the original which was not in the patent*, and *ſeveral* were *named in the original which were not in the patent*, and therefore the writ was abated. Br. Aſſiſe, pl. 238. cites 22 Aſſ. 20.

2. Aſſiſe de libero tenemento, the plaint was of *reaſonable eſtovers apprendre in a moor to burn in a * chimney of a houſe, and this in ſuch a vill*, the defendant demanded what he had of the eſtovers, who *ſhewed ſpecialty of eſtovers apprender in a certain croſt of moor for his chimney in a houſe in the ſame vill;* and judgment was demanded of the ſaid variance between the writ and the ſpecialty, & non allocatur, but by all the juſtices upon adjournment upon this in C. B. it was agreed that the writ was brought in the beſt manner; and it was ſaid that he might have taken the ſame exception between the writ and the plaint if it had been material. Br. Variance, pl. 68. cites 23 Aſſ. 1.

* Orig. is (auſtr.)

3. Debt upon an obligation, the defendant was *named J. M. of M. in the obligation*, and in the writ *M. was left out*, therefore the writ was abated, quod nota. Br. Variance, pl. 39. cites 38 E. 3. 24.

S. P. for he is not bound to ſhew deed unleſs

4. If waſt be brought by him in remainder, and there is a variance *between the writ and the deed of remainder*, yet it is good. Br. Variance, pl. 18. cites 42 E. 3. 19.

the defendant demands it, and if he demands it *the action does not lie by him in remainder without ſhewing deed*, for *this action is not properly founded upon the deed*, as action of debt *is founded upon the obligation*; note the diverſity. Br. Variance, 108. cites 10 H. 6. 8. ——— S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

5. In covenant the *writ was of one houſe and* 20 *acres of land in D.* where the *ſpecialty was of all lands and tenements which he had in D.* And yet good, notwithſtanding the variance; for the writ ought to be certain. Br. Covenant, pl. 14. cites 47 E. 3. 25.

6. In debt the writ was *John de Lore vicar of A.* executor *of the teſtament of J. W.* and the *obligation was J. de L. only* without the words vicar of A. and therefore was abated for the variance. Br. Variance, pl. 81. cites 3 H. 4. 1.

[41]

7. Debt upon a bond of 20*l.* Newton ſaid the *bond is viginti libris* and the writ *viginti*, judgment of the writ for the variance. Per Babb. it has ſufficient intendment, therefore well, to which Paſton agreed. Br. Obligation, pl. 4. cites 9 H. 6. 7.

For Villiams and *Williams* and *T. Thomas* and *Thomas* is all one, and *two V's and one double W.* is all one, and there is not any W. in the croſs-row in the Latin or French alphabet. But per Cott. *J. Wyſe* and *J. Vyſe* is not all one, but in this it ſeems different, by reaſon of the Engliſh, but *in Latin double W. and ſingle V. is all one.* Ibid.

8. *Quare impedit* which varies from the ſpecialty ſhall not abate. Br. Variance, pl. 108. cites 10 H. 6. 8.

S. P. Br. Variance, pl. cites 14 H. 6. 1.——Quare impedit upon a *grant of the next preſentation granted to J. N. Gent.* and *in the writ brought by J. N. this word (Gent.) is omitted*; and the defendant demanded oyer of the deed, and had it, and the variance no matter; for the *action of quare impedit is founded upon the diſturbance*, and *not upon the deed*, as action of debt is founded upon the obligation. Br. Variance, pl. 109. cites 2 E. 6.

9. Debt upon an *obligation* which *was J. D. of B.* and the *writ was J. D. of B. Underhill*, and ſo a variance, and yet well. Br. Variance, pl. 78. cites 21 E. 4. 79. 80.

(F. a. 2) By Variance in the Names of Plaintiff or Defendant.

1. IN *treſpaſs againſt maſter, confreres and others*, the *count was that the confreres and the others did the treſpaſs* without mentioning of the maſter, by which the writ was abated. Thel. Dig. lib. 9. cap. 5. ſ. 11. cites Mich. 1 E. 3. 24.

2. *Aſſiſe of rent by W. N. Knight*, and the *ſpecialty was not Knight*, and therefore the writ was abated. But Herle did contra, where the ſpecialty was maſter J. C. of S. and the writ was only J. C. without maſter, and of S. and the writ awarded good, anno 5 E. 3. Br. Variance, pl. 65. cites 11 Aſſ. 8.

Debt againſt J. N. executor of J. S. and the *ſpecialty was maſter J. S.* and the writ wanted this word maſter, and the defendant pleaded it to the writ, & non allocatur; for the want of ſuch words as maſter, reverend, nephew, doctor, or the like, are not traverſable, but ſurpluſage. Contra of knight, taylor, carpenter, &c. Br. Variance, pl. 10. cites 35 H. 6. 55.

3. In *writ* brought *by two heirs*, the *writ was that the common anceſtor was grandfather to the one, and couſin to the other*, and *by the deſcent in the count it appeared, that he was grandfather to the one, and great grandfather to the other*, by which the writ was abated. Thel. Dig. lib. 9. cap. 5. ſ. 17. cites Trin. 13 E. 3. Joinder in Action 29.

4. In aſſiſe; *rent* was *granted to T. Quintin*, parſon, father, *by name of T. his ſon*, and he *brought aſſiſe of the rent by name of T. Q. of N.* and did *not ſay T. ſon of T. Q.* and yet the writ good. Quod nota. And yet in annuity it ought to agree with the ſpecialty. Br. Variance, pl. 70. cites 26 Aſſ. 38.

5. *Debt by J. of P.* becauſe the *plaintiff leaſed a manor to R. for term of life, rendring* 10*l.* per ann. *with clauſe* and condition *to re-enter by indenture*, which R. leaſed his eſtate to S. who leaſed

S. P. Br. Dette, pl. 116. cites 29 E. 3. 22.

leaſed it to T. now defendant; and for 3 terms arrear the leſſor re-entered, and brought debt of the arrears, and becauſe the writ is J. of P. and *the indenture is J. P. the younger*, the writ was abated for the variance; for he cannot re-enter by the condition, if the leaſe had not been by deed, and then *the deed, the condition, and the re-entry is the cauſe of this action*; for during the franktenement he cannot have action of debt, and therefore for the variance the writ was abated; quod nota. Br. Variance, pl. 54. cites 39 E. 3. 22.

S. P. Br. Variance, pl. 18. cites 42 E. 3. 19.——S. P. Br. Variance, pl. 6. cites 9 H. 6. 11. by the beſt opinion.——S. P. Br. Variance, pl. 56. cites 14 H. 6. 1. For the obligation ſhall be ſhewn in the declaration, and therefore varian e is material, and ſhall abate the writ.——S. P. Br. Variance, pl. 108. cites 10 H. 6. 8.——S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

S. P. *And ſo in* action of *covenant upon an indenture*; for in theſe caſes the bar is *merely founded upon the ſpecialty*. Br. Variance, pl. 20. cites 44 E. 3. 42.

*6. Debt upon a bond. The *writ was prior of D.* and *the bond was that J. prior of D. was bound*; and the opinion was, that for this variance the writ ſhall abate. But ſee [(X) pl. 15.] that where more is in the writ than in the bond, this is good. Br. Variance, pl. 12. cites 40 E. 3. 23.

*[42]

7. *Debt upon* an indenture of *leaſe for years rendring rent*, and *the indenture was J. K. Clerk*, and the *writ J. K. only*, and yet awarded good, notwithſtanding the variance, for it was ſaid that the *action is maintainable without the indenture*, and therefore it is no matter. Br. Variance, pl. 20. cites 44 E. 3. 42.

8. *Debt by R. and S. his feme* againſt P. *upon an obligation made to the feme, dum ſola* fuit, *by name of feme of D.* and therefore the defendant pleaded this to the writ for the variance, becauſe ſhe was named feme of R. where ſhe ſhould be named *heretofore feme of D.* and the opinion of the court was that the writ is good; for by the laſt marriage her *name is changed*. Br. Variance, pl. 23. cites 48 E. 3. 23.

Br. Nugation, pl. 1. cites S. C.—Br. Variance, pl. 5. cites S. C.

9. Debt upon obligation, and the *obligation was that A. B. and C. yeomen, were bound*, and this word yeomen put for all their names; and *in the action of debt every one was named yeoman particularly*, and this was pleaded to the writ for ſurpluſage, & non allocatur; for this is of neceſſity by the ſtatute of additions. Br. Additions, pl. 3. cites 3 H. 6. 23.

Br. Variance, pl. 42. cites S. C.—Br. ibid. pl. 89. cites S. C. But Brooke ſays, it is uſual at this day to ſay it in an *alias dictus, to make it agree with the ſpecialty*.——In debt or annuity, *where the plaintiff* in count counting *ought to ſhew ſpecialty*, there the *writ and the ſpecialty ought to agree*; per Finch. Br. Variance, pl. 14. cites 41 E. 3. 23.

10. *Annuity by J. N. Clerk*, where the *grant was maſter J. N.* and yet well; for the king will not write any man maſter nor ſeignior; quod nota by award. Br. Additions, pl. 26. cites 8 H. 6. 23.

In debt by executors upon a teſtament, there *the teſtament* ſhall be ſhewn in the

11. *Debt by A. D. againſt M. as executor of R. D.* and the *writ was* præcipe N. quod reddat *A. D. executor of the teſtament of R. D. and* the defendant had oyer of the *teſtament*, which *was that he made A. his wife his executrix*; and becauſe the writ was not *A. D. late wife of R. D. executrix of the teſtament of the ſaid R. D.*

R. D. therefore the writ was abated for the variance; for though the action be not founded upon the teſtament, but upon the obligation, yet the teſtament enables him to the action, and therefore it ſhall agree with it, and if not the writ ſhall abate. Br. Variance, pl. 57. cites 14 H. 6. 5.

declaration, and where the deed ſhall be ſhewn in the count, there variance is material, and it ſhall abate the writ. Br. Variance, pl. 56. cites 14 H. 6. 1.

12. *Formedon in remainder.* Fulth demanded what he had of the remainder, and Chaunter *ſhewed deed* which was *to Dolby*, and the *writ was Dalby;* therefore judgment of the writ is demanded by the tenant; and by all the juſtices, except Cotteſm. the *writ* is good; for *it is not founded upon the deed, but upon the gift;* for *the deed is not traverſable* as ne dona pas by the deed, but ſhall ſay ne dona pas. Br. Variance, pl. 56. cites 14 H. 6. 1.

S. P. Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt opinion. S. P. Br. Variance, pl. 14. cites 41 E. 3. 23.

13. *Debt upon a bond* in which *J. D. was bound to T. E.* and the *writ was quod reſpondeat T. E. armigero;* and for this *ſurpluſage of armigero* in the writ more than in the bond, the writ was abated; and it was ſaid there, that before theſe days writ ſhould abate for *ſurpluſage of the part of the defendant*, but *not* for ſurpluſage *of the part of the plaintiff.* Br. Brief, pl. 27. cites 28 H. 6. 8.

Br. Nugation, pl. 23. cites S. C.

[43]

14. In debt upon an obligation, by which the defendant *acknowledged himſelf* to be *indebted to the plaintiff in certain corn, to be delivered* to the plaintiff *at ſuch a place and day, and for performance bound himſelf in* 100*s.* &c. *without ſaying to whom*, &c. It was held that the plaintiff might *count that the defendant obliged himſelf to him.* But Littleton prayed that the entry ſhould be per hæc verba, and ſo it was done. Thel. Dig. lib. 9. cap. 6. ſ. 1. cites Mich. 2 E. 4. 22. and that ſo it was held Mich. 4 E. 4. 31. where the *obligation was teneri W. pl' in* 10*l. ſolvendis Jo. def.* &c. yet the *count was entered ſolvend' to the plaintiff.*

15. *Debt by E. Haſtinges*, and *counted that he, by name of E. Haſtings, recovered* certain land in ancient demeſne, and 100 *l. damages, and brought the action of the damages.* Quære if the count ſhall abate the writ; for the writ is *Haſtinges*, and the count is by name of *Haſtings.* And per Chocke, Needham, Littleton, Fairfax, and Jenney, becauſe the *action is founded upon a matter in fact, and not upon record or writing*, it is no material variance; for *it ſuffices if he be the ſame perſon*, and thoſe words *by name*, &c. *is only ſurpluſage;* for this recovery ſhall be tried *per pais, and not by the roll;* for nul tiel record is no plea, but he ſhall ſay nul tiel recovery; for if the rolls are burnt, yet the plaintiff ſhall recover. But Danby and Moyle J. contra, and that the count ſhall abate the writ. Br. Variance, pl. 52. cites 9 E. 4. 42.

Br. Noſme, pl. 27. cites S. C.

16. Debt upon indenture againſt the abbot of W. *the indenture was* between *the abbot of the monaſtery of St. Mary of W.* and rehearſed diverſe covenants *ad quas conventiones perimplendas the abbot of W. obligavit ſe* in 10*l.* and *did not ſay the aforeſaid abbot*, and yet good; for *it ſhall be intended he who is party to the deed;*

and the writ was for the abbot of W. and not St. Mary, &c. as in the indenture: and therefore the opinion was, that the writ ſhall abate for the variance; for where it is founded upon ſpecialty, they ſhall purſue the ſpecialty, and ſhall not ſay, that known by the one name and the other, as he ſhall ſay where it is founded upon matter in fact. Br. Variance, pl. 77. cites 11 E. 4. 2.

17. In debt upon a bond *againſt J. S. of D. yeoman*, it is no plea that there are two *J. S.'s, elder and younger, within the ſame vill, and none without addition*, becauſe the action is founded upon the bond, and agrees with it; quod nota by award. Br. Brief, pl. 325. cites 9 H. 7. 21.

S. P. adjudged contra; for by Rolle Ch. J. the word clauſum is nomen aggregativum, and may contain many cloſes; and ſo may well enough agree with the declaration. Sty. 109. Trin. 24 Car. Burrel v. Lancaſter. ——— S. P. accordingly per cur. and ſaid that it had been ruled often of late, that there is no variance between the writ and count, though the writ is clauſum, and the count is clauſa. 2 Lutw. 1343. Trin. 2 Jac. 21. Meriton v. Benn.

18. In *treſpaſs*, &c. the writ was quare *clauſum fregit*, and the declaration was *clauſa* fregit; and for this variance the judgment was reverſed. Cro. Eliz. 185. pl. 5. Trin. 32 Eliz. B. R. Edwards v. Watkin.

[44]

(F. a. 3) By Variance in the Sum or Value.

Br. Variance, pl. 38. cites S. C.

1. IN treſpaſs Wich challenged the count, becauſe he had *counted of goods* carried away *to the value of* 40*l.* and the *writ was not but to the value of* 40*s.* Thorp ſaid, this is a good diverſity to abate the count. Br. Variance, pl. 87. cites 38 E. 3. 21.

Br. Variance, pl. 50. cites S. C. but Brooke ſays, quære if it be material, and if it may not be amended by the ſtatute of 14 E. 3.

2. Debt *of* 20*l. quatuordecim ſolid'* where *the bond is quatuordecem ſolid'* with (e) but *in the count he confeſſed himſelf ſatisfied of the* 14*s.* And Rolf pleaded the variance between the writ and the bond to the writ; and becauſe nothing is in demand but the 20*l.* which is according to the bond, and the 14*s.* is confeſſed to be paid, therefore the writ was awarded good: but note, that in the writ there was only 20*l.* and in the count he counted of a bond of 20*l.* 14*s.* and confeſſed ſatisfaction of the 14*s.* Br. Brief, pl. 212. cites 4 H. 6. 26.

(F. a. 4) Variance between the Writ and Count. In reſpect of the Place where.

* Debt upon *obligation, bearing date in the county of L.* but it did not appear in what county the action was brought, and *in the end was put the name of a ſcrivener who was abiding in London*, by which the defendant prayed that the attorney may be examined where the deed was made; and the court was in opinion to have examined him, by which the attorney took upon him to bring in his maſter

1. 6 *Ri.* 2. *cap.* 2. THAT *writs of debt and account, and all other ſuch actions, be taken in their counties where the ſame did riſe. It is ordained, that if in pleas upon the ſame writs it ſhall be* * *declared, the contract thereof was made in another county, that then incontinently the ſame writ ſhall be utterly abated.*

maſter the next day, by which the court ſpared him. Quære inde; for this ſeems to be by the equity of this ſtatute. But *quære if this ſtatute has equity in it*; for by 21 E. 4. 79, 80. he ſhall not be examined, but where the deed bears † *date at a place certain*, and the action is brought in another county; but where the deed is dated at large, there no examination lies. And ſee debt 3 H. 6. 35. per Martin, the defendant ſhall have it by way of plea, that the deed was made in another county, judgment of the writ; by which Rolf paſſed over, and replied that it was not. Quod nota, and quære; and ſee, in the principal caſe, that Martin was in opinion that the party may plead it to the writ; but Babbington Ch. J. contra, for then the deed ſhall be confeſſed by him, ſo that he cannot ſay, non eſt factum afterwards. And Martin ſaid, that he may ſay by proteſtation that he has an acquittance, and for plea that it was made in another county. Quære. Br. Examination, pl. 2. cites 3 H. 6. 29.

† S. P. Br. Examination, pl. 1. cites 3 H. 6. 15. and 21 E. 4. 79, 80.

2. *Debt by executors upon an indenture in the county of C.* and the *defendant ſaid, that the indenture was made in the county of D.* and prayed that the executors be examined, and ſo they were. Br. Examination, pl. 16. cites 5 H. 5. 1.

3. In *treſpaſs* the writ was, that the treſpaſs was done *at the vill of Weſtminſter*, and the *count was*, that it was done *in the palace of the king*, &c. And the opinion was, that the writ ſhall abate. Thel. Dig. lib. 9. cap. 5. ſ. 33. cites Paſch. 2 H. 6. 7.

4. In *debt* the *plaintiff counted* in one action, *that the obligation was made in one county*, and *by another action that it was made in another county*; and yet per Martin, it is out of the caſe of the ſtatute where a man brings action in one county, and declares in another, for there his writ ſhall abate; but it is good here, and there upon this matter pleaded to the writ, it was ruled againſt the defendant; quod nota. And therefore it ſeems, in this caſe, that no examination lies. Br. Examination, pl. 1. cites 3 H. 6. 15. and 21 E. 4. 79, 80. [45]

5. In *debt upon an obligation*, which was *dated at the manor of Dale*, the plaintiff was received to *count that it was made at Dale*; for the manor may extend into diverſe vills. Thel. Dig. lib. 9. cap. 6. ſ. 7. cites Mich. 34 H. 6. 1.

6. In *treſpaſs* the writ was *of aſſault and menace* made *at London*, and the *count was, that the aſſault and menace was at London, ſo that the plaintiff could not do his buſineſs at Iſlington*; and yet held good. Thel. Dig. lib. 9. cap. 5. ſ. 41. cites 36 E [H.] 6. Treſpaſs 159. and ſays, ſee 37 H. 6. 3. accordingly, and 20 H. 6. 15. *But* where the writ was of the menace made *at Dale, ſo that he durſt not go to his buſineſs there*, &c. and the count was, *that he durſt not go from the vill of Dale to the market* and fair *of the vill of Downe*, the writ was abated. Thel. Dig. lib. 9. cap. 5. ſ. 41. cites Paſch. 26 H. 6. 15.

7. In debt *the attorney of the defendant pleaded foreign acquittance in another county*; the *attorney of the plaintiff ſaid, that his maſter never came there*, and *prayed that the defendant's attorney be examined*; and ſo he was by oath, and *ſaid that he did not know the truth*, by which he was compelled to plead other plea, &c. Br. Examination, pl. 30. cites 21 E. 4. 22.

8. In an action of *waſte* done in ſeveral places, the declaration *aſſigned the waſte* to be committed *in one place more than* was *named in the writ*; and this was held to be a fault incurable, and that the writ ſhould abate. Hob. 37. pl. 43. Cumberland (earl of) v. Cumberland (counteſs of). Mo. 862. pl. 1185. Hill. 12 Jac. S. C. and S. P. accordingly; but per cur. otherwiſe it is where the count is *of leſs than the writ*, as writ of waſte in two vills, and the count is of waſte in one.

(G. a) Variance between Writ and Record.

1. ATTAINT upon quare incumbravit; the writ was abated for *variance* between this and the firſt record *in rehearſing the iſſue;* but it does not plainly appear what variance. Br. Variance, pl. 40. cites 21 E. 3. 42.

2. In *quare non admiſit againſt the biſhop of N.* making mention of the writ by which he recovered, propter quod mandaverimus eid' epiſcopo, &c. quod non obſtante reclamatione, &c. and the *record was*, that the *writ was awarded to the biſhop elect of N. & confirmato*, for which variance the writ was abated, for it ought to be mandaverimus *eid' epiſcopo tunc electo & confirmato.* Thel. Dig. lib. 9. cap. 1. ſ. 3. cites Mich. 22 E. 3. 13.

3. In aſſiſe the parol demurred, becauſe the land was in cuſtody of the king's committee, and after *writ of procedendo* iſſued out, *which did not agree with the record verbatim*, yet becauſe the writ *comprehended the effect*, therefore exception was not allowed, by which the tenant prayed that his exception be entered; and agreed in the end there, that the procedendo *is good, if it agrees in all the pleas;* quod nota. Br. Variance, pl. 94. cites 22 Aſſ. 28.

4. In aſſiſe of rent the *tenant prayed aid of the king* and had it; and now the *plaintiff brought procedendo, ſuppoſing the aſſiſe to be arraigned before S. and B. where it was* arrained *before A. S. and B.* And yet becauſe that which was done before three was done before two, and alſo they had writ of *ſi non omnes*, therefore they ſhall proceed. Br. Variance, pl. 73. cites 31 Aſſ. 1.

Br. Variance, pl. 30. cites S. C. —Br. Waſte, pl. 64. cites S. C.

* 5. In waſte where the plaintiff *had the reverſion ex aſſignatione J. which J. had it ex aſſignatione of W. by fine*, &c. And it appeared by the *fine ſhewed, that W. and R. granted the reverſion to J.* &c. by which the writ of waſte abated, notwithſtanding that the plaintiff alleged that *R. had nothing in the reverſion at the time* of the fine levied. Thel. Dig. lib. 9. cap. 1. ſ. 10. cites Mich. 11 H. 4. 1.

* [46]

S. P. But per Babb. it ſuffices if it be counted in his count accordingly; Quære inde.

6. If decies tantum *varies from the record* it is not good; *as* if the *firſt record is J. D. of E. yeoman*, and the *decies tantum is J. D. only.* Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt opinion.

Br. Decies tantum, pl. 1. cites S. C.

7. *So in conſpiracy, ſcire facias upon a fine, attaint, writ of error*, &c. Br. Variance, pl. 6. cites 9 H. 6. 1. by the beſt opinion.

8. In *writ* of maintenance *by the abbot beatæ Mariæ de Miſſenden*, &c. of maintenance in quadam querela, quæ fuit inter predict' abbatem and one B. The defendant *pleaded that there is a record of action between the abbot of Miſſenden*, and the ſaid B. &c. *Abſque hoc that there is any record that the abbot beatæ Mariæ de Miſſenden has any action againſt him*, &c. But ſuch pleading was not received,

received, becauſe it is triable by the juſtices, and therefore he pleaded nul tiel record generally, and it ſeemed by the opinion there that the writ is good enough if the plaintiff in his count ſhews the maintenance in loquela, which was between the aforeſaid abbot per nomen, &c. Thel. Dig. lib. 9. cap. 1. ſ. 15. cites Mich. 10 E. 4. 19.

(H. a) Variance between Original Writ and Judicial or other Writ.

1. SOMETIMES an original writ ſhall abate for variance between it and writ or proceſs judicial, as in *writ of meſne of tenements in Burton*, and the defendant came in *by the grand diſtreſs* by which *the tenements were ſuppoſed to be in Birton*, &c. for which variance the defendant went ſine die, &c. Thel. Dig. lib. 9. cap. 2. ſ. 1. cites 6 E. 3. 277. But ſays, ſee that default in judicial writ ſhall not abate the original. Hill. 11 H. 4. 43.

2. Writ of *audita querela* was to the juſtices quod *ſi conſtare poterit*, &c. that they had aſſented ad evacuationem recognitionis prædict', &c. And the *ſcire facias was, if the defendant knew any thing to ſay wherefore the plaintiff ſhould not be diſcharged of the recognizance*; and yet all was adjudged good, inaſmuch as all is one intendment. Thel. Dig. lib. 9. cap. 2. ſ. 2. cites 6 E. 3. 280.

3. *Writ original* ſhall not abate for variance between it *and the pone in a ſurname*. Thel. Dig. lib. 9. cap. 2. ſ. 2. cites 6 E. 3. 296.

4. In a patent of aſſiſe there was no *ſuch a clauſe et alios in brevi noſtro originali contentos*, &c. And *ſeveral were named in the original which were not in the patent*, by which the writ abated. Thel. Dig. lib. 9. cap. 2. ſ. 3. cites 22 Aſſ. 20.

5. Scire facias againſt the *prior of St. John of Jeruſalem in England* upon a recovery which was *prior of the hoſpital of St. John in England*, and exception taken, and not abated for the variance; for Thorp ſaid it is known by the one name and the other, therefore [ruled him to] anſwer; quod nota. Br. Variance, pl. 19. cites 44 E. 3. 16.

6. Scire facias upon garniſhment in *writ* of detinue of a writing, the original named the plaintiff *J. Shipſted*, and the *ſcire facias J. Shiplow*, and therefore it was awarded that he ſhall ſue a new ſcire facias, notwithſtanding it was a judicial writ. Br. Variance, pl. 27. cites 3 H. 4. 8. [47] Br. Scire facias, pl. 56. cites S. C.

7. In *writ of maintenance ſuppoſed to be made in an aſſiſe, the which aſſiſe was adjourned*, &c. It was held that he *need not make mention of this adjournment in the writ*; for it is founded upon the maintenance which is the matter, and not upon the record. Thel. Dig. lib. 9. cap. 2. ſ. 6. cites Mich. 21 H. 6. Brief 90. Quære of ſeverance and of garniſhment in detinue. *But* in maintenance *ſuppoſed to be made in an aſſiſe quæ capta fuit*, where in truth the *plaintiff was nonſuited* in the aſſiſe, the writ ſhall abate, per Gaſcoigne. Thel. Dig. lib. 9. cap. 2. ſ. 7. cites Mich. 7 H. 4. 30.

(I. a) Variance between Writ and Declaration made good by Alias Dictus.

1. IN debt the writ was quod reddat *J. T. clerk*, and the *obligation was chaplain*, and for the variance the writ was abated quod nota; and note alſo, that an *alias dictus* would have remedied the matter, as it ſeems; quære *of the part of the plaintiff*, but it is clear of the part of the defendant, for there he is bound to give addition. Br. Variance, pl. 55. cites 39 E. 3. 23.

2. If a man be *bound to J. N.* and *after he is created a biſhop*, he ſhall ſue by name of biſhop, and the variance is not material; per Ham and Perſey; and per Fulth. this is true, by reaſon of the name of dignity. *Quære* if the law be ſo; for *alias dictus* is uſed. Br. Variance, pl. 23. cites 48 E. 3. 23.

3. Debt *by J. S. and Joan Newton his feme, as executors of J. N. to accord with the ſpecialty*, and becauſe ſhe has loſt her ſurname by taking of the baron, and is named J. N. therefore the writ was abated by award; but it was ſaid that the name of daughter, ſiſter, or coſin, may remain, &c. And it ſeems that *alias dicta* would have ſerved here. Br. Brief, pl. 92. cites 2 H. 4. 1.

4. Writ of *debt* was abated, becauſe it was *againſt J. K. of G. in the county of C.* where the *obligation was J. K. of G. without naming of the county of C.* &c. But at this day this is remedied by an *alias dictus*. Br. Variance, pl. 25. cites 2 H. 4. 24.

(K. a) What ſhall be ſaid to be Variance.

1. *ASSISE of a robe of 20 s. price.* The defendant demanded what he had of the robe, *who ſhewed deed which willed a robe with furr of the price of 20 s. and* yet per cur. becauſe it is *intended parcel of the robe*, the plaint nor the writ was not abated by the variance. Br. Variance, pl. 67. cites 22 Aſſ. 10.

2. In debt the writ was præcipe *prior of T.* quod reddat, and *the obligation was prior of the monaſtery of T.* and for this omiſſion
[48] of (monaſtery) the writ was abated for the variance. Br. Variance, pl. 13. cites 40 E. 3. 25.

3. Waſte by him in remainder, who was compelled to ſhew deed, and ſo he did, and the *deed was J. ſon of W. of T.* and the *writ was J. of T.* and becauſe all was of one and *the ſame intendment*, therefore well. Br. Variance, pl. 14. cites 41 E. 3. 23.

4. *But* becauſe the *writ willed it to remain to him and his heirs*, and the *ſpecialty was to him and the heirs of his body*, therefore for this variance the writ was abated. Br. Variance, pl. 14. cites 41 E. 3. 23.

5. *Replevin was Henry abbot of D.* and the *pone*, which was brought at the ſuit of the plaintiff, *was abbot of D. without Henry*, and

and therefore the replevin was abated; quod nota; and therefore no return awarded. Br. Variance, pl. 15. cites 41 E. 3. 24.

6. Protection and writ varied, becauſe the one was *militi* and the other *chevalier*, and yet awarded good; quod nota; for they have one and the ſame intendment, as it ſeems. Br. Variance, pl. 17. cites 42 E. 3. 9.

7. Debt upon an obligation. The *obligation was Alice, who was the wife of R. B.* and the *writ was Alice heretofore wife of R. B.* and becauſe (was wife) and (heretofore wife) have one and the ſame intendment, therefore the writ was awarded good; quod nota. Br. Variance, pl. 4. cites 3 H. 6. 17.

8. Debt againſt 3 upon *an obligation*, which *was that A. B. and C. yeomen, were bound*, &c. and the *writ was by this word (yeoman) after every one of their names*, and well, and no variance; for this is by neceſſity of the ſtatute of additions. Quod nota. Br. Variance, pl. 5. cites 3 H. 6. 23. Br. Additions, pl. 3. cites S. C.—Br. Nugation, pl. 1. cites S. C.

9. In debt the writ was againſt an executor, ſcilicet, J. B. *executor of the teſtament of W. B. brother of the ſaid W.* where the *teſtament is (his brother)* and yet well; for it is all the ſame in effect. Br. Variance, pl. 83. cites 9 H. 6. 19.

10. The record was treſpaſs againſt *A. B. of O. in the county of H. Eſq;* and the *protection was A. B. of O. Eſq; in the county of H.* alias dictus A. B. of O. Paſton ſaid, it ſhall not be allowed for the variance; but Aſcue and Fulth. ſaid yes; for it has *ſufficient intendment* to be one and the ſame perſon. Br. Variance, pl. 47. cites 22 H. 6. 3. Br. Protection, pl. 54. cites S. C.

11. *Debt of* 40 *s.* upon an obligation. The defendant demanded judgment of the count for the variance; for he *counts of* 6 *l. Flemiſh, as the obligation was*, and that 40 s. ſterl. and 6 l. Flemiſh, were one and the ſame ſum. Quære; for it was not adjudged. Br. Variance, pl. 9. cites 34 H. 6. 12.

12. In caſe the *writ was for raiſing of the yard*, and the *declaration is for exalting the yard, and making a gutter therein*; and ſo there is more comprized in the declaration than in the writ; and for this cauſe the court held it ill, and not aided by the ſtatute of 18 Eliz. Cro. E. 829. pl. 34. Paſch. 43 Eliz. Norton v. Palmer.

(L. a) By * Death of the Plaintiff.

1. IN writ by executors, the death of him who is ſevered ſhall not abate the writ; per judicium. Thel. Dig. 178. lib. 12. cap. 1. ſ. 5. cites Trin. 5 E. 2. Br. 802. and ſays, that ſo it was adjudged in treſpaſs brought by executors, Trin. 16 E. 2. Executors 111. and that ſo agrees 3 H. 7. 1. but ſays the contrary is adjudged Paſch. 38 E. 3. 13. and Hill. 20 E. 3. Accompt 78.

* By the *ſpiritual law*, the death of the party never ſhall abate any ſuit. 2 Roll Rep. 20 Paſch. [49] 16 Jac. B. R. Dobſon v. Scott.

—*Wherever the death of any party happens pending the writ, and yet the plea is in the ſame condition as if ſuch party were living, there ſuch death makes no alteration*; for where the death of the parties makes no change of proceeding, it would be unreaſonable that the ſurviving parties ſhould make any alteration in the writ; and it would be abſurd, that what made no alteration ſhould change the writ and the proceſs; and on this rule all the diverſities turn. G. Hiſt. of C. B. 195.

But it was adjudged, that writ of aiel ſhall abate by death of one of the demandants who was ſevered. Thel. Dig. 179. lib. 12. cap. 1. ſ. 6. cites Hill. 5 E. 3. 174. and that ſo it is adjudged Mich. 19 R. 2. Brief 925. and 37 H. 6. 11. in formedon; but the contrary is adjudged Hill. 42 E. 3. 28. in ſcire facias.

In aſſiſe by 2, if the one be ſevered, the writ ſhall not abate by the death of him who is ſevered. Thel. Dig. 179. lib. 12. cap. 1. ſ. 12. cites 38 E. 3. 43. per Thorp.

It is held, that in writ of ward of the body by two, the writ ſhall not abate by the death of him who is ſevered: but the contrary is held in writ of ward by parceners, inaſmuch as he who ſurvives, and the heir of the other, ſhall have re-ſummons by the ſtatute. Thel. Dig. 179. lib. 12. cap. 1. ſ. 13. cites Mich. 38 E. 3. 43. Quære. ——— So it is held, that in aſſiſe by parceners, the writ ſhall abate by the death of him who is ſevered; and ſo of jointenants after the ſeverance. But, per Davers, the aſſiſe ſhall not abate by the death of one of the plaintiffs jointenants before the ſeverance. Thel. Dig. 179. lib. 12. cap. 1. ſ. 12. cites Mich. 37 H. 6. 11.

In formedon it was ſaid, that where 4 *bring formedon, and one is ſummoned and ſevered*, and the others proſecute the ſuit, and *he who is ſevered dies*, that this ſhall abate the writ. Quære. Br. Brief, pl. 119. cites 11 H. 4. 19, 20. ———In ſuch caſe, it was held by Priſot and Danby, that the writ ſhould abate. Contra Moyle and Needham; and ſee 38 E. 3. 11. 36. that the writ ſhall abate; contra 16 E. 3. and H. 42 E. 3. 2. and ſee joinder with an alien 11 H. 4. 26. and 39 E. 3. 13. But Priſot agreed, that where he who ſurvives may recover the whole, there the death of the one ſhall not abate the writ, as in writ of ward, or quare impedit. Contra where he who ſurvives ſhall not recover but a moiety; for the writ is falſe when one is dead; and alſo when the one recovers the moiety, the other may enter with him; and ſo the beſt opinion was, that the writ ſhall abate. Br. Brief, pl. 231. cites 37 H. 6. 9.

If two ſue a *ſtatute-merchant*, and one dies *before execution*, it ſhall go on.

2. Where 2 ſued execution of a ſtatute-merchant, the one died, and the other was compelled to ſue new writ upon his caſe. Thel. Dig. 179. lib. 12. cap. 1. ſ. 8. cites Hill. 25 E. 3. 38.

In the caſe of defendants 'tis different; proceſs is expreſsly given upon the ſtatute-merchant; per Bridgman Ch. J. in delivering the opinion of the court. Cart. 195. Paſch. 19 Car. 2. C. B. in caſe of Law v. Tothill & Rawlins.

S. P. D. 279. b. pl. 8. cites 1 H. 5.

3. The death of the *one plaintiff in monſtraverunt* ſhall not abate the writ. Br. Brief, pl. 145. cites 38 E. 3. 35.

Thel. Dig. 179. lib. 12. cap. 1. ſ. 5. cites S. C. that the writ abated, notwithſtanding that he who died had only an eſtate for his life, and the fee was in the other who ſurvived.

4. *Two brought writ of warrantia chartæ*, and the *one died*, and the writ was abated; and yet another writ may be brought in the name of the other after the aſſiſe determined; for no default is in the plaintiff, quia cauſa mortis. Br. Brief, pl. 82. cites 48 E. 3. 22.

S. P. Br. Brief, pl. 145. cites 38 E. 3. 35. ——— *Three brought quid juris clamat upon grant of reverſion by fine to them, and to the heirs of one*, and the *one, who had for term of life only died, pending the writ*; and yet the writ awarded good. Br. Brief, pl. 83. cites 48 E. 3. 31. ——— S. P. Thel. Dig. 179. lib. 12. cap. 1. ſ. 9. cites 48 E. 3. 32. and ſo agrees Paſch. 18 H. 6. 2.

5. In *quid juris clamat* by two, if the one dies the writ ſhall not abate. Br. quare impedit, pl. 67. cites 48 E. 3. 31 & 32.

6. In debt by 3, after iſſue and the darrein continuance, it was pleaded, that one of the plaintiffs, viz. Jo. Dale, was dead; to which plea, his attorney and the 2 other plaintiffs imparled; and at the day given, he who was alleged to be dead appeared in proper perſon; but the attorney of the defendant ſaid, that Jo. Dale was dead, and would not ſay any thing elſe; by which the plaintiffs had judgment to recover, becauſe the juſtices ſhall adjudge, if he who now appears, and he who made the attorney, be the ſame perſon or not. Thel. Dig. 179. lib. 12. cap. 1. ſ. 11. cites Trin. 34 H. 6. 45.

7. In

7. In homine replegiando by 3, quære if the writ ſhall abate by the death of one of them. Thel. Dig. 179. lib. 12. cap. 1. ſ. 14. cites 8 E. 4. 16.

8. Aſſiſe of an office by two joint patentees ſhall abate by the death of one of them. Thel. Dig. 179. lib. 12. cap. 1. ſ. 18. cites Paſch. 9 E. 4. 5.

9. It is ſaid, that in writ of error of judgment given againſt the tenant in præcipe quod reddat of land, the death of one of the plaintiffs in the writ of error ſhall abate the writ. Thel. Dig. 179. lib. 12. cap. 1. ſ. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

So in dower there was *judgment by default*, and a *writ to inquire if the huſband died ſeiſed, and of what eſtate*, either in fee or tail, and judgment thereon, and a *writ of error brought*, and *after the record removed the widow died*; per cur. The writ ſhall not abate. Yel. 112. Mich. 5 Jac. B. R. Bromley v. Littleton.

But where R. had *judgment in* an action on the *caſe againſt* 2, in C. B. and *they brought a writ of error* in B. R. and *before the errors were diſcuſſed one of the plaintiffs in error died*; it was adjudged that the writ ſhall abate, and that R. is put to his ſcire facias againſt the executor of him that is dead. Yelv. 208. Mich. 9 Jac. B. R. Spenſer and Woodward v. the Earl of Rutland.

In *writ of error by* 2, and one dies pending the writ, the plaintiff in the original action, by entering a ſuggeſtion on the roll that one of the parties in error is dead, may take out *execution on the judgment*, without ſuing out a *ſcire facias* either againſt the heir or executor of the dead perſon. 8 Mod. 108. Mich. 9 Geo. Pennoire v. Brace.

10. The death of one of the plaintiffs in audita querela ſhall not abate the writ, becauſe the ſuit is only to diſcharge them. Thel. Dig. 179. lib. 12. cap. 1. ſ. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

S. P. Cro. J. 16. pl. 4. Mich. 1 Jac. B. R. Leigh and Brown v. Bargany.

11. The death of one of the executors plaintiffs ſhall not abate the writ. Thel. Dig. 179. lib. 12. cap. 1. ſ. 16. cites Hill. 3 H. 7. 1. and 2 R. 3. 1. Quære.

But in all actions, where one of the plaintiffs dies the writ abates, *except* in actions *brought by two executors*, per cur. And Hale Ch. J. ſaid, that ſo it ſhould in a *quare impedit*, but that it is revivable by Journey's accounts. Vent. 235. Hill. 24 & 25 Car. 2. B. R. Dacres v. Duncomb.

12. Two *grantees of a next preſentation brought quare impedit; one died pending the writ.* Three juſtices held that the writ ſhould abate. D. 279. pl. 8. Mich. 10 & 11 Eliz. Anon.

13. Under-leſſee and his aſſignee of part of the land for years being ſued in the ſpiritual court for *tithes*, join in a *prohibition*; the prohibition ſhall not abate by the death of one of them, becauſe *nothing is to be recovered*, but they are only to be *diſcharged* of tithes. Owen. 13. Hill. 36 Eliz. B. R. Bartue's caſe.

14. *Avowry by two*, one dies where the avowry was made *en auter droit*, the ſuit ſhall not abate; otherwiſe if in *their own* right. Mo. 395. pl. 513. Hill. 37 Eliz. Short v. Tucker & al'.

15. If 2 *jointenants bring treſpaſs*, and one dies, the action is gone, per tot. cur. for on the plaintiff's part, if one dies all the writ or bill ſhall abate, unleſs in caſe of neceſſity, as in a *quare impedit*, where the 6 months peradventure might be paſſed, ſo as if the bill ſhould abate, the action failed. Cro. J. 19. pl. 4. Mich. 1 Jac. B. R. Leigh and Brown v. Bargany.

If there be 2 *jointenants* or copartners, and they *bring a real action*, and *one is ſummoned and ſevered*, the other ſhall proceed for his moiety; and if the *perſon ſevered dies*, the writ abates, becauſe he goes [on] for the whole, in caſe of the death of the jointenant, or of the coparcener, without iſſue; and it would be improper to do it on that writ, where by the ſummons and ſeverance he went [on] only for

for a moiety before, and the writ cannot have a double effect to go on for a moiety in case of summons and severance, and for the whole in case of survivorship. And therefore, since the *state of the things is changed* by the death of one of the parties, there must be a new writ. G. Hist. of C. B. 197.—— And it is the *same law, if* such *jointenants* should *proceed without summons or severance*; for since both by the writ might by possibility recover their moiety, they shall not go on for the whole in case of survivorship, because the words and effect of the writ, at the time of its first purchasing, * was, that each might recover his moiety; and therefore a new writ must be purchased to enable one to proceed for the whole. G. Hist. of C. B. 197.

But in personal and mixt actions, where there is summons and severance, the plaintiff goes on for the whole, there, if one of them dies, yet the writ shall not abate, because they go on for the whole after summons and severance; and if they were to have a writ, it would only give the court authority to go on for the whole. G. Hist. of C. B. 197.

*[51] 16. In *trover* brought *by* 2 *plaintiffs*, the defendant pleaded, that pending the action *one of the plaintiffs died*. Adjudged that the trover being brought for the goods of both, the action survives to the other. 2 Bulst. 262. Mich. 12 Jac. Spring v. Barrett.

17. *Before a judgment*, if there be *two plaintiffs*, and *one dies*, though the interest survives, the writ shall abate, so 'tis in *debt*, *trespass*, &c. though if *one of the defendants die*, the writ shall not abate. Cart. 190. per Bridgman Ch. J. in delivering the opinion of the court, in case of Law v. Tothill & Rawlins, Pasch. 19 Car. 2. C. B.

18. It was held per cur. that where *four took out a bill of Middlesex*, by the death of one of them the writ abated; and a *new writ* should have been taken out in *the name of* the three *survivors*, *by Journies accounts*; and when *one of them died* the bill abated, and a *new bill* should have been taken out *in the name of the two survivors only*, *by* Journies accounts. 12 Mod. 188. Pasch. 10 W. 3. B. R. Temple v. Bishop.

6 Mod. 290. S. C. and judgment affirmed accordingly. 11 Mod. 34. S. C. and judgment accordingly.

19. *Fieri facias* abates not by the plaintiff's death, and the sheriff may proceed in the execution; for he has nothing to do with the plaintiff, for the writ commands him to levy and bring the money into court, which the plaintiff's death does noways hinder; besides, an execution is an entire thing, and cannot be superseded after it is begun. 1 Salk. 322. pl. 10. Mich. 3 Ann. B. R. Clerk v. Withers.

See (A. b)

(M. a) By Death of the Defendant.

But writ of *formedon against jointenants* shall abate by the death of one them, per judicium.

1. IN *mortdancestor* against *jointenants*, the writ shall not abate by the death of one of them, nor in *scire facias*, inasmuch as the survivor has all by right of survivor; but it is otherwise of *parceners*. Thel. Dig. 180. lib. 12. cap. 2. s. 5. cites Tempore E. 1. 857, 858. and says, see 40 Ass. 15. and 43 E. 3. Thel. Dig. 181. lib. 12. cap. 2. s. 26. cites Pasch. 43 E. 3. 16. and 9 H. 6. 57.

In *assise against two jointenants*, if the *one dies* pending the writ, the writ shall abate; but if one of the * disseisors dies, yet the writ is good if the other disseisor be alive. Br. Brief, pl. 291. [295] cites 27 Ass. 45.

* The large edition is (disseisees,) but the others, and the Year-book, are (disseisors.)

2. In *assise of common* of pasture against two, the death of one who is not tenant of the waste out of which, &c. shall not abate

abate the writ. Thel. Dig. 180. lib. 12. cap. 2. ſ. 4. cites Tempore E. 1. Br' 864.

3. In *aſſiſe againſt two*, where *the one the day of the writ purchaſed was ſole tenant*, and *pending the writ infeoffed the other and a ſtranger not named* in the writ, and after the *feoffor died*, by which the writ was abated by judgment. Thel. Dig. 180. lib. 12. cap. 2. ſ. 7. cites Mich. 1 E. 3. 22. and 1 Aſſ. 12.

4. In *præcipe quod reddat againſt three*, who *at the grand cape returned gaged their law of non-ſummons in common*, and at the day given, &c. *two came and ſaid that the third was dead*, ſed non allocatur, by which they two made their law, and the writ abated for two parts, and the * demandant recovered the third part. Thel. Dig. 180. lib. 12. cap. 2. ſ. 9. cites Mich. 6 E. 3. 278.

But it is held, that ſuch death is pleadable to the writ, *without ſaying the default*. Thel. Dig. 180. lib. 12. cap. 2. ſ. 9. cites 20 H. 6. 2. and 21 E. 4. 19. 95.

5. In a *writ of right patent* removed by pone *unde ſuch a one held ſo much, and a feme and her ſon held ſo much*, & ſic de ſingulis, &c. It was *pleaded that the feme was dead*, by which it was adjudged that the writ ſhould *abate as to this (unde) notwithſtanding it was alleged that her ſon was ſole tenant*. Thel. Dig. 180. lib. 12. cap. 2. ſ. 11. cites Hill. 7 E. 3. 300. * [52]

6. In writ of entry againſt Dioneſe and one Ro. at the day of the grand cape returned againſt Dioneſe, ſhe made default, by which Ro. took the entire tenancy abſque hoc that Dioneſe any thing had, and the demandant ſaid that they held in common, &c. And upon this to iſſue, and after Dioneſe died, by which the opinion was that the writ ſhould abate, notwithſtanding that each was eſtopped againſt the other. And therefore the demandant waved his writ. Thel. Dig. 180. lib. 12. cap. 2. ſ. 12. cites Trin. 7 E. 3. 325.

7. In writ by ſeveral præcipes, the death of the tenant in one præcipe ſhall not abate all the writ. Thel. Dig. 180. lib. 12. cap. 2. ſ. 14. cites Paſch. 9 E. 3. 449. Brief 945. 729. 12 H. 6. 2.

8. In *writ againſt two*, if the *one diſclaims* the writ ſhall not abate by his death, quod fuit conceſſum. Thel. Dig. 180. lib. 12. cap. 2. ſ. 16. cites Paſch. 10 E. 3. 509. and Mich. 13 E. 3. Brief 678. and Mich. 14 E. 3. Procedendo 4.

9. In *writ of right or* of *eſcheat by the king againſt ſeveral*, the writ ſhall not abate by the *death of one* of them. Nor in *ſcire facias* ſued *out of a petition ſued to the king*. Thel. Dig. 181. lib. 12. cap. 2. ſ. 18. cites Paſch. 13 E. 3. Br. 260. and 7 H. 4. 33. and ſays, ſee Trin. 27 E. 3. 83. Quære.

10. In *writ of meſne againſt two parceners*, they *were forejudged*, and after the one of them and the heir of the other joined in writ of error, and aſſigned for error that the *one of the parceners was dead before the judgment* given in the writ of meſne. And adjudged a good plea to reverſe the judgment, notwithſtanding that the ſurvivor might have pleaded the death of her ſiſter in the writ of meſne; for death ſhall abate the writ without plea. Thel. Dig. 181. lib. 12. cap. 2. ſ. 21. cites 19 Aſſ. 8. and ſays, ſee 20 H. 6. 2. agree-

6. 2. agreeing, and 18 E. 4. 20. and Trin. 2 H. 5. 9. agreeing, that the writ by death ſhall abate immediately.

11. Death *of diſſeiſor* in aſſiſe of land ſhall not abate the writ *if* there is *another diſſeiſor and tenant alive.* Thel. Dig. 180. lib. 12. cap. 2. ſ. 4. cites 23 Aſſ. 10.

Regularly *judicial writs* ſhall not abate by the death of one of the plaintiffs, per Bridgman Ch. J. in delivering the opinion of the court.

12. Aſſiſe *by baron and feme who recovered* the land and damages, and *after the year they* ſued *ſcire facias againſt the tertenants* to have execution of the damages, and one came and ſaid that the baron is dead, judgment of the writ; and upon nient dedire the writ abated. And ſo ſee that *judicial writ, in which a man has day to anſwer,* may abate by plea. Br. Brief, pl. 293. cites 28 Aſſ. 45.

Cart. 194. Paſch. 19 Car. 2. C. B. Law v. Tothill and Rawlins.

13. In *debt againſt* 2 *upon a joint contract,* the *one was outlawed,* and the *other pleaded that he who was outlawed died before the outlawry* pronounced; and adjudged a good plea, and that the writ ſhould abate. Thel. Dig. 181. lib. 12. cap. 2. ſ. 39. cites Trin. 40 E. 3. 26.

Three recovered againſt J. N. and he brought *writ of error and ſcire facias* thereupon, and the ſheriff returned the one dead, and the other two warned, and yet the writ good per Keble and Wood; for the plaintiff is not to recover any thing, but to be diſcharged of the firſt judgment: but Vaviſor contra; for he is to be reſtored, and reſtitution cannot be awarded againſt a dead perſon. Br. Brief, pl. 310. cites 3 H. 7. 1.——Thel. Dig. 182. lib. 12. cap. 2. ſ. 42. cites S. C. and Trin. 14 H. 7. fol. ultimo, That in writ of *error of a judgment* given *in a perſonal action* brought *againſt* 3 who were *plaintiffs in the firſt action,* the death of the one ſhall abate the writ; per opinionem.

14. In writ of *error againſt the heir of the party and* againſt the *tenant,* the *heir died pending the writ,* and yet the writ ſtood againſt the tenant, and ſcire facias granted againſt the heir of the heir. Thel. * Dig. 181. lib. 12. cap. 2. ſ. 25. cites 42 Aſſ. 22. in fine. And 44 E. 3. Brief 584. agreeing.

A *writ of error* was brought *againſt* 2 *upon a recovery in a præcipe quod reddat,* and *one* of them *died*; the queſtion was, if it ſhould abate? It was inſiſted, that it ſhould not, becauſe it is no more than a commiſſion to examine the record, and the party ſhall recover nothing thereby; and it is not like a præcipe. But the juſtices ſaid, that if the recovery were in a *real action,* as here it was, the writ ſhall abate; for the judgment is, that he ſhall be reſtored to the land. But if error be brought on a recovery in a *perſonal action,* it is otherwiſe; and that ſo is 3 H. 7. 1. Godb. 66. pl. 79. Mich. 28 & 29 Eliz. B. R. Anon.——Godb. 68. pl. 82. Mich. 28 & 29 Eliz. B. R. Sir Edward Hobby's caſe, ſame difference taken; and Gawdy and Clench juſtices bid them bring a new writ of error; for that is the ſureſt way.

Error was brought *upon a judgment* in B. R. and pending the writ one of the parties died; per cur. The writ ſhall abate. Trin. 30 Eliz. Goldſb. 98. pl. 18. Trin. 30 Eliz. Anon.

In a *writ of error,* if the *defendant dies,* the writ is not abated; but it is otherwiſe if the *plaintiff dies.* And the ſecondary informed the court of the caſe of Thynn and Corie, where the defendant in error died, and a ſcire facias ad audiendum errores went againſt the executors. Vent. 34. Trin. 21 Car. 2. B. R. Anon.

*[53]

In ejectione firmæ againſt 2, after verdict for the plaintiff, and before judgment one of the defendants died; and adjudged that the writ ſhould ſtand good againſt the ſurvivor. Goldſb. 80. pl. 16. Hill. 30 Eliz. Clayton v. Lawſell.——In *ejectment, between the firſt day of aſſize and verdict* the *defendant died*; and upon affidavit of this fact the defendant's counſel moved to ſtay execution; and ſaid this was not helped by 17 Car. 2. and quoted 1 Sid. 131. Hard. 51. where the like motion had been granted, and as often denied; but per cur. Let things ſtay till notice of motion to plaintiff; but after the court held the judgment well entered. 12 Mod. 241. Mich. 10 W. 3. B. R. Robertſon v. Moor.

15. *Ejectione firmæ* ſhall not abate by the death of one of the defendants. Thel. Dig. 181. lib. 12. cap. 2. ſ. 27. cites Trin. 44 E. 3. 22.

16. In *ſcire facias of damages recovered in aſſiſe* againſt 2, if the one dies the writ ſhall not abate, if he be only *diſſeiſor and not tenant*. Thel. Dig. 181. lib. 12. cap. 2. ſ. 28. cites Mich. 47 E. 3. 7.

17. In *writ of ward againſt* 2, the ſheriff *returned that the one was dead*. Thel. Dig. 181. lib. 12. cap. 2. ſ. 31. cites 50 E. 3. 7. Quære.

But *ejectment of ward, and raviſhment* of ward, ſhall not abate by the death of one of the defendants. Thel. Dig. 181. lib. 12. cap. 2. ſ. 31. cites Mich. 12 H. 4. 10.

18. In debt againſt 2, at the capias the ſheriff returned cepi corpora of both, &c. yet the one of them was received to ſay that the other was dead, and abate the writ notwithſtanding the return. Thel. Dig. 181. lib. 12. cap. 2. ſ. 30. cites Hill. 50 E. 3. 7.

19. In *audita querela againſt* 2, the *one* of them *died after iſſue joined, and the niſi prius ſued*; by which it was held by the court, that the original ſhould not abate, but that he ought to ſue a new venire facias. Thel. Dig. 181. lib. 12. cap. 2. ſ. 32. cites Hill. 11 R. 2. Brief 638.

20. *Detinue of charters againſt* 2 *executors*; the *one died* pending the writ, and all the writ abated. Quod nota; for *otherwiſe in* writ of *treſpaſs*. Br. Brief, pl. 96. cites 2 H. 4. 18.

Br. Executors, pl. 123. cites S. C. ——S. P. Thel. Dig. 181. lib. 12. cap. 2. ſ. 34. cites Paſch. 2 H. 4. 25. ——*So* in debt againſt executors, the *one died pending the writ*; and by the opinion of the court the writ ſhall abate againſt all. And Littleton prayed judgment that it ſhould abate, to the intent to have a new writ againſt the others, and had it; for to his intent the writ is abated in law by the death of the one, but is not abated in fact till judgment be given. Br. Brief, pl. 232. cites 37 H. 6. 16. ——Thel. Dig. 181. lib. 12. cap. 2. ſ. 34. cites S. C. ——In debt *againſt three executors, if one dies* pending the writ, the writ ſhall abate; but on ſurmiſe of this by plaintiff's counſel, a new writ was granted by Journey's accounts. Le 44. pl. 57. Mich. 28 & 29 Eliz. C. B. Knight's Caſe.

[54]

21. In *treſpaſs againſt ſeveral*, who *pleaded not guilty*, notwithſtanding that *one* of them *died after verdict* found againſt them, and before judgment, yet the writ did not abate, unleſs againſt the deceaſed, and the plaintiff recovered againſt the others. Thel. Dig. 181. lib. 12. cap. 2. ſ. 36. cites Trin. 2 H. 6. 12.

Br. Treſpaſs, pl. 7. cites S. C. but ſays, that 3 H. 4. 5. and 21 H. 6. 22. there is a *diverſity* where it is by *joint* venire facias *and* where by *ſeveral venire* facias's. ——In treſpaſs *againſt* 4 in B. R. by one, and the *one died* meſne *between the niſi prius and the day in bank*; and therefore the plaintiff prayed judgment againſt the others; but Markham ſaid he might have *judgment againſt all*, for none can have error but the executors of the deceaſed, and not the other defendants: and ſo it ſeems, that he may have judgment againſt the others, for the writ *ſhall not abate but againſt him who is dead*, and not againſt the others. Br. Brief, pl. 357. cites 5 E. 4. 6, 7.

In *treſpaſs, &c. againſt* 4 defendants, *one* of them *died before the verdict*, and the *jury found* them *all guilty*, and aſſeſſed damages, &c. The court was moved, that the plaintiff might have judgment againſt the other 3. Roll Ch. J. ſaid, that upon his *relinquiſhing the damages* as to him who was dead, he may have judgment againſt the reſt. Sty. 209. Mich. 1651. Preſton v. Mortlock.

So in treſpaſs upon 5 R. 2. *againſt* 3, they were at iſſue, and *after iſſue one died*, and notwithſtanding this, *diſtringas was awarded againſt all*; which matter was after alledged in arreſt of judgment, and that the writ ſhould abate; & non allocatur, for though it was ill againſt the dead perſon, yet it was good againſt the others. Br. Brief, pl. 314. cites 4 H. 7. 7.—Br. Repleader, pl. 29. cites S. C.

In *treſpaſs againſt* 2, and *after iſſue* joined, *and puis darrein continuance, one* of them *dies*, the plaintiff may, *at the trial, get his default recorded*, and proceed to trial, and have a verdict againſt the other; and he may *before judgment* come and *ſuggeſt the death* of the defendant who died, and have judgment againſt the other. And taking the inqueſt againſt one, where there are two defendants, and one of them dies puis darrein continuance cannot be error, if the default of the other be recorded, and his death be ſuggeſted before judgment; and one cannot plead death of a party in abatement puis darrein continuance; per Holt Ch. J. 12 Mod. 668. Hill. 13 W. 3. B. R. Anon.

22. And

* Br. Brief, pl. 160. cites 7 H. 6. 21. S. C. and P. For proceſs cannot be entered againſt a dead perſon, nor it cannot be continued againſt one where it was againſt two at the firſt. Br. Brief, pl. 160. cites 7 H. 6. 21.

22. And if the *one dies after the niſi prius granted, and before the inqueſt taken*, the writ ſhall ſtand, and a new venire facias ſhall be awarded. Thel. Dig. 181. lib. 12. cap. 2. ſ. 36. cites Paſch. * 7 H. 6. 23. 3 H. 7. 5. 10 H. 6. 10. 4 H. 7. 7.

But in ſuch caſe the proceſs againſt the inqueſt was continued and taken, and held. Thel. Dig. 181. lib. 12. cap. 2. ſ. 36. cites 4 H. 7. 7.

23. In detinue, if the defendant dies after the garniſhment, the writ ſhall abate. Thel. Dig. 181. lib. 12. cap. 2. ſ. 37. cites Paſch. 21 H. 6. 39.

24. In writ of *forcible entry againſt* 2, the *one* had *made default after the declaration* and appearance, and *the other was at iſſue*, and after the niſi prius granted, the plaintiff ſaid that *he who was at iſſue died after the laſt day*, &c. and the attorney of the defendant tendered to aver the life of his maſter, and was not received, but the plaintiff prayed writ to enquire of the damages againſt the other. Thel. Dig. 181. lib. 12. cap. 2. ſ. 38. cites Hill. 31 H. 6. 15.

Br. Brief, pl. 489. cites S. C. ——Thel. Dig. 181. lib. 12. cap. 2. ſ. 27.

25. *Conſpiracy* againſt 2; the one pleaded that his companion is dead pending the writ, and no plea to the writ. Per cur. The reaſon ſeems to be, becauſe it may be found that the defendant, and he who is dead, conſpired. Br. Brief, pl. 376. cites 18 E. 4. 1.

ſays, it was touched Trin. 44 E. 3. 22. that writ of conſpiracy againſt two ſhall abate by the death of one of them; but cites the caſe 18 E. 4. 1. above contra; and ſays, ſee Mich. 22 R. 2. Br. 888. Quære.

26. In *treſpaſs againſt* 2, the plaintiff at the aſſizes ſaid, that *one of the defendants died after the laſt continuance*, and prayed the juſtices to proceed to take the inqueſt againſt the ſurvivor only, and ſo they did; and the plaintiff had judgment. D. 175. a. pl. 24. cites Mich. 9 H. 7. Rot. 292.

27. The *death of the defendant in writ of warrantia chartæ* ſhall not abate the writ of warrantia chartæ, which is ſo expreſſed, that if the warrantee dies pending the plea, by this the writ ſhall [55] not be quaſhed, but his heir ought to be re-ſummoned to anwer to the ſame writ. Br. Brief, pl. 409. cites the Regiſter, fol. 158.

28. In *attaint* between H. and J. in B. R. and pending the writ J. died. The writ ſhould not abate by reaſon of the ſtat. of 23 H. 8. [cap. 3.] upon which this attaint was brought. D. 129. b. pl. 65. Paſch. 2 & 3 Ph. & Ma. Heydon v. Ibgrave.

In replevin againſt 2, they were at iſſue, and afterwards *one* of them *died*. The

29. In *replevin*, after verdict for the plaintiff, the defendant's counſel, as amicus curiæ, alleged *that one of the defendant's died after the laſt continuance*. The Court, præter Brown J. after adviſing a long time, held that the writ ſhall not abate. D. 175. pl. 24. Mich. 1 & 2 Eliz. Sackvill's caſe.

other moved that the writ might abate; but the opinion of the court was that it ſhould not abate, but ſtand good againſt him; and Walmſley ſaid he had known it twice ſo adjudged in his time. Cro. E. 574. pl. 17. Trin. 39 Eliz. C. B. Wythers v. Rooks & Smith.

30. In a writ of *entry ſur diſſeiſin* againſt Sir H. R. *tenant for life*, who *made default* after default. He in *reverſion was received*, and the *jury found againſt the demandant;* but after the trial, and *before the day in bank, the tenant for life died.* Afterwards the appearances of the demandant and tenant by receipt, by their attornies, were recorded; and the demandant pleaded the death of the tenant for life, and prayed that the writ might abate, and that judgment might not be entered againſt him; but the tenant by receipt moved, that upon the return of the poſtea the judgment might be entered, and would not anſwer to the death. The court doubted what to do, and would adviſe. D. 258. b. pl. 17. Hill. 9 Eliz. Sir Humphrey Ratcliff's caſe, alias the Earl of Suſſex's caſe. Ibid. Marg. ſays, it ſeems that by his death the writ ſhall abate, becauſe no judgment can be given againſt a dead perſon, and cites 21 H. 6. 11. 9 H. 7. 23. 20 H. 7. 10. and ſ[illegible], that in *præcipe quod reddat againſt baron and feme*, the *baron made default*, and the *feme was received, and traverſed the action, and* it was *found againſt her*; and after the feme ſaid, that her *baron died after the verdict*; and yet the plaintiff had judgment to recover. Cites Mich. 27 E. 3. 88. Fitzh. Judgment 193. and cites 9 H. 4. 1. that one died after verdict, and yet judgment was given for the plaintiff, who was dead; but ſays, ſee in Waſte that the writ was abated Mich. 34 E. 1. Fitzh. Brief 854. and ſays, ſee Fitzh. Brief 202. and Quare Imp. 71. and Monſtrans 7. ——— Le. 187. pl. 264. Trin. 31 Eliz. in Isley's Case, cites it as lately adjudged in Derick James's Case, who died the day after the verdict, and yet judgment was not ſtayed; becauſe the court after verdict cannot examine ſurmiſes, and they have not a day in court to plead.

31. In account, if the *defendant is awarded to account, and does* account, *and is found in arrears, and dies*, the writ ſhall not abate, but the executors ſhall be charged; per Manwood J. Le. 263. pl. 352. 19 Eliz. in C. B. Anon. 3 Le. 68. pl. 103. Mich. 20 Eliz. C. B. S. C. in the ſame words. ——— If the *defendant* in account *dies before the ſecond judgement*, the writ ſhall not abate. Noy. 146. in caſe of Cutter & Ux' v. Barber & Ux'. ——— *But* if the *plaintiff* in action of account *dies before the ſecond judgment*, the writ ſhall abate. Brownl. 25. Anon. ——— But Cro. J. 356. Mich. 12 Jac. B. R. Metcalf v. Wood is, that the death of any of the parties in account, before the 2d judgment, abates the writ.

If *two be adjudged to account*, and proceſs iſſues, and *one dies*, the other ſhall account alone. Brownl. 25. Anon.

32. *Aſſumpſit againſt* 2. The plaintiff had a verdict, and *before the day in bank one of the defendants died;* and after judgment the *ſurviving defendant brought a writ of error*, and it was clearly agreed, that the death of one of the parties did abate the writ, and the judgment was reverſed. Cro. E. 105. pl. 19. Trin. 30 Eliz. B. R. Meggot v. Broughton. 2 Le. 54. pl. 77. Mich. 29 Eliz. B. R. Meggot and Broughton and Davie's caſe, S. C. And it was ſaid that the caſe is not like the caſe of an action of treſpaſs; for every treſpaſs done by many is ſeveral by each of them; but every aſſumpſit is joint, and not ſeveral.

33. Death of one defendant in *debt* abates the whole, but not in *treſpaſs*. Noy 72. in the ſheriff of Nottingham's caſe. [56]

34. *Eſcape againſt two ſheriffs, one died*, the court gave no opinion. Noy 72. ſheriff of Nottingham's caſe. Caſe, &c. againſt P. and B. ſheriffs of London, for an eſcape on meſne proceſs. After trial by niſi prius, and before the day in bank, B. died; and this was ſuggeſted by affidavit, without entering it on the roll, becauſe no roll is made till after the term, and then it would be too late. It was moved, that the ſuit ought to abate, as in an action of debt, accompt, or caſe againſt 2 upon a joint contract, or againſt executors, where one dies the action falls; but it was anſwered, that an eſcape is in nature of a treſpaſs, and a tort, and committed by both and each of them; for they are diſtinct perſons, though but one officer; and 'tis not like a contract which is intire, and cannot be ſevered in judgment, but like treſpaſs againſt huſband and wife, which, though but one perſon in law, yet if the huſband dies the ſuit ſhall proceed againſt the wife. Hard. 161. Mich. 1659. in the exchequer. Harris v. Phillips & Biggs.

But in action *againſt two ſheriffs for inſufficient ſecurity on* 23 *H.* 6. by them taken, if *one dies* it does not abate the whole writ. Noy 72. Paſch. 2 Jac. C. B. Mounſon v. Sheriff of Lincoln.

35. In

Cro. C. 574. pl. 16. The KING. v. SIR JOHN DRYDEN, GYBES, & al' S. C. and S. P. agreed by all the court; but adjornatur.

35. In a writ of *right of advowſon againſt* 3 defendants, a *ſpecial verdict was found;* and afterwards, and *before judgment, one of the defendants died;* and this was alleged on record in abatement of the writ, and that the defendants were coparceners. The attorney-general alleged that they were jointenants, and not coparceners. Sed. per curiam, whether *coparceners or jointenants*, the writ ſhall abate. But upon motion of the attorney-general, day was given to ſpeak to it the next term. W. Jones 452. pl. 5. Hill. 18 Car. B. R. The King v. Kingſmill & al'.

——Ibid. 583. pl. 10. Paſch. 16 Car. B. R. the S. C. and no one arguing for the king, the court all retained their former opinion that the writ ſhould abate, and that judgment ſhould be entered accordingly.

36 If a writ of *covenant* be brought *againſt three*, and *one* of them *dies*, the writ is abated only as to him, and abateable as to the reſt; per Roll Ch. J. But Latch inſiſted ſtrongly that it is abated to all. The reporter makes a quære. Sty. 421. Trin. 1654. Jones v. Graves.

37. Where action is brought againſt two, and one dies, the writ ſhall abate, though they are executors; but *on tort* not. Sid. 259. Trin. 17 Car. 2. B. R. in caſe of Wirrall v. Brand.

38. Six defendants all pleaded jointly, not guilty. A venire facias was awarded, and a diſtringas with a niſi prius; but *before the day of niſi one died.* The plaintiff ought to have made a ſpecial entry of the death of ſuch defendant, with *nihil ulterius verſus eum fiat, and then take judgment only againſt the ſurvivors*, and not againſt him who was dead. Carth. 149. Trin. 2 W. & M. B. R. Woolridge v. Cloberry.

40. If *one of the defendants dies* pending the writ, this ſhall not abate the action againſt the other defendant; becauſe this is the *act of God*, &c. and no fault in the plaintiff. G. Hiſt. of C. B. 200.

(N. a.) Where Baron and Feme are Parties. In what Caſes the Writ ſhall abate by the Death of either.

In treſpaſs againſt baron and feme, after *verdict for the plaintiff*, and *between the day of niſi prius and day in bank, the huſband died.*

1. IN writ *againſt baron and feme*, if the *baron dies after verdict* in pais, at the niſi prius, *and before the day in bank*, the writ ſhall abate, inaſmuch as the name of the feme is changed. Thel. Dig. 180. lib. 12. cap. 2. ſ. 10. cites Mich. 6 E. 3. 295.

[57] It was held by all the court, that the death of plaintiff or defendant after verdict by niſi prius, and before the day in bank, ſhall abate the writ; and though baron and feme be but one perſon in law, yet on death of the baron before the day in bank, no judgment may be entered, and if entered it is error: but becauſe this action is perſonal, the court doubted; for if the feme had been dead and the baron ſurvived, judgment ſhould have been entered againſt him; and the ſame reaſon is that ſhe ſurviving ſhould be chargeable. Sed adjornatur. Cro. C. 509. pl. 1. Trin. 14 Car. Anon.

Thel. Dig. 180. lib. 12. cap. 2. ſ.

2. *Aſſiſe againſt baron and feme, and others.* The *baron died.* The feme pleaded this to the writ. The writ ſhall abate againſt the feme

feme only, and not againſt all, if diſſeiſor and tenant remain alive. Br. Brief, pl. 268. cites 11 Aſſ. 15. 17. cites S. C. and ſays that ſo ſeems

to agree 27 Aſſ. 45. where in aſſiſe againſt baron and feme, and a 3d perſon, the baron died; but it was found that the 3d perſon was ſole tenant and not diſſeiſor, but that the baron and feme were diſſeiſors; by which the clear opinion was that all the writ ſhould abate. And ſo agrees 28 Aſſ. 37. becauſe the feme of the deceaſed baron had loſt the name of feme. ——— *And in treſpaſs* againſt baron and feme, and others, the writ ſhall abate only againſt the feme by the death of the baron. Thel. Dig. 181. lib. 12. cap. 2. ſ. 17. cites Mich. 11 H. 7. 6. and ſays, ſee Poſtea, 50 E. 3. ——— But Br. Brief, pl. 291. cites 27 Aſſ. 45. That in aſſiſe *againſt baron and feme*, if the *baron dies pending the writ*, the writ ſhall abate.

3. In *quare impedit* the writ was abated by the death of one of the plaintiffs. Thel. Dig. 179. lib. 12. cap. 1. ſ. 7. cites Hill. 17 E. 3. 11. the which writ was brought *by* the *baron and feme and a third perſon*, and the *feme died*. A quare impedit was brought by baron and feme and a third perſon, the

feme died and the *baron was intitled to be tenant by the courteſy*, yet the writ was abated. D. 279. b. pl. 8. cites Hill. 17 E. tit. Brief in Fitzh. 665.

4. In *writ againſt baron and feme*, the feme came and *pleaded as party, and ſaid that her baron was dead*, to which it was *replied that pending the writ, divorce was* made between her and the baron, and *that ſhe is now covert of another;* and yet the writ was abated. Thel. Dig. 181. lib. 12. cap. 2. ſ. 22. cites Paſch. 25 E. 3. 39.

5. In *præcipe* quod reddat *againſt baron and feme*, at the grand cape returned againſt them, the baron came and ſaid that the *feme was dead before the writ purchaſed*, ſed non allocatur; becauſe the writ was ſerved and her death not returned by the ſheriff, but ſeiſin of the land was awarded. Thel. Dig. 181. lib. 12. cap. 2. ſ. 23. cites Mich. 26 E. 3. 68.

6. In *attaint againſt baron and feme and a third perſon by one ſummons, and againſt another by another ſummons*, the feme and the third perſon pleaded *that the baron was dead*, &c. And the opinion of the court was, that the writ ſhould abate as to this ſummons. But *otherwiſe* it is *in writ of error*, where it is not requiſite that the tenant be named, but he who was party to the judgment. Thel. Dig. 181. lib. 12. cap. 2. ſ. 24. cites Mich. 28 E. 3. 9.

7. In *appeal of mayhem againſt baron and feme and a third* perſon, the ſheriff *returned that the baron was dead*, upon which it was held that the feme would not be put to anſwer upon this writ; but the plaintiff continued his proceſs againſt the third perſon. Thel. Dig. 181. lib. 12. cap. 2. ſ. 29. cites Hill. 53 E. 3. 1.

8. In aſſiſe of *darrein preſentment againſt baron and feme*, the ſheriff returned that the *feme was dead*, and yet it was held that the writ ſhould not abate. Thel. Dig. 181. lib. 12. cap. 2. ſ. 33. cites Paſch. 21. R. 2. Brief 935.

9. If the *baron and feme bring action*, and the *baron dies pending the writ*, there the writ ſhall abate; for now the feme is not his wife. Br. Brief, pl. 415. cites 32 H. 6. 28, 29.

10. In writ *againſt* baron and feme, *ſhe pleaded that her baron died after the laſt continuance*, and iſſue taken that he did not die after the laſt continuance, and held a good iſſue, and that ſhe could *not* plead ſuch death after continuance taken *as party but as amicus curiæ*.

Thel. Dig. 182. lib. 12. cap. 2. ſ. 40. cites Mich. 38 H. 6. 9. but ſays, ſee 18 E. 4. contra, quære. And ſee 14 H. 6. 9.

7. If an action of *waſt* be brought by *baron and feme*, in remainder in eſpecial tail, and hanging the writ, the wife dies without iſſue, the writ ſhall abate; becauſe every kind of action of waſte muſt be ad exhæredationem. Co. Litt. 285.

Hutt. 37. Trin. 17 Jac. S. C. by the name of WHITTINGTON's caſe, per tot. cur. the writ ſhall abate, for the wife cannot recover as a feme ſole, and though the writ be *judicial*, yet 'tis *in nature of an original*.

12. *N. obtained judgment and made J. his executrix and died*, and *before execution J. died inteſtate*, whereupon *S. adminiſtered to the goods of N. and took to huſband W.* and they *both brought ſeveral ſcire facias's againſt ſeveral tertenants of the defendant, ſome* of whom *appeared and pleaded, and ſome made default*, and *judgment paſſed againſt them and* writs of *elegit awarded, but before any execution thereon, W. the huſband died.* The queſtion was, whether all the writs of ſcire facias, as well thoſe againſt the tertenants who appeared and pleaded, as againſt thoſe who had judgment againſt them, ſhould abate or not? But hereof the court would adviſe. Hob. 287. pl. 374. Whittingham & Ux. v. Tertenants of Lord Darby.

——If huſband and wife ſue a ſcire facias and the huſband dies, the ſcire facias ſhall abate; for it is no more a judicial writ, but as it were an original to revive a judgment. Brownl. 64. ——The death of one of the parties *in an original writ* abates the writ; but otherwiſe in a *judgment*. Brownl. 64.

13. In an *action againſt baron and feme as daughter and heir to W.* and pending the writ the *baron died;* it was moved that the writ ſhould not abate becauſe brought againſt the feme as daughter and heir when the land is aſſets, in which the baron had nothing. And Hobart Ch. Juſt. was of that opinion, but day was given over. Winch. 102. Mich. 22 Jac. C. B. Holman v. Sir Tho. Pope and Eliz. his wife.

(O. a) Where Corporations are Parties. In what Caſes the Writ ſhall abate by the Death of one of them.

But in aſſiſe againſt an abbot, the tenant pleaded that this writ was purchaſed in the time of his predeceſſor, and that he found his church ſeiſed, &c. And adjudged no plea. Thel. Dig. 180. lib. 12. cap. 2. ſ. 3. cites 13 E. 1. Br. 869.

1. IN writ againſt an abbot, it was pleaded that he was depoſed pending the writ, ſed non allocatur. And after it was pleaded by the ſucceſſor, that he, who was depoſed, died, upon which the writ abated by award. Thel. Dig. 180. lib. 12. cap. 2. ſ. 2. cites 30 E. 1. Br. 885.

2. It is held in writ of entry ad terminum qui præterit againſt dean and chapter, that the writ ſhall abate by the death of the dean. Thel. Dig. 180. lib. 12. cap. 2. ſ. 8. cites Paſch. 5 E. 3. 148. and 21 E. 4. 78. and ſays, ſee 7 E. 3. 320. in quare impedit. And that aſſiſe of nuſance abated by the death of the dean. 41 E. 3. 23.

3. In debt by a dean and chapter, the defendant was outlawed, who had his charter of pardon, and ſued ſcire facias, &c. and at the

the day of the return the defendant ſaid that the dean was dead, which was not denied, by which the charter was allowed. Thel. Dig. 179. lib. 12. cap. 1. ſ. 10. cites Mich. 11 H. 6. 1.

4. Writ by *mayor and commonalty* ſhall not abate by death of the mayor. Dig. 179. lib. 12. cap. 1. ſ. 15. cites Trin. 12 E. 4. 10. and 18 E. 4. 9.

[59]

5. Where an action is brought *by dean and chapter*, and *not by name of baptiſm*, the *dean dies*, and *another is choſe before the day in court*, the writ ſhall not abate. Contra if he was named by name of baptiſm, or if he was not elected by the day in court; and here it appears that the writ is good without name of baptiſm. Br. Brief, pl. 389. cites 21 E. 4. 16.

S. P. Thel. Dig. 179. cap. 1. ſ. 15. cites 21 E. 4. 18. 19. but ſays the writ ſhall abate by the death of the abbot.

(P. a) By the Death of one who is not Party to the Writ.

1. IF aſſiſe be brought, and the tenant brings warrantia chartæ againſt another, the writ of warrantia chartæ ſhall not abate by the death of the plaintiff in the aſſiſe. Thel. Dig. 184. lib. 12. cap. 10. ſ. 1. cites Mich. 32 E. 1. Brief 876.

2. Writ of meſne ſhall not abate by the death of the lord paramount pending the writ. Thel. Dig. 184. lib. 12. cap. 10. ſ. 11. cites Mich. 32 E. 1. Brief 876. and Trin. 13 E. 3. Meſne 12. and 4 H. 6. 28.

But if forejudgment be made, then it ſhall abate; for a man ſhall not be made attendant to a dead perſon. Ibid. cites Mich. 32 E. 1. Brief 876. and Trin. 13 E. 3. Meſne 12. and 4 H. 6. 28. and Trin. 21 E. 3. Meſne 48. but cites Mich. 10 H. 6. 27. and 13 H. 6. Meſne 3. where in writ of meſne 3 men were ſuppoſed to be lords paramount, the writ was not abated by the death of one of them, notwithſtanding that forejudgment was made; for the judgment ſhall be no other than that the meſne ſhall be forejudged, and that the tenant ſhall be attendant to the chief lord, viz. to thoſe who are alive.

3. Writ of ward of the land ſhall not abate by the death of the heir pending the writ. Thel. Dig. 184. lib. 12. cap. 10. ſ. 2. cites Mich. 34 E. 1. Brief 853. and ſays, ſee 46 E. 3. Brief 776. in writ of ward of the land.

4. In conſimili caſu of the alienation of one A. who held for term of life, the writ ſhall not abate by the death of A. after the writ purchaſed. Thel. Dig. 184. lib. 12. cap. 10. ſ. 3. cites Trin. 6 E. 2. Brief 807.

5. Where writ is brought againſt tenant for term de auter vie, if ceſty que vie dies pending the writ, and he in reverſion enters, the writ ſhall abate, by Shard. which Parning denied. Thel. Dig. 184. lib. 12. cap. 10. ſ. 4. cites Trin. 5 E. 3. 203. and ſays, ſee 39 E. 3. 36. 46 E. 3. 29. 9 E. 4. 53. and 15 E. 4. 5.

But before the entry of him in reverſion, it ſhall not abate; per opinionem. Ibid. cites 18 E. 4. 26. ——— Writ of waſte againſt tenant for term de auter vie, ſhall not abate by the death of ceſty que vie. Thel. Dig. 184. lib. 12. cap. 10. ſ. 9. cites Hill. 9 E. 4. 53.

6. *Præcipe quod reddat* was brought *againſt tenant pur auter vie*, who ſaid that pending the writ *ceſty que vie* died, and becauſe the demandant could not deny it, therefore by award the writ

But if leſſor brings *waſte againſt tenant*

pur autre vie, and pending the writ *ceſty que vie dies*, the writ ſhall not abate; becauſe no other perſon can be ſued for damages but the ſurvivor. Arg. 3 Mod. 249. Mich. 4 Jac. 2. B. R. in caſe of Capel v. Saltonſtall.—Co. Litt. 285.——Br. Brief, pl. 192. (bis) cites 15 E. 4. 4. S. P.

was abated. Quod nota. Br. Brief, pl. 380. cites 24 E. 3. 5. The dutcheſs of Lancaſter's caſe.—But Brooke ſays, quod nota, againſt the opinion of the court 18 E. 4. 25.

7. Where the king had leaſed to B. for his life, and B. leaſed his eſtate to R. writ brought againſt R. was abated by the death of B. Thel. Dig. 184. lib. 12. cap. 10. ſ. 5. cites Hill. 24 E. 3. 24. 25.

[60] 8. If *writ* is brought *againſt J. S. the younger*, and *pending the writ J. S. the elder dies, and another J. S. the younger is born*, yet the writ remains good. Br. Brief, pl. 291. cites 27 Aſſ. 45.

9. Writ of raviſhment of ward by a guardian in ſocage was not abated by the death of the infant. Thel. Dig. 184. lib. 12. cap. 10. ſ. 6. cites Hill. 10 R. 2. Brief 932. But ſays, that Paſch. 2 H. 4. 19. writ of ward was abated by the death of the infant, as the reporter heard, but he was not preſent. Quære. And that ſo it was held in writ of ward of the body, 9 E. 4. 53. but not in raviſhment of ward.

10. Jo. leaſed to B. for his life, remainder to Ro. and his feme, and the heirs of their bodies, &c. who had iſſue, and after the feme died, and Ro. brought writ of waſte againſt B. pending which writ the iſſue died, &c. And the opinion of the court was, that the writ ſhould abate by the death of the iſſue, inaſmuch as Ro. now is only tenant in tail after poſſibility of iſſue extinct. Thel. Dig. 184. lib. 12. cap. 10. ſ. 7. cites 2 H. 4. 20. 22. 3 H. 4. 5.

11. The *garniſhee in detinue*, nor the *vouchee in a præcipe quod reddat*, are not parties to the writ; and therefore their death could not abate the writ, but the plaintiff or demandant might have reſummons againſt the tenant or defendant. Br. Brief, pl. 15. cites 9 H. 6. 36.

Br. Brief, pl. 175. cites S. C. That the whole court was againſt Markham, that it ſhould not abate by the death of the one; for *it is only meſne proceſs*.

12. In *detinue* the *defendant prayed garniſhment againſt* 2, and had it, and the *ſcire facias returned againſt the one warned, and the other dead.* Markham ſaid, the ſcire facias ſhall abate now, for it is in lieu of the original; & non allocatur; but *alias ſcire facias* againſt the executors & *idem dies* given to him who was returned warned. Quod nota, that it was not abated. Br. Scire facias, pl. 111. cites 19 H. 6. 9.

Br. Brief, pl. 184. cites S. C. ——Ibid. pl. 437. cites S. C.

13. Second deliverance *by T. P. againſt S. who made avowry upon the ſaid T.* and *his feme*, by which *T. prayed aid of his feme, and had it*, and proceſs; and *ſhe came upon the proceſs, and joined*, by which they were *at iſſue*, and *venire facias returned*, and *no jury appeared*, by which *iſſued diſtreſs with decem tales*; and *at the day the plaintiff ſaid that his feme died after the laſt continuance, judgment if the inqueſt ought they to take*; & non allocatur, inaſmuch as *ſhe was not party to the original*, and *yet ſhe was party*

party to the iſſue; for per Newton, where the *avowry is made upon a ſtranger*, and the *plaintiff pleads hors de ſon fee*, and *pending the iſſue the ſtranger dies*, yet the iſſue ſhall not abate, and ſo here, and all one, by which the other paſſed over. Br. Iſſues Joines, pl. 87. cites 21 H. 6. 23.

14. *Three were received by reverſion by default of the tenant for life*, and *joined iſſue*, and *at the venire facias returned, the one of the* 3 *was dead;* and yet the iſſue ſtood, and a venire facias de novo awarded; but note, that this death cannot abate the writ; for he who died *was not party to the writ, but came collaterally.* Br. Brief, pl. 381. cites 19 E. 4. 4.

15. Death of an *attorney* ſhall not abate the writ. Thel. Dig. 184. lib. 12. cap. 10. ſ. 10. cites 5 H. 7. 3.

(Q. a) By Death. At what Time. [61]

1 IN treſpaſs *againſt* 4, the *one ſaid that another defendant was dead before the writ brought;* and becauſe the plaintiff could not deny it, the writ was abated by award. Br. Brief, pl. 297. cites 29 Aſſ. 62.

But in treſpaſs *againſt* 3, the one ſaid that the 2 *were dead before the writ purchaſed*; judgment of the writ, & non allocatur, but againſt them. And ſo ſee the death of ſome ſhall not abate the writ againſt all. But Brooke ſays mirum, as here before the writ purchaſed; for then it is falſe, &c. but death pending the writ ſhall not abate all the writ. Br. Treſpaſs, pl. 60. cites 47 E. 3. 18.——Br. Brief, pl. 79. cites S. C.——And where an aſſiſe was adjourned before Thorp, upon ſuch a point, becauſe there was another diſſeiſor and tenant named in the writ, the writ was awarded good. Brooke ſays, quod mirum! upon a falſe writ. Br. Brief, pl. 297. cites 29 Aſſ. 62.——So in *quare impedit againſt two*, the one pleaded that the *other defendant was dead the day of the writ purchaſed*, judgment of the writ for all, & non allocatur; but Brooke ſays, quod mirum! Br. Brief, pl. 112. cites 7 H. 4. 24.——But Br. Treſpaſs, pl. 174. cites 19 H. 6. 4. That in treſpaſs *againſt* 2, if the *one ſays that the other was dead the day of the writ purchaſed*, it ſhall abate the writ againſt all; for there the *writ was always falſe*.——Br. Brief, pl. 281. cites 23 Aſſ. 10. S. P. accordingly.

2. Treſpaſs *againſt ſeveral.* They are at iſſue, and *one of the defendants dies before the writ of ven. fac. is returnable.* There it ought to be returned for thoſe who are alive, and not for thoſe that are dead, if the death be alledged to the court and confeſſed by the plaintiff. Quod nota bene, inde. Br. Brief, pl. 312. cites 3 H. 7. 6.

After iſſue joined, one of the defendants dies; ven. facias was awarded afterwards, and iſſue tried. Adjudged no error. Cro. Car. 426. Mich. 11 Car. B. R. Tyffin's Caſe.

3. Aſſiſe of *novel diſſeiſin* was brought *againſt* 4. *After verdict one* of them *died.* This ſhall not be pleaded in abatement of the writ, becauſe there is no day in court for the other to plead it; but upon a writ of error brought, this matter ſhall aid the other, if judgment be given; ſo that now by his death the writ is abated. Bendl. 42. pl. 74. Paſch. 2 & 3 P. & M. Granefield v. Stretch.

D. 132. pl. 76. &c. GRENEFIELD v. STRECH, S. C. and S. P. but nothing ſaid as to this point by the court.

4. If *one be condemned* in an action upon the *caſe, or treſpaſs upon nihil dicit, demurrer*, &c. and he *dies after* a writ of *inquiry of damages awarded, and before the return thereof*, the writ ſhall not abate; for the awarding the ſaid writ is a judgment; per Dyer and Manwood. Leon. 263. pl. 352. 19 Eliz. C. B. Anon.

3 Le. 68. pl. 103. Mich. 20 Eliz. S. C. in totidem verbis.

* S. P. Noy 146. in caſe of Cutter & Ux' v. Barber & Ux'.

5. In a *partitione facienda by conſent*, quod partitio fiat, and a writ was to the ſheriff to make partition, and *before that it was filed, (but after the return)* the court being informed that *one of the wives was dead*, it was prayed that the writ ſhould not be filed. By the court, if it ſhould be filed, then the court ſhould give an erroneous judgment againſt the dead perſon. And a day was given to the other party to ſhew if the wife was dead; and in the interim the filing of the writ was ſtaid. But after, becauſe it appeared that ſhe was not dead until after the return-day of the writ, to which day the judgment ſhall have relation, it was ruled that judgment ſhall be given, and the writ filed. Noy 145. 146. Cutter & Ux' v. Barber & Ux'.

In an *information* in the Exchequer by the attorney general, a

6. 17 *Car.* 2. *cap.* 8. *The death of either party, between verdict and judgment, ſhall not be alledged for error, ſo as ſuch judgment be* * *entered within two terms after ſuch verdict.* Made perpetual by 1 *Jac.* 2. 17.

verdict was given *againſt the defendant*, and after verdict, and *before the day in bank*, the *defendant dies*; and queſtion was, if this information was within the ſtatute 17 Car. 2. c. 8. and upon ſolemn argument by Ward, Powis, and Hatſell, (Lechmere abſent) it was held that an information was not within the word *action*, nor the *king* within the word *party*, and that it was never ſaid the death but the *demiſe of the king*; and adjudged that the information ſhould be *diſcontinued*. 12 Mod. 228. Mich. 10 W. 3. in the Exchequer. Attorney-general v. Buckley.

* [62]

7. *Judgment* was *entered as of Trinity Term*, and a *writ of inquiry returnable in Michaelmas Term*, and the *plaintiff died in the long vacation.* Reſolved that as the firſt was but an interlocutory judgment, the action abated by the death of the plaintiff. Mod. 5. pl. 17. Mich. 21 Car. 2. B. R.

8. *Debt* againſt two, if one dies *before verdict*, the action is abated. Cumb. 169. Mich. 1 W. & M. B. R. Dove v. Martin.

See 6 Mod. 142. 1 Salk. 42. 8 Mod. 115. 1 Salk. 352.—And ſee Tit. Executors.

9. 8 & 9 *W.* 3. *cap.* 11. *ſ.* 6. *In all actions commenced in any court of record after March the 25th*, 1697, *if the plaintiff dies* after an interlocutory judgment, and before final judgment, *the ſaid action ſhall not* abate, *if the action might be originally proſecuted by his executors or adminiſtrators; and if the* defendant dies *after ſuch* interlocutory judgment, *and before final judgment, the action ſhall not abate, if ſuch action might be originally proſecuted againſt his executors or adminiſtrators; and the executors or adminiſtrators of ſuch plaintiff, after ſuch interlocutory judgment, may have a* ſci. fa. *againſt the defendant if living, or if dead againſt his executors or adminiſtrators, to ſhew cauſe why damages ſhould not be aſſeſſed and recovered againſt him or them; and if he or they do not appear at the return, and ſhew ſufficient cauſe to arreſt the final judgment, or being returned warned, or upon two writs of ſci. fac. it being returned that the defendant had nothing whereby to be ſummoned, or could not be found, a writ of* inquiry of damages *ſhall be awarded; which being executed and returned, judgment final ſhall be given for the ſaid plaintiff, his executors, or adminiſtrators.*

S. 7. *If there be* 2, or more plaintiffs or defendants, *and one dies, if the* cauſe of action ſurvive *to the ſurviving plaintiff, or againſt the ſurviving defendant, the writ or action ſhall not abate; but ſuch death being ſuggeſted upon the record, the action ſhall proceed.*

10. *Verdict*

10. *Verdict* in Eaſter Term, and *before judgment ſigned*, the *plaintiff* died; per Holt Ch. J. that ſhall not hinder the judgment being entered, provided it be within 2 terms after; and the ſtatute of frauds, &c. only requires the time of *ſigning the judgment* ſhould be entered on the roll, and that is only for the benefit of purchaſers. 1 Salk. 401. pl. 9. 1 Ann. B. R. The duke of Norfolk's caſe.

11. Death of either party *before the aſſiſes* is not remedied by the ſtatute; but if the party dies *after* the aſſiſes begins, though the *trial be after his death*, that is within the remedy of the ſtatute; for the aſſiſes is but one day in law, and this is a remedial law, and ſhall be conſtrued favourably. And the court further held that it was in their diſcretion whether on motion to *arreſt judgment*, or put the party to a *writ of error*. 1 Salk. 8. pl. 21. Mich. 6 Ann. B. R. Anon.

In ejectment the caſe was this. The *aſſiſes began* on the *Monday*, and the *defendant died the day before*, and yet a *trial was had*, and a *long defence, and a verdict for the plaintiff*; and now it was moved that judgment ſhould be arreſted. 'Twas objected that this is matter of fact, and not aſſignable after verdict, but that they ought to bring a writ of error. Per Holt Ch. J. If he had *died the day the aſſiſes began*, though the cauſe had been tried after, the trial had been good, though he had died at one o'clock in the morning; for there is no fraction of a day, according to SHELLEY's Caſe in 1 Co. in which caſe my Lord Hobart ſaid, any man, as an amicus curiæ, may inform the court of ſuch an error. Adjornatur. 11 Mod. 136. Falmouth v. Strode.

12. *Judgment* was given *niſi ſuch a day*; at which day it was urged that the plaintiff being lately dead, the ſuit abated; but per cur. there was judgment niſi, ſo the rule muſt be made abſolute. 8 Mod. 381. Paſch. 11 Geo. Colvin v. Fletcher. [63]

(R. a) Abated, or abatable only. And How.

1. BY the *entry* of the plaintiff in aſſiſe *to take livery* on a feoffment to him by the tenant pending the aſſiſe, the firſt aſſiſe was abated; and ſo ſee that an entry ſhall abate a writ in fact, and upon this the writ was awarded good. Br. Brief, pl. 302. cites 35 Aſſ. 4.

2. *Præcipe* quod reddat, *at the grand cape*, the *tenant* came and *ſaid that before the writ purchaſed A. was ſeiſed in fee, and infeoffed him by deed, upon condition that upon payment of* 40l. *to re-enter, and that after the default A. had paid and entered*, and ſo the writ abated in law; judgment of the writ. And ſo ſee that *entry is only an abatement in law*, as it is admitted there; for it ſeems that it is *not* an abatement *in fact before judgment be given*. Caund. ſaid, if writ be brought *againſt tenant pur auter vie*, and *ceſty que vie dies pending the writ*, the writ ſhall abate. And agreed that the entry in the other caſe is an abatement in law alſo, nota. Br. Brief, pl. 229. cites 39 E. 3. 28. But Brook ſays, ſee in the ſecond caſe if it be abated before entry, by 18 E. 4, 25, 26. it ſeems that it is not, and ſo it is agreeable that it is only an abatement in law. Ibid.

3. By *taking of baron pending the writ* on the part of the plaintiff, the writ is only abateable. Br. Brief, pl. 232. cites 37 H. 6. 16. per Littleton.

G. Hiſt. of C. B. 84. S. P. —— *But* if an *action* be brought *againſt a feme covert as ſole*, this makes another man's property liable without giving him

him an opportunity of defending himſelf, which would be contrary to common juſtice; and therefore the writ is de facto abated. G. Hiſt. of C. B. 199.

4. When a man pleads to the writ by *death pending the writ*, he *ſhall not plead it after the laſt continuance*, becauſe by this writ is abated in fact. Br. Brief, pl. 379. cites 18 E. 4. 18, 19.

S. P. Br. Brief, pl. 396. cites 21 E. 4. 80. And Brook ſays, it is to be underſtood againſt both there—— * Quære, if it ſhould not be (so.)

5. Præcipe quod reddat *againſt two* who were *eſſoigned at the ſummons and made default* at the day, by which grand cape iſſued, and at *the day the one appeared, and ſaid that after the day of their default the other died*, judgment of the writ. And per Brigg. he ſhall have the plea without ſaving his default, becauſe it proves the writ abated in fact; contra of entry after the laſt continuance or ſuch like, for by this the writ is only abateable. Br. Brief, pl. 390. cites 21 E. 4. * 16.

6. If there *is no tenant at the return of the writ* the writ is abated; but the court cannot abate an abateable writ without plea. Ld. Raym. Rep. 476. Arg. cites 9 E. 4. 12. per Littleton, and that there is *no difference between a writ abated and abateable as to a ſtranger*; for though the tenant does not take advantage of it by plea, yet that will not prejudice a ſtranger.

7. If the *plaintiff* in an action *is made a knight*, the writ is only abateable. G. Hiſt. of C. B. 84. cites 2 H. 6. 13.

[64]

(S. a) Abatement in Part or in All.

Thel. Dig. 236. lib. 16. cap. 10. ſ. 5. cites S. C.

1. IT was ſaid that if *one of the tenants* be *miſnamed in aſſiſe of rent* againſt ſeveral, it ſhall abate the writ againſt all; *contra* in aſſiſe *of land*. Br. Brief, pl. 257. cites 5 Aſſ. 6.

——Miſnoſmer *of one in aſſiſe* ſhall not abate the writ but againſt him only, if there be another tenant and a diſſeiſor named. Thel. Dig. 236. lib. 16. cap. 10. ſ. 5. cites 11 Aſſ. 15. ——*So* in aſſiſe *againſt two*, and the *one was miſnamed* in the writ *in the words of the attachment*; and the opinion was, that *if he was tenant* the writ ſhould abate in all, and *if diſſeiſor* then but againſt himſelf only; but the aſſiſe was againſt ſeveral, ſo that it ſeems it is intended there is another diſſeiſor named in the writ; for if tenant or diſſeiſor is wanting in aſſiſe, the writ does not lie. Br. Brief, pl. 279. cites 22 Aſſ. 8. ——Thel. Dig. 236. lib. 16. cap. 10. ſ. 13. cites S. C. but adds quære.

Note, by the juſtices in C. B. that by *miſnomer of one defendant* all the writ ſhall abate, but it is not expreſſed therein what action this was. Br. Brief, pl. 414. cites 32 H. 6. 24. ——S. P. Br. Miſnoſmer, pl. 79. cites S. C.

But of a *thing apparent in the writ* between ſeveral, *one alone may ſhew it* in abatement of all the writ.

2. *Aſſiſe againſt three*, the *one pleaded a plea which went to the writ againſt all*, and to abate the writ for all the defendants; yet the others were put to anſwer alſo; quod nota. Br. Brief, pl. 264. cites 9 Aſſ. 6.

Br. Brief, pl. 267. cites 11 Aſſ. 9.

In *præcipe* quod reddat *upon ceſſavit againſt three* who *waged their law of non ſummons* at the grand cape, and *at the day two appeared* ready, and the *third made default*, and the *demandant prayed ſeiſin of the land againſt the three*; for by the default of the one the ſummons is affirmed. Per Wich. it is good firſt to pray ſeiſin of the third part, for if the two make their law the writ ſhall abate, by which one came and was received for the third part, and the two made their law, and

3. A *præcipe quod reddat* was *abated for the moiety, by ley gager of nonſummons, by one* of the tenants, and the demandant recovered the moiety againſt the other. Thel. Dig. 236. lib. 16. cap. 10. ſ. 2. cites 9 E. 3. 470. 22 E. 3. 2. 29 E. 3. and 48 E. 3. 14.

and the writ was abated by award for the two, and ſtood good for the third part, quod nota abated in part. Br. Brief, pl. 81. cites 48 E. 3. 13.

4. It is held that if *parcel of the tenements* be *frankfee, and parcel ancient demeſne*, all the writ ſhall abate. Thel. Dig. 236. lib. 16. cap. 10. ſ. 4. cites Mich. 10. E. 3. 541. Quære.

So in quid. juris clamat, *ancient demeſne as to parcel* ſhall abate all the writ. Thel. Dig. 236. lib. 16. cap. 10. ſ. 21. cites Hill. 31 E. 3. Ancient Demeſne 16.

But in *praecipe* quod reddat *of two acres*, whereof the *one is ancient demeſne*, the writ ſhall abate thereof, and ſtand for the other, per Half. Br. Privilege, pl. 12. cites 14 H. 4. 21.

5. It is ſaid that if the *baron brings* writ of *treſpaſs againſt his own feme and others*, all ſhall abate. Thel. Dig. 236. lib. 16. cap. 10. ſ. 6. cites Hill. 12 E. 3. Br. 481. 670. Quære.

6. In writ of *ward of the body and land*, as to the body the writ was abated by the *not naming of the feme of the defendant*, and ſtood for the land. Thel. Dig. 236. lib. 16. cap. 10. ſ. 7. cites Trin. 14 E. 3. 279.

7. In *aſſiſe*, the *tenant ſaid by bailiff that the plaintiff had taken the profits of half an acre parcel of the ſeven acres in plaint, pending the aſſiſe*, judgment of the writ, and if, &c. Nul tort, and *found accordingly, and that of the reſt the plaintiff was ſeiſed and diſſeiſed.* And as to the half acre the plaintiff took nothing by his writ, and recovered the reſt. Br. Brief, pl. 430. cites 21 E. 3. 34.

Br. Aſſiſe, pl. 66. cites S. C.

8. In *treſpaſs againſt the prior of B.* and *one of his commoignes*, the *prior did not come* at the pone, and the *commoigne ſaid that he was commoigne to the abbot of B. and not to the prior*, which was not denied by the plaintiff, by which he took nothing by his writ. Thel. Dig. 236. lib. 16. cap. 10. ſ. 10. cites Paſch. 21 E. 3. 13.

[65]

9. In treſpaſs if *one of the parties is a villein to the defendant*, all ſhall abate. Thel. Dig. 236. lib. 16. cap. 10. ſ. 11. cites Mich. 22 E. 3. 18.

But it ſeems that writ of *monſtraverunt* ſhall not abate for all, notwithſtanding that *ſome of the plaintiffs are villeins to the defendant.* Thel. Dig. 236. lib. 16. cap. 10. ſ. 24. cites Paſch. 39 E. 3. 8.

10. *In formedon laſt ſeiſin of parcel* ſhall abate all the writ. Thel. Dig. 236. lib. 16. cap. 10. ſ. 17. cites Trin. 27 E. 3. 81.

11. In *ſcire facias of rent out of a fine*, as to parcel the *tenant was tenant of parcel of the rent*, and as to other parcel of the rent the tenant was *tenant of the land out of which* this parcel was iſſuing as rent-charge; and the writ abated for one and ſtood for the other. Thel. Dig. 236. lib. 16. cap. 10. ſ. 20. cites Hill. 31 E. 3. Brief 331.

12. Writ of *mortdanceſter* may *abate in right of one ſummons, and ſtand of the remainder.* Thel. Dig. 236. lib. 16. cap. 10. ſ. 18. cites 28 Aſſ. 25.

Br. Several Præcipe, &c. pl. 2. cites S. C.——

Br. Maintenance de Brief, pl. 18. cites S. C.

13. Where a man *confeſſes part* of his writ *to be falſe*, there it ſhall abate in all. Br. Confeſſion, pl. 6. cites 46 E. 3. 9.

S. P. Br. Abridgement, pl. 12. cites 14 H. 6. 4.——*So* if he confeſſes that his action does not lie in part. Br. Brief, pl. 18. cites 9 H. 6. 54.

In *aſſiſe againſt A. and B.* and *A. pleads a releaſe of all the right, and of all actions*, if the *plaintiff confeſſes it*, the writ ſhall abate againſt all, though A. be diſſeiſor and not tenant. Br. Brief, pl. 267. cites 11 Aſſ. 9.——*So* if the *plaintiff confeſſes that any one named in the writ is not diſſeiſor.* Br. ibid.——*Or that* it may be *found that any one named in the writ by record was at another time acquitted.* Br. ibid.

Where

Where the *writ is ſpecial*, as in *debt of* 10*l.* whereof he *confeſſes himſelf paid* 3*l.* it ſhall abate in all, for it is falſe in parcel; for the writ ſhall be of the duty only, and the confeſſion ſhall be in the count. Br. Brief, pl. 485. cites 6 E. 4. 5. —— But in *aſſiſe of rent of* 10*l.* the *defendant pleaded releaſe of* 3*l. thereof*, and the *plaintiff confeſſed it*, and yet the whole plaint was not abated; for it ſeems in bar of this part. Br. Confeſſion, pl. 54. cites 8 Aſſ. 37.

As if *debt* be brought *againſt* 3 *executors*, and it is *found upon iſſue joined that the one is executor and the others not*, it was agreed that the writ ſhall not abate in all, but the plaintiff ſhall be barred againſt him, and recover againſt the other, notwithſtanding his writ is falſe in part, becauſe this matter is found by verdict. Br. Confeſſion, pl. 6. cites 46 E. 3. 9.

14. *Contra* where it is *found by verdict*. Note the diverſity. Br. Confeſſion, pl. 6. cites 46 E. 3. 9.

15. It was agreed, that a man may *plead to the count as to parcel, and in bar for the reſt*, and there the count ſhall not abate but for the parcel. Quod nota. Br. Ceſſavit, pl. 10. cites 48 E. 3. 4.

16. In *treſpaſs of* his ſervants, viz. *Jo. and A. taken out of his ſervice*, &c. it was *pleaded* to the writ, *that A. was ſeme of the plaintiff*; upon which as to A. the writ was abated, and ſtood for the reſt. Thel. Dig. 238. lib. 16. cap. 10. ſ. 65. cites Mich. 7 Rich. 2. Treſpaſs 206.

17. In treſpaſs upon the *caſe of diverſe treſpaſſes, tenancy in common between the plaintiff and the defendant of parcel*, ſhall not abate all the writ. Thel. Dig. 237. lib. 16. cap. 10. ſ. 35. cites Paſch. 19 R. 2. Brief 927.

18. Quære if writ of *treſpaſs* brought *againſt a clerk privileged of the Chancery and others*, or *againſt a monk and others, without his ſovereign*, ſhall abate for all, or not. Thel. Dig. 237. lib. 16. cap. 10. ſ. 39. cites Hill. 14 H. 4. 21. and 34 H. 6. 29. and 22 H. 6. 43. Quære.

19. In writ of *debt of* 20*l.* where the count is of 10*l. by obligation, and* the other 10*l. upon contract*, if there be a variance between the obligation, all ſhall abate per Hank. and Hull, and [66] Thirning to the contrary. Ibid. Adjudged to abate for the parcel. Thel. Dig. 237. lib. 16. cap. 10. ſ. 38. cites 1 H. 5. 4.

20. In *treſpaſs of entring into his warren vi & armis, and chacing there, and taking of conies*, &c. the writ was abated as to the entring into the warren vi & armis, and ſtood for the reſt. Thel. Dig. 237. lib. 16. cap. 10. ſ. 41. cites Mich. 3 H. 6. 13.

It was held, that obligation made to a monk is void for want of capacity, and that the ſovereign ſhall not ſue it. Br. Nonability, pl. 2. cites 3 H. 6. 23.

21. Writ of *debt by a monk profeſſed, and by others*, ſhall not abate againſt all. Thel. Dig. 237. lib. 16. cap. 10. ſ. 42. cites Hill. 3 H. 6. 23. and ſays, vide in Profeſſion 7 H. 4. and quære.

S. P. Br. Brief, pl. 18. cites 9 H. 6. 54. —— S. P. Though it appears by defendant's plea. Arg. Roll. Rep. 307. cites 22 E. 4. 4. 9 H. 6. 10. —*Whatever proves the writ falſe at the time of ſuing it out*, ſhall abate the writ intirely, as if it *appears on the plaintiff's own ſhewing, that he has no cauſe of action for part*. G. Hiſt. of C. B. 199.

22. Writ which is *falſe in part* ſhall abate in all. Br. Brief, pl. 14. cites 9 H. 6. 10.

Thus if an action of *treſpaſs* be brought *againſt* 2 *defendants*, and the *one pleads that the other was dead die impetrationis brevis, or that there is none ſuch in rerum natura*, the whole writ ſhall abate; for it

it is the plaintiff's fault to abuſe the authority of the court, to call in a man that was dead; and it was no leſs an abuſe of the proceſs to iſſue it againſt a feigned perſon. G. Hiſt. of C. B. 199. 200.

But this falſification of the writ *muſt be in a material point*; for in a *præcipe quod reddat againſt* 2, if *one pleads non-tenure*, and the *other takes the whole tenancy* on himſelf, the writ ſhall not abate in the whole, but ſtand good againſt him that has accepted the tenancy, becauſe he is a proper defendant to the action, and the non-tenure of the one does no way prejudice the other defendant. G. Hiſt. of C. B. 200.

23. *Debt for rent due at two rent-days*, and payable at two rent-days, *of which the one day is not yet come*, the writ ſhall abate in all; for it is falſe in parcel. *Contra of bar which ſerves for part*, and not for all. Quære *of avowry for rent* due at two rent-days of which the one is not yet come; for by the beſt opinion, in this caſe the defendant ſhall have return, and as it is ſaid elſewhere, ſhall be amerced for the other day. Br. Brief, pl. 410. cites 11 H. 6. 5.

Thel. Dig. 238. lib. 16. cap. 10. ſ. 57. cites 11 H. 6. 6. S. C. and 9 H. 7. 2. and ſays, That ſo it is of an obligation, containing divers days of payment. ——In reſcous the plaintiff *counted that he diſtrained for rent of* 2 *rent days*, and it *appeared that the one was come and the other not*, and the defendant to the reſcous pleaded not guilty, and was found guilty; and becauſe the *jury aſſeſſed the damages intirely*, where per Brian they ought to have ſevered the damages, the plaintiff ſhall not recover; but per Vavaſor, it may be good in part, and abate in part, as in *waſte of oaks and thorns*, or in *dower of land and common*; and after the beſt opinion was, that the action lies in part, as here, and ſhall not abate in all, though the plaintiff in his declaration has ſhewn, that the one day is paſſed and not the other. Br. Brief, pl. 322. cites 9 H. 7. 3.——Br. Verdict, pl. 56. cites S. C.

24. In *debt againſt ſeveral upon ſpecialty*, if the *writ* be *variant from the ſpecialty*, and this ſhewn or pleaded by one, yet the writ ſhall abate againſt all, notwithſtanding the others ſhould plead to the action. Thel. Dig. 237. lib. 16. cap. 10. ſ. 48. cites Paſch. 11 H. 6. 42.

25. *Treſpaſs* brought *againſt the parſon of N.* and others. The *parſon ſaid that he was parſon only of the moiety of the church of N.* judgment of the writ; and for this cauſe the writ was abated againſt all. Br. Brief, pl. 178. cites 21 H. 6. 4.

26. *Debt againſt* 2 executors. The *one ſaid where he is named of S. he was of D.* the day of the writ purchaſed; judgment of the writ; and it is agreed that if it be found for him, the writ ſhall abate againſt both, and yet the other ſhall anſwer now, and the other plea ſhall be firſt tried. Br. Brief, pl. 180. cites 21 H. 6. 4.

27. In *præcipe* quod reddat *by ſeveral præcipes* againſt ſeveral, if *one wages his law of non-ſummons*, all the writ ſhall abate; and ſo was the opinion of the court. Br. Brief, pl. 525. cites 27 H. 6. 6.

[67]

28. In *ceſſavit*, if the *lord receives part of the ſervices pending the ſuit*, the writ ſhall abate in all. Br. Brief, pl. 256. cites 39 H. 6. 43. per Laicon.

So in *debt*, if the *plaintiff receives part* pending the writ, all the writ ſhall abate. Br. Brief, pl. 480. cites 2 E. 4. 10. per cur.——*But* if the *defendant tenders part in court, and the plaintiff receives it by judgment*, then it is otherwiſe. Per Moyle. Br. Brief, pl. 480. cites 2 E. 4. 10.——S. P. per Moyle J. Br. Brief, pl. 338. cites 1 E. 4. 3. 4.—— See pl. 17.

29. If the defendant *pleads acquittance of parcel before the writ purchaſed*, the writ ſhall abate in all; for it never was a good nor true writ; *and* if he makes an acquittance of parcel *pending the writ*, then he has falſified his own writ, and ſo his writ by this ſhall

ſhall abate in all. Br. Brief, pl. 256. cites 39 H. 6. 43. per Aſhton.

Thel. Dig. 188. lib 12. cap. 21. ſ. 21. cites Mich. 4 E. 4. 34. S. C. accordingly. But ſays the iſſue for the others was not waived, and cites 5 E. 4. 117. and 5 H. 7. 7. agreeing.

30. Formedon *againſt* 5 perſons, who plead to iſſue *of* 2 *manors*, &c. and now the *one of the* 5 *pleads that the demandant, after the laſt continuance, has entered into one manor*; judgment of the writ. And by all the juſtices, this is a good plea by one only, and to all the writ, if it be found for him; but perchance the other 4 then ſhall have thereof advantage; and the reaſon is, becauſe that he by his own act has falſified his own writ. Quod nota. Br. Brief, pl. 351. cites 4 E. 4. 32.

31. *Variance between the writ and count in parcel* ſhall abate all the writ. Thel. Dig. 238. lib. 16. cap. 10. ſ. 51. cites Paſch. 7 E. 4. 10.

32. And it is held there that in *treſpaſs againſt ſeveral*, if the *one has not any addition*, the writ ſhall not abate but againſt him only. Thel. Dig. 238. lib. 16. cap. 10. ſ. 51. cites Paſch. 7 E. 4. 10.

33. In writ of *entry, upon the ſtatute of Richard, into a manor, and into an advowſon*, it was held that the writ ſhould abate for all, per Markham, inaſmuch as ſuch action does not lie of an advowſon; but Laicon held, that it ſhould abate only for the parcel, inaſmuch as the plea is to ſuch action for the advowſon; but otherwiſe it ſhall be where the plea for the parcel goes only to the writ. Thel. Dig. 238. lib. 16. cap. 10. ſ. 52. cites Paſch. 8 E. 4. 3. Quære.

34. In treſpaſs of a *cloſe broken, and trees taken*, &c. the defendant as to the trees *pleaded that the plaintiff was ſeiſed of ſuch a manor* of which the place where, &c. *and that he was bailiff of the ſaid manor* to the plaintiff *at the time*, &c. judgment of the writ; and it was held that it goes only to parcel, and not to all. Thel. Dig. 238. lib. 16. cap. 10. ſ. 54. cites Hill. 18 E. 4. 28. Quære.

35. In *dower of a manor, houſes, and rent*, to ſay, *that the rent is parcel of the manor*, &c. goes only for the parcel, ſcil. for the rent only. Thel. Dig. 238. lib. 16. cap. 10. ſ. 63. cites Paſch. 21 E. 4. 28.

* This is miſprinted, and quære what it ſhould be?

36. In *treſpaſs of aſſault, battery, impriſonment, and of taking a bag with* 20*l.* therein contained, &c. *without ſaying who was the owner of the bag*; and it was held that all the writ ſhould abate for this cauſe. Thel. Dig. 237. lib. 16. cap. 10. ſ. 38. cites Mich. 13 * E. 5. 11. Quære.

37. If one brings an action *for one thing for which he has right, and for another for which he has no right*, his writ ſhall abate for all; per Williams J. Bulſt. 1. cites 9 H. 7. 3. per Fineux.

Diſcontinuance of part of the matter in the writ, or againſt one of the defendants in treſpaſs, ſhall abate the writ in all. Br. Brief, pl. 360. cites 7 E. 4. 10.

38. *Diſcontinuance againſt one of the defendants in appeal*, is no diſcontinuance againſt all for the advantage of the king. Thel. Dig. 236. lib. 16. cap. 10. ſ. 9. cites Trin. 21 E. 3. 34. Quære of miſnoſmer of one in appeal, and cites 21 H. 7. 31.

39. In

39. In *entry ſur diſſeiſin*, the defendant pleaded for part, that he *had nothing but in right of his wife not named*, &c. and ſo demanded judgment of the writ; and *for the reſt he pleaded in bar*, and they joined iſſue for both, and found both the iſſues for the defendant. Agreed by all the juſtices, that the writ ſhall abate but in part, and judgment ſhall be given for the reſt, and ſo for the reſidue the judgment was nil capiat per breve. Goldſb. 85. pl. 8. Paſch. 30 Eliz. Carleton v. Carr.

40. A bill may be abated *as to part of a treſpaſs*, and ſtand good for the reſt. Agreed per cur. but ſaid they never knew it abated *as to one defendant*, and ſtand good againſt the other. 2 Ld. Raym. Rep. 926. Trin. 2 Ann. Arg. in caſe of Staples v. Heydon.

8. Action upon 3 *ſeveral promiſes*, the 1ſt for 55*l.* the 2d for 65*l.* and the 3d for 65*l.* The defendant pleads *as to part non aſſumpſit*, and as *to part in abatement* thus, viz. *Quoad* 50*l. of the firſt promiſe*, 60*l. of the* 2*d, and* 60*l. of the* 3*d, quod breve caſſetur, becauſe* there were 3 *actions in the Exchequer for the ſame ſums.* Judgment of reſpondeas ouſter was given in C. B. but in error B. R. held the judgment well given; for a plea in abatement muſt go to the whole, and not to part; and the 3 actions depending in the Exchequer might have been pleaded in bar of the whole. 10 Mod. 285. Hill. 1 Geo. 1. B. R. Aylwood v. Woolley.

(S. a. 2) Abatement in Part or in all. By Death.

1. IN aſſiſe againſt ſeveral, the defendant *pleaded death of the one named in the writ before the writ purchaſed*; and yet Thorp upon this being found, awarded that the writ ſhall abate but againſt him only; but per Knivet clearly, it ſhall abate againſt all, becauſe it is falſe in part, and the plaintiff cannot have a better writ againſt him. Br. Brief, pl. 281. cites 23 Aſſ. 10. Thel. Dig. 236. lib. 16. cap. 10. ſ. 14. cites S. C.

2. Where one is *named R. where his name is J. or* if a *feme* be *named ſole where ſhe is covert*, there the writ ſhall not abate but againſt him or her alone; for there a *better writ is given.* Contra of death before the writ purchaſed. Br. Brief, pl. 281. cites 23 Aſſ. 10. S. P. in Aſſiſe, Thel. Dig. 236. lib. 16. cap. 10. ſ. 14. cites S. C. and ſo it is in treſpaſs. Ibid. cites Hill. 14 H. 4. 22.

3. In *ſcire facias* out *of a fine*, by which parcel of the land was granted, with a *remainder to the father of the demandant in tail, after the death of Ro. and Jane his feme*, who held this parcel for their lives, and *other parcel was granted in the ſame manner*, which Jo. and Alice his feme held for their lives, &c. and by the writ the death of all was ſuppoſed. The tenant *pleaded that Alice was alive*, &c. and it was held that the writ ſhould not abate but only for this parcel. Thel. Dig. 237. lib. 16. cap. 10. ſ. 32. cites Mich. 44 E. 3. 39.

ſhall abate in all. Br. Brief, pl. 256. cites 39 H. 6. 43. per Aſhton.

Thel. Dig. 188. lib 12. cap. 21. ſ. 21. cites Mich. 4 E. 4. 34. S. C. accordingly. But ſays the iſſue for the others was not waived, and cites 5 E. 4. 117. and 5 H. 7. 7. agreeing.

30. Formedon *againſt* 5 perſons, who plead to iſſue *of* 2 *manors*, &c. and now the *one of the* 5 *pleads that the demandant, after the laſt continuance, has entered into one manor*; judgment of the writ. And by all the juſtices, this is a good plea by one only, and to all the writ, if it be found for him; but perchance the other 4 then ſhall have thereof advantage; and the reaſon is, becauſe that he by his own act has falſified his own writ. Quod nota. Br. Brief, pl. 351. cites 4 E. 4. 32.

31. *Variance between the writ and count in parcel* ſhall abate all the writ. Thel. Dig. 238. lib. 16. cap. 10. ſ. 51. cites Paſch. 7 E. 4. 10.

32. And it is held there that in *treſpaſs againſt ſeveral*, if the *one has not any addition*, the writ ſhall not abate but againſt him only. Thel. Dig. 238. lib. 16. cap. 10. ſ. 51. cites Paſch. 7 E. 4. 10.

33. In writ of *entry, upon the ſtatute of Richard, into a manor, and into an advowſon*, it was held that the writ ſhould abate for all, per Markham, inaſmuch as ſuch action does not lie of an advowſon; but Laicon held, that it ſhould abate only for the parcel, inaſmuch as the plea is to ſuch action for the advowſon; but otherwiſe it ſhall be where the plea for the parcel goes only to the writ. Thel. Dig. 238. lib. 16. cap. 10. ſ. 52. cites Paſch. 8 E. 4. 3. Quære.

34. In treſpaſs of a *cloſe broken, and trees taken*, &c. the defendant as to the trees *pleaded that the plaintiff was ſeiſed of ſuch a manor* of which the place where, &c. *and that he was bailiff of the ſaid manor* to the plaintiff *at the time*, &c. judgment of the writ; and it was held that it goes only to parcel, and not to all. Thel. Dig. 238. lib. 16. cap. 10. ſ. 54. cites Hill. 18 E. 4. 28. Quære.

35. In *dower of a manor, houſes, and rent*, to ſay, *that the rent is parcel of the manor*, &c. goes only for the parcel, ſcil. for the rent only. Thel. Dig. 238. lib. 16. cap. 10. ſ. 63. cites Paſch. 21 E. 4. 28.

* This is miſprinted, and quære what it ſhould be?

36. In *treſpaſs of aſſault, battery, impriſonment, and of taking a bag with* 20*l.* therein contained, &c. *without ſaying who was the owner of the bag*; and it was held that all the writ ſhould abate for this cauſe. Thel. Dig. 237. lib. 16. cap. 10. ſ. 38. cites Mich. 13 * E. 5. 11. Quære.

37. If one brings an action *for one thing for which he has right, and for another for which he has no right*, his writ ſhall abate for all; per Williams J. Bulſt. 1. cites 9 H. 7. 3. per Fineux.

Diſcontinuance of part of the matter in the writ, or againſt one of the defendants in treſpaſs, ſhall abate the writ in all. Br. Brief, pl. 360. cites 7 E. 4. 10.

38. *Diſcontinuance againſt one of the defendants in appeal*, is no diſcontinuance againſt all for the advantage of the king. Thel. Dig. 236. lib. 16. cap. 10. ſ. 9. cites Trin. 21 E. 3. 34. Quære of miſnoſmer of one in appeal, and cites 21 H. 7. 31.

39. In

39. In *entry ſur diſſeiſin*, the defendant pleaded for part, that he *had nothing but in right of his wife not named*, &c. and ſo demanded judgment of the writ; and *for the reſt he pleaded in bar*, and they joined iſſue for both, and found both the iſſues for the defendant. Agreed by all the juſtices, that the writ ſhall abate but in part, and judgment ſhall be given for the reſt, and ſo for the reſidue the judgment was nil capiat per breve. Goldſb. 85. pl. 8. Paſch. 30 Eliz. Carleton v. Carr.

40. A bill may be abated *as to part of a treſpaſs*, and ſtand good for the reſt. Agreed per cur. but ſaid they never knew it abated *as to one defendant*, and ſtand good againſt the other. 2 Ld. Raym. Rep. 926. Trin. 2 Ann. Arg. in caſe of Staples v. Heydon.

8. Action upon 3 *ſeveral promiſes*, the 1ſt for 55*l.* the 2d for 65*l.* and the 3d for 65*l.* The defendant pleads *as to part non aſſumpſit*, and as *to part in abatement* thus, viz. *Quoad* 50*l. of the firſt promiſe*, 60*l. of the* 2*d, and* 60*l. of the* 3*d, quod breve caſſetur, becauſe* there were 3 *actions in the Exchequer for the ſame ſums.* Judgment of reſpondeas ouſter was given in C. B. but in error B. R. held the judgment well given; for a plea in abatement muſt go to the whole, and not to part; and the 3 actions depending in the Exchequer might have been pleaded in bar of the whole. 10 Mod. 285. Hill. 1 Geo. 1. B. R. Aylwood v. Woolley.

(S. a. 2) Abatement in Part or in all. By Death.

1. IN aſſiſe againſt ſeveral, the defendant *pleaded death of the one named in the writ before the writ purchaſed*; and yet Thorp upon this being found, awarded that the writ ſhall abate but againſt him only; but per Knivet clearly, it ſhall abate againſt all, becauſe it is falſe in part, and the plaintiff cannot have a better writ againſt him. Br. Brief, pl. 281. cites 23 Aſſ. 10. Thel. Dig. 236. lib. 16. cap. 10. ſ. 14. cites S. C.

2. Where one is *named R. where his name is J. or* if a *feme* be *named ſole where ſhe is covert*, there the writ ſhall not abate but againſt him or her alone; for there a *better writ is given.* Contra of death before the writ purchaſed. Br. Brief, pl. 281. cites 23 Aſſ. 10. S. P. in Aſſiſe, Thel. Dig. 236. lib. 16. cap. 10. ſ. 14. cites S. C. and ſo it is in treſpaſs. Ibid. cites Hill. 14 H. 4. 22.

3. In *ſcire facias* out *of a fine*, by which parcel of the land was granted, with a *remainder to the father of the demandant in tail, after the death of Ro. and Jane his feme*, who held this parcel for their lives, and *other parcel was granted in the ſame manner*, which Jo. and Alice his feme held for their lives, &c. and by the writ the death of all was ſuppoſed. The tenant *pleaded that Alice was alive*, &c. and it was held that the writ ſhould not abate but only for this parcel. Thel. Dig. 237. lib. 16. cap. 10. ſ. 32. cites Mich. 44 E. 3. 39.

(S. a. 3) Abatement in Part or in all. By Jointenancy, &c.

1. WHERE *a parſon and others join in a ſuit for tithes*, it may be pleaded againſt the parſon to the writ, and it ſhall abate all the writ againſt all; for the others ought not to join with him. Br. Brief, pl. 267. cites 11 Aſſ. 9.

2. *Parcenary in parcel of the part of the demandant* ſhall not abate all the writ. Thel. Dig. 236. lib. 16. cap. 10. ſ. 12. cites Trin. 22 E. 3. 10. Brief 384.

3. In aſſiſe *the tenant pleaded in bar of part, and jointenancy by deed of the reſt*, and after the plaintiff, becauſe he would not be delayed of the reſt by the jointenancy, *confeſſed the jointenancy*, and prayed the aſſiſe of the reſt, and had it; and the writ did not abate in all, by the confeſſion of the jointenancy of part. Br. Brief, pl. 277. cites 19 Aſſ. 14.

4. A writ of *debt, and detinue of chattle* brought *againſt an abbot and his commoign upon their joint contract and joint detinue*, was abated for all. Thel. Dig. 236. lib. 16. cap. 10. ſ. 23. cites Hill. 33 E. 3. Brief 913.

5. In *treſpaſs of a cloſe broken and of goods taken, jointenancy of the part of the plaintiff in the cloſe* ſhall only abate the writ as to the cloſe. Thel. Dig. 237. lib. 16. cap. 10. ſ. 28. cites Mich. 43 E. 3. 24. Brief 567.

6. In *aſſiſe againſt* 2, the *one pleaded releaſe in bar*, the *other jointenancy to the writ*, and the *releaſe was found for the plaintiff*, and the *jointenancy againſt him*, and all the writ was abated, and the plaintiff recovered no part. Br. Brief, pl. 454. cites 44 Aſſ. 30.

Thel. Dig. 237. lib. 16. cap. 10. ſ. 29. cites S. C. and 44 E. 3. 23. —— S. P. Br. Aſſiſe, pl. 23. cites 44 E. 3. 22. —— Br. Aſſiſe, pl. 9. cites 44 E. 3. 23. S. C.

(S. a. 4) Abatement in Part or in all. Where there are ſeveral Places.

1. WHERE *parcel of the land demanded is in another county*, all the writ ſhall abate; per Wilby. Thel. Dig. 236. lib. 16. cap. 10. ſ. 16. cites Mich. 26 E. 3. 68.

2. Where *tenements are demanded in A. and B.* if the tenant *pleads that B. is a hamlet of another vill not named* in the writ, it ſhall not abate but for the portion. Thel. Dig. 236. lib. 16. cap. 10. ſ. 19. cites Paſch. 29 E. 3. 39. Quære.

But in waſte againſt M. late wife of Thomas Earl A. the *defendant* pleaded to the writ, becauſe it is *brought in A. B. and C.* and *no ſuch vill as C. in the ſame county.* And per Martin, it is a good plea to all the writ, without anſwering to the reſidue; for this goes to all the writ. Br. Brief, pl. 6. cites 2 H. 6. 11. —— *So* in treſpaſs *in F. and H.* the *defendant ſaid, that no ſuch vill or hamlet as H. in the ſame county*, judgment of the writ. And by the beſt opinion, it goes to all the writ; for falſe in parcel is falſe in all, and the damages are intire. Br. Brief, pl. 397. cites 22 E. 4. 4.—Thel. Dig. 238. lib. 16. cap. 10. ſ. 56. cites S. C.—Br. Deux Plees, pl. 26. cites 22 E. 4. 3, 4. S. C.

3. Where

3. Where writ of *account* was brought, that the defendant was his *bailiff and receiver in two places, whereof the one was of the cinque ports, and the other guildable*, the writ was abated for the one part, and awarded good for the other, and ſo abated in part. Quod nota. But the caſe was of *reſceit in P.* and *parcel of P. was in the cinque ports*. Br. Brief, pl. 86. cites 49 E. 3. 24.

Thel. Dig. lib. 16. cap. 10. pl. 34. —In *account againſt* one as *receiver*, it was abated for part, and judgment given for the reſidue quod computet. 11 Mod. 187. Mich. 7 Ann. B. R. Biſhop v. Eagle.

4. Aſſiſe *in Great Dunmow and Little Dunmow*, the *tenant ſaid, that all* the tenements *are in Great D.* and demanded judgment of the writ. And the opinion was, that the writ ſhall abate, becauſe it is *falſe in part*, by which the plaintiff was nonſuited by reaſon of the opinion of the court; quod nota bene. Br. Brief, pl. 166. cites 8 H. 6. 12, 13. [70]

5. *Two dales and none without addition* [being pleaded to] a vill named in the writ of account, ſhall abate all the writ. See Thel. Dig. 237. lib. 16. cap. 10. ſ. 49. cites Hill. * 21 H. 6. 23.

* But it ſhould be 21 H. 6. 21. b. pl. 42.

6. Dower *de libero tenemento in D.* and made her *demand of the third part of the manor of D. and S.* the tenant demanded judgment of the writ, becauſe 20 *acres of land parcel of the manor of D. extends into P.* And there it was argued if this plea ſhall abate all the writ, or only for the ſaid 20 acres, and at the laſt by award the tenant was compelled to anſwer to the remnant; quod nota. Br. Brief, pl. 28. cites 33 H. 6. 4.

7. *Præcipe* quod reddat *of land in D. S. and W.* the tenant demanded judgment of the writ, for *all the land is in D. abſque hoc* that any part of it is in S. or W. and the demandant ſaid, that 100 acres are in D. and 100 acres in S. and the reſt in W. and ſo to iſſue. Br. Brief, pl. 32. cites 34 H. 6. 45.

8. Entry upon the ſtatute of 5 *R.* 2.[2] for entering *into the manors of H. P. and S. and one meſſuage* 100 *acres of paſture, and* 20 *acres of wood, and* 40 *acres of meadow of the plaintiff in Peckham, D. and S.* and the *defendant as to the manors pleaded, that he did not enter contra formam ſtatuti*, and *found againſt him*, and *to the reſt* pleaded, *that there is Eaſt-Peckham and Weſt Peckham, and none without addition*, and was *found for the defendant*. And the queſtion was, if the writ ſhall abate in all or in parcel, becauſe by ſome the manor ſhall be intended to be in Peckham, as well as the houſe and land; but contra per cur. and that the *manors ſhall be intended to be vills in themſelves, and the houſe and land in Peckham D. and S. only and not the manors*, and therefore ſhall not abate but in part; and the plaintiff ſhall have judgment for the damages of the entry into the manors, for there was taken a *diverſity* per cur. *when the plea goes to the action of the writ and when to the writ only*; for where it goes to the action of the writ as above, and where parcel is in ancient demeſne and parcel in the guildable, there it ſhall abate for parcel and ſtand for the reſt, for it is in a manner one bar; but contra where it goes merely to the writ, as in action againſt two, the one pleads bar, and the other pleads the death of one of the defendants the day of

of the writ purchaſed, it goes to all the writ; note the diverſity per cur. Br. Brief, pl. 382. cites 19 E. 4. 6, 7.

(S. a. 5) Abatement in Part or in all. Where the Action is brought for ſeveral Things.

1. *DEBT of* 20 *l.* 10 *l. by contract and* 10 *l. by bond*, the *defendant waged his law of the contract and denied the bond*, and he performed the law, and the *bond found for the plaintiff*, by which he was barred of 10 l. and recovered 10 l. Br. Brief, pl. 516. cites 3 H. 4. 2.

2. *Debt*, parcel *upon a leaſe for years*, parcel *for work*, and *the reſt upon buying of ſtuff*; the *defendant to the leaſe ſaid*, that *ne leſſa pas*, and *as to the work tendered his law*, and *to the reſt tendered the money in court*, and to the firſt part the *plaintiff maintained the leaſe*, and to the ſecond *refuſed the law*, ſo that of this he took nothing by his writ, and was amerced, and *to the third part tendered*, &c. *he received it*, and took nothing by his writ of thoſe two parts, and the iſſue ſuffered of the other part. And ſo ſee that they [71] ſhall not abate the writ, and all by the receipt of part pending the writ; and ſuch matter in debt 38 E. 3. as it was ſaid there. Br. Brief, pl. 121. cites 11 H. 4. 55.

3. *Intruſion* of ward *ſuppoſing* 20 *acres of land and* 8 *d. rent to be held*, Norton prayed judgment of the writ ſuppoſing rent to be held, for *rent does not lie in tenure*; but per Hank. the writ is good; contra Hill, clearly, for in writ of ward of the heir of the meſne, where there is lord, meſne, and tenant, the writ ſhall ſay, quod terram ſuam tenuit, and not quod redditum tenet. And there by him *where ſuch matter comes of the ſhewing of the plaintiff himſelf* the writ, and the count ſhall abate in all, and not only in this parcel, and to be good of the land; quod nota by the beſt opinion. Br. Brief, pl. 123. cites 11 H. 4. 82.

4. In *debt*, if the count be *for arrears of rent-ſervice as to parcel, and for rent upon a leaſe for years of the reſidue*, by the opinion of Babbington all ſhall abate. Thel. Dig. 237. lib. 16. cap. 10. ſ. 45. cites Mich. 10 H. 6. 5. for ſuch action does not lie of rent-ſervice at the common law. Quære.

Detinue was brought by J. N. *of two deeds*, and *in his count it appeared the one appertained to him, and the other* appertained *to him and his feme*; and becauſe his feme was not named, it was abated for the one and ſtood for the other; quod nota. Br. Brief, pl. 253. cites 38 H. 6. 24, 25.

5. Detinue *of two writings*, whereof the *one appertained to the plaintiff* and *the other not*, yet it goes but to the action for the one, and to the other the defendant anſwered; for the writ ſhall not abate for all, by the beſt opinion. Br. Brief, pl. 391. cites 9 H. 6. 54.

S. P. as in waſte *in aſſets and thorns* where

6. *And* it was ſaid, that if *waſt*, *dower* or *aſſiſe* be brought, and the *writ is general*, and the *plaint*, *demand*, or count is of *things whereof the action lies of ſome and of ſome not*, yet the writ ſhall

ſhall not abate in all but in parcel. Br. Brief, pl. 485. cites 6 E. 4. 5. *therns is not waſte*, yet the writ ſhall not abate in all. Quod nota; and this exception was pleaded to the count. Br. Brief, pl. 14. cites 9 H. 9, 10. —— S. P. Roll. Rep. 307. Arg. cites 22 E. 4. 4. 9 H. 6. 10. —— S. P. And ſo writ of dower ſhall not abate for all, by the demand of dower of ſuch thing of which a feme is not dowable. Quære; for Babington denied it, if ſuch matter be acknowledged by the plaintiff. Thel. Dig. 237. lib. 16. cap. 10. ſ. 43. cites 9 H. 6. 10. 46. 48. 54. and 10 H. 6. 5. and ſee 8 E. 4. 3. 9 H. 7. 4. 22 H. 6. 28. Brief 94. 5 E. 4. 89. 18 E. 4. 28.

So in waſte in a houſe, and breaking of a wall or pale, where *it appears that waſte does not lie for the wall or pale, unleſs it was covered*, the writ ſhall not abate in all, as if the party had *confeſſed that his writ had not lain in part*; for otherwiſe it is where it comes by *ſurmiſe in writ or declaration*. And ſo ſee a diverſity between a confeſſion of the plaintiff, and where the thing comes of the ſurmiſe of the plaintiff in his writ or declaration. Br. Confeſſion, pl. 18. cites 22 H. 6. 24.

So in *ejectment of the cuſtody of land and body* where it lies not of the body. Arg. Roll. R. 307. cites D. 23 El. and 9 H. 6. 54.

7. Where a *writ* is brought *for ſeveral ſums*, it is in nature of 2 ſeveral actions; ſo that though it be void as to one, it is well enough for the other, it being *only a miſpriſion* in his writ or count; *but where* one brings an *action for two things, and ſhews* by his own confeſſion *that for the one he had not any cauſe of action or is to have another action* it is otherwiſe; per cur. Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. cites 10 H. 6. 5. 41 E. 3. 2. 9 H. 6. 10. 9 H. 7. 3. 21 H. 7. 34. Where *debt for ſeveral ſums* is brought as upon the ſtatutes of uſury for 40l. corruptive lent, &c. againſt the form of the ſtatute ſuch a day, and that he lent 20l. &c. againſt the ſtatute, but ſays not corruptive. Tho' this is ill as to the 20l. for want of the word corruptive, yet being *good for part* he ſhall have judgment for that part, for 'tis *in the nature of two ſeveral actions*; and though it be void for one, yet it is well enough for the other, being it *is but a miſpriſion in his writ or count*. Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. Woody v.

8. *Where* a man brings action for two things and of his own ſhewing, it appears that he cannot have action or *better writ* for one of them, there the writ ſhall not abate *for the whole*, but ſhall ſtand for that which is good; but when a man brings action *for two things*, and it appears that he cannot have his writ for the one thing but may have another in * another form, then the writ ſhall abate in the whole, and ſhall not ſtand for that which is good. By the Reporter. 11 Rep. 45. b. Mich. 12 Jac. in Godfrey's caſe. S. P. by Coke Ch. J. Roll. Rep. 77. in caſe of Bullen v. Godfrey, S. C. —— S. C. cited Arg. Saund. 285. —— S. C. cited 7 Mod. 89. Arg. —— G. Hiſt. of C. B. 209. cites S. C. —— New Abr. 12. the laſt plea, cites S. C. in the very words of G. Hiſt. of C. B.

* [72]

(T. a) Againſt one, where it ſhall abate againſt the other.

1. IT was ſaid by Herle, that in treſpaſs, if the writ abates by *plea of one as to the form*, it ſhall abate againſt all, though the others had before pleaded to iſſue. But the *one may abate the writ as to the matter* as by reaſon of miſpriſion of a name, &c. Yet the writ *ſhall ſtand againſt the others*. Thel. Dig. 236. lib. 16. cap. 10. ſ. 2. cites 6 E. 3. 278. G. Hiſt. of C. B. 204. S. P. accordingly.

2. *Præcipe* quod reddat *againſt E. and N.* and *E. ſaid that N. is his villein, and N. ſaid the like*, by which he went ſine die, and

E. pleaded to the writ, becauſe now it appears that N. had nothing the day of the writ purchaſed, & non allocatur; for he is tenant to the writ, and the other is as *diſclaimer*, and therefore all veſted in the other, by which he was awarded to anſwer. Br. Brief, pl. 147. cites 21 E. 3. 14.

3. Writ of *audita querela* may abate againſt ſome of the defendants *for nontenure*, and ſtand againſt the others. Thel. Dig. 236. lib. 16. cap. 10. ſ. 15. cites Paſch. 25 E. 3. 41.

4. *Præcipe* quod reddat *againſt* 2, *who waged their law of non-ſummons*, and *at the day the one came and did it*, the *other made default, by which the demandant recovered the moiety*, and the writ abated for the other moiety; but 'twas ſaid, that had there been view, then by the ley gager of the one all ſhall abate; for the one cannot be ſummoned without the other. Br. Brief, pl. 469. cites 41 E. 3. 2.

S. P. Br. Brief, pl. 360. cites 7 E. 4. 10. and ſo of ill addition.

5. It was adjudged, that *miſnoſmer in treſpaſs of one* of the defendants ſhall not abate the writ, but againſt him only, and not againſt his companions. Br. Brief, pl. 355. cites 5 E. 4. 2.

6. In formedon *againſt the baron and feme, and two others, the two pleaded nontenure*, and the *baron and feme pleaded in bar*, and were at iſſue, and the other 2 prayed judgment that the writ ſhould abate againſt them; and by two or three juſtices, they ſhall not have judgment; for if judgment ſhall be, the writ ſhall abate againſt all; for it *cannot abate againſt ſome but againſt all, but the 2 ſhall go quit, and no continuance ſhall be againſt them*, nor the demandant is not compellable to maintain that tenants as the writ ſuppoſes, unleſs he will; but by one of the prothonotaries, the writ ſhall abate againſt the two. Quod nota. Br. Brief, pl. 335. cites 5 E. 4. 125.

Show. 75. S. C. adjornatur.—— Comb. 144. S. C. adjornatur.

7. J. S. brought *treſpaſs againſt A.* and *afterwards brought treſpaſs againſt A. and B. for the ſame treſpaſs*; and they both plead this matter in abatement. It was objected, that if this be a plea for A. it is not ſo for B. Holt Ch. J. doubted, but the other 3 inclined that the plea was good as to both defendants. Carth. 96. Mich. 1 W. & M. in B. R. Rawlinſon v. Oriett & Benſon.

New Abr. 11. in the ſame words.

8. If there be 2 *executors*, and *one is named of D. and ſays he is of C.* the writ ſhall abate againſt both, becauſe they are both the repreſentatives of one perſon, and muſt both be legally ſummoned; as *they are both but one perſon in the eye of the law*, the plaintiff cannot proceed againſt the one without the other; but [73] in this caſe the other defendant will be obliged to plead, though the defendant's plea in abatement ſhall be firſt determined, and if it be found for him, ſhall abate the writ in toto. G. Hiſt. of C. B. 200.

9. If there be 2 *or more plaintiffs*, a *diſability in one* of them ſhall ſtop the others proceedings on their writ; for as they have made it a joint demand, the defendant, by diſabling one of them, ſhews the others have no right to proceed; for they cannot all recover, and the writ has ſuppoſed them all to have an equal right. G. Hiſt. of C. B. 204.

(U. a) Writ abatable. Made good by what.

1. IN *writ de rationabili parte*, the tenant *pleaded that they held in common* the day of the writ purchaſed; judgment of the writ; to which the demandant *replied that the tenant held now in ſeveralty*, &c. yet the writ was abated; for it is not like to the purchaſe of parcel made by the tenant pending the writ; for in this laſt caſe the tenant cannot plead the nontenure of parcel the day of the writ, &c. without aſſigning that he is tenant at the time of the plea pleaded, and ſo the writ ſhall be held for good. Thel. Dig. 219. lib. 16. cap. 3. ſ. 1. cites Hill. 2 E. 2. Brief 780.

2. If the tenant *recovers, and has execution againſt a ſtranger* of thoſe tenements pending the writ, it is good. Thel. Dig. 219. lib. 16. cap. 3. ſ. 3. cites Paſch. 8 E. 3. 400. and 22 E. 3. 8.

So if a man brings *aſſiſe or præcipe* quod reddat againſt another, and *pending the writ the defendant, who had nothing before* *, *recovers the land in demand and enters*, there the writ by this is made good. Quod nota by award. Br. Brief, pl. 289. cites 26 Aſſ. 38.

* So if he *takes a ſurrender of it*; per Littleton. Br. Brief, pl. 379. cites 18 E. 4. 18, 19.

3. *But* if he comes to the tenements *by deſcent*, the writ ſhall abate. Thel. Dig. 219. lib. 16. cap. 3. ſ. 3. cites Paſch. 8 E. 3. 400. and 22 E. 3. 8. and 18 E. 4. 27. and 32 E. 3. Brief 290. and 41 E. 3. 5.

S. P. Arg. Ld. Raym. Rep. 476. cites 41 E. 3. 5. 1 H. 6. 1. 18 E. 4. 26.

4. It is ſaid that *in aſſiſe and quare impedit* the *defendant may make himſelf diſſeiſor and diſturber, who was not* diſſeiſor nor diſturber *before the writ purchaſed*, &c. viz. *by counterpleading* of the action or title of the plaintiff, but not by delays made in the ſuit. Thel. Dig. 219. lib. 16. cap. 3. ſ. 4. cites Mich. 17 E. 3. 71. and 34 Aſſ. 3. and 44 Aſſ. 31.

5. If *writ* be brought *againſt him in reverſion, living the tenant for life*, and after the *tenant for life dies*, the writ ſhall not be made good; for he is in by title in law. Thel. Dig. 219. lib. 16. cap. 3. ſ. 6. cites Trin. 30 E. 3. 4. and Hill. 31 E. 3. Brief 336.

But where there is *tenant by the curteſy*, and the *writ is brought againſt him in reverſion*, and *after the writ* purchaſed *the tenant* by the curteſy *ſurrenders to him in reverſion, and dies after the ſurrender*, yet the writ is good, notwithſtanding this deſcent after the ſurrender. Thel. Dig. 219. lib. 16. cap. 3. ſ. 9. cites Mich. 1 H. 6. 1.

6. Aſſiſe *in O.* The defendant *ſaid that the tenements are in B. and not in O.* Judgment of the writ, *and if*, &c. *he holds jointly by charter with N. not named*, &c. And by the opinion of the court, becauſe *by the firſt plea he has pleaded to the aſſiſe, and* has *pleaded ill naming of the vill as ſole party*, he has loſt the advantage of the jointenancy. Br. Brief, pl. 299. cites 30 Aſſ. 2.

7. Writ brought *againſt baron alone, of tenements* which he *held jointly with his feme* the day of the writ purchaſed, ſhall not be made good by the *death of the feme pending the writ.* Thel. Dig. 219. lib. 16. cap. 3. ſ. 7. cites Paſch. 32 E. 3. Brief 290. and Mich. 18 H. 6. 26. accordingly.

[74]

Br. Nonabilitie, pl. 14. cites S. C.—Thel. Dig. 219. lib. 16. cap. 3. ſ. 8. cites S. C. that writ which abates by *reſignation* ſhall not be made good by relation; but adds Quære.

8. *Debt by J. D. prior* of the friars of S. The *defendant ſaid that after the laſt continuance the plaintiff reſigned*; judgment of the writ, *and did not ſay, and ſo not prior*; for it may be that he reſigned, and was re-elected *before the return of the writ*; and yet the beſt opinion was that it is a good plea. Br. Brief, pl. 134. cites 9 H. 5. 1.

If action of *detinue* be brought *againſt a feme* and ſhe has a baron, which *baron dies pending the writ*, yet the writ is abatable; for it was never good; per Littleton J. Br. Brief, pl. 380. cites 18 E. 4. 25.

9. *So* where a *feme ſole brings action, and takes baron, who dies before the writ returned.* Br. Brief, pl. 134. cites 9 H. 5. 1.

10. Quære where a man is *outlawed pending his writ*, and *obtains a pardon pending the writ.* Br. Brief, pl. 134. cites 9 H. 5. 1.

S. P. per Littleton. Br. Brief, pl. 379. cites 18 E. 4. 18, 19.——S. P. Arg. Ld. Raym. Rep. 476. cites 41 E. 3. 5. 1 H. 6. 1. 18 E. 4. 26.——*But if* writ be brought againſt one who has nothing the day of the writ purchaſed, and *he after purchaſes the tenements to himſelf and to another jointly*, &c. in ſuch caſe the writ is not made good, but it ſhall abate. Thel. Dig. 219. lib. 16. cap. 3. ſ. 5. cites Paſch. 18 E. 3. 14.

11. *But purchaſe pending præcipe* quod reddat makes the writ good. Br. Brief, pl. 134. cites 9 H. 5. 1.

12. In *aſſiſe of tenements, parcel in franchiſe, and parcel out*, one of the tenants demanded judgment of the writ for this cauſe, &c. To which the demandant *replied, that the writ was brought againſt one of the bailiffs of the franchiſe*, and ſo the writ good; to which the *tenant ſaid, that this bailiff was diſcharged, and another choſe*, &c. yet the writ held good, inaſmuch as it was well purchaſed. Thel. Dig. 219. lib. 16. cap. 3. ſ. 10. cites H. 10 H. 4. 9.

And it is held by Herle, that it is a *good maintenance of the writ* againſt ſuch entry or diſſeiſin pleaded, to ſay *that the tenant is new tenant, as is ſuppoſed by the writ.* Thel. Dig. 188. lib. 12. cap. 21. ſ. 22. cites Paſch. 8 E. 3. 388. but ſays, ſee that this is denied by Fitzh. Paſch. 26 H. 8. 1. 7.

13. In *præcipe quod reddat*, if the *demandant enters pending the writ*, the writ is abateable, but if the *tenant re-enters* the writ is good. Thel. Dig. 188. lib. 12. cap. 21. ſ. 22. cites Trin. 4 H. 6. 27. 34 H. 6. 9. and 5 H. 7. 7. 41.

14. In formedon, the *tenant alleged deſcent to him and another, and* that *partition was made between them* by prochein amy, *and this land was allotted to him*; and therefore he *prayed aid of the other*, and that the parole demur; and the *other alleged the partition to be void, becauſe it was by prochein amy*; and therefore the other pleaded to the writ, for if the partition be void, the writ ought to be brought againſt both: et non allocatur; for by the *aid prayer*, he has *affirmed the writ good*; per cur. Br. Brief, pl. 12. cites 9 H. 6. 5.

15. *Præcipe* quod reddat is *brought in S. where the land is in D.* the *tenant accepted the writ, and vouched, and the vouchee entered into the warranty, and pleaded in bar*, where *he might have pleaded* this matter *to the place*, and ſo he loſt the advantage; for

he

he cannot abate the writ for this miſtake of the vill, becauſe the tenant has affirmed it, but for that he might have drove him from the place. Br. Brief, pl. 186. cites 22 H. 6. 12, 13.

16. Where writ is *abateable*, as *by jointenancy, ſeveral tenancy, miſnoſmer, or* by *taking of baron* by the plaintiff pending the writ, and the like, if the party pleads and admits it, he ſhall not have writ of error after; *but where* the writ *is abated*, as by death [75] pending the writ, and the party admits it, yet there he ſhall have writ of error after; per Pigot and Choke. Br. Brief, pl. 379. cites 18 E. 4. 18, 19.

(W. a) The Order of Pleading.

1. THERE ought to be good regard, that no word or ſentence in a writ be writ before or after another, *contrary to the uſual form;* ſed quod habeat in verbis cancellariæ ordinatam diſpoſitionem & verborum ordinem; otherwiſe it ſhall abate. Thel. Dig. 104. lib. 10. cap. 12. ſ. 1. cites Bract. 188.

2. The order of pleading is, 1ſt. To the *juriſdiction.* 2dly. To *the* * *perſon.* 3dly. To the *count.* 4thly. To the *writ.* And 5thly. To the *action.* And if he fails of any of theſe, he ſhall not go back again. Br. Exception, pl. 1. cites 17 E. 3. 74.

And if he fails of any of theſe, he has affirmed the firſt matter. Br. Pleadings, pl. 14. cites 35 H. 6. 12. per tot. cur.——Br. Exception, pl. 5. cites 35 H. 6. 11. S. P. per cur.——Co. Litt. 303. a. accordingly, and that the plea to the perſon muſt firſt be to the perſon of the plaintiff, and then to the perſon of the defendant.——R. S. L. 3. cites Kitchin 95. That the plea to the juriſdiction is called a *foreign plea*, becauſe it either alleges that the matter ought to be tried in another court, or elſe refuſes the judges as incompetent, for that the matter in queſtion is not within his juriſdiction. The pleas to the perſon of the plaintiff are there ſaid to have been 6, viz. *villeinage, outlawry, alien, out of protection, profeſſed in religion*, and *excommunication*: that the pleas to the count are for *variance between the writ or count, or ſpecialty and record*, and for *uncertainty in the plaint or count*: that the pleas to the writ are for *variance between the writ and regiſter, uncertainty, death of parties, miſnoſmer, jointenancy*, and the like: that thoſe to the writ are, where one pleads ſome matter which *ſhews the plaintiff had no cauſe to have that writ brought, but ſome other writ.* G. Hiſt. of C. B. 40, 41, 42. ſays, 5thly to the *action of the writ*, and 6thly to the *action itſelf in bar thereof*; and ſays, this is the natural order, becauſe by this order each ſubſequent plea admits the former. As when he pleads to the perſon of the plaintiff, he admits the juriſdiction of the court; for it would be *nugatory to plead any thing in that court, that has no juriſdiction in the caſe.* When he *pleads to the count, he allows that the plaintiff is able to come into that court* to implead him, and he may there be properly impleaded; *but* in pleading to the count *he does not admit the writ to be good*; yet if the count be vitious, the writ is conſequently deſtroyed; for though the writ in itſelf may be good, yet it is not purſued: but *in pleading to the writ he admits the form of the count*, becauſe by an objection to the form of the writ, he allows the count to be ſufficient in form; if the writ be good, it is not to any purpoſe to object to the form of ſuch writ, if the form of the count be thereupon inſufficient; but if the count be in ſubſtance variant, the defendant may ſhew it any time in arreſt of judgment, becauſe the court has no authority to proceed in a matter of ſubſtance different from the original. If a man *pleads to the action of the writ, he allows both the form of the count, and the writ*; for if he admits, that if the form of the writ and count were adapted to the plaintiff's caſe, that ſuch form is good and ſufficient, ſince to object to the action not quadrating to the plaintiff's caſe, does admit, that if it be ruled by the count, that it does allow that the plaintiff has before the court a count in form ſufficient. If the defendant *pleads in bar to the action, he admits the form of the writ and count*; for he anſwers to the right in demand, and puts that right in iſſue, and thereby admits that there is a ſufficient form to put in iſſue; and therefore, though a man pleads non aſſumpſit modo & forma, yet the modo & forma does not traverſe the form of the writ or count, but the ſubſtance of the promiſe only; which is the true reaſon why you may give another promiſe in evidence different in time and place mentioned in the declaration, though not different in ſubſtance.

* See tit. Courts, alien, &c. and recuſant (d).

3. Thel. Dig. of Writs, lib. 10. cap. 1. ſ. 21. ſays, ſee Mich. 30 E. 3. 20. how the order is obſerved well; firſt, *excommunication to the perſon of the plaintiff before full defence made, and after to the count*, and *then to the writ for default of the place in the writ*; and after that contra pacem was in the writ, which ought not to be, &c. *and after to the action.*

A man ſhall not plead to the count after plea to the writ;

4. It was held, that *after plea to the writ*, a man may plead *to the matter of the count*. Thel. Dig. lib. 10. cap. 1. ſ. 19. cites Mich. 24 E. 3. 47. 35.

but as *amicus curiæ* a man *may ſhew matter apparent* in the count. Thel. Dig. of Writs, lib. 10. cap. 1. ſ. 30. cites Mich. 19 H. 6. 10, 11. and 4 H. 6. 16. and H. 20 H. 6. 19.

[76] In *debt*, the *defendant took exception to the writ* for certain cauſes, and they were ruled againſt him, and *after he took exception to the count*, and was not ſuffered, becauſe he had pleaded to the writ before; quod nota. Per Markham, it is *matter apparent in the count*; and *therefore a ſtranger may aver it as amicus curiæ*, to inform the court for error, by which he was admitted to aver it to the court, and not otherwiſe. Quod nota. Br. Exception, pl. 1. cites 19 H. 6. 10.

Pleas in abatement are *to the count firſt, and after to the writ*;

5. *By exception to the count* the writ ſhall abate; for there is no other judgment of it but quod querens nihil capiat per breve ſuum. Br. Brief, pl. 14. cites 9 H. 6. 10.

but to the matter of the count a man may plead after he has pleaded in abatement of the writ. Fin. Law 8vo. 363.

6. In *waſte in A. and B.* the 1ſt exception was *to the count*; the 2d *two dales, and none without addition*; the 3d that *A. is a hamlet of B.* and the 4th that *B. is in A. and not a vill by itſelf.* Thel. Dig. of Writs, lib. 10. cap. 1. ſ. 29. cites Mich. 9 H. 6. 42.

In reſpect of the concluſion, ſee (C. b)

(X. a) Pleas to the Writ.

1. PLEAS to the writ are, 1ſt. Such as are *apparent in the writ*. And of this the defendant may at all times take advantage. 2dly. Such as *reſt upon the defendant's plea*, as miſnoſmer, jointenancy, nontenure, non habetur aliqua talis villa, or over-dale or nether-dale of the place where the action is laid, and not of which the defendant is named, *unleſs* in caſes *where outlawry lies*; or that the lands lie in A. and not in B. which pleas the defendant is bound to take in time, and have a care that he be not concluded of them by his general appearance, continuance, or imparlance. 3dly. Obſerve, that if the defendant *for matter apparent in the writ*, pleads in abatement thereunto, that he ſhall both in the beginning and ending thereof, pray judgment of the writ, viz. *petit judicium de brevi prædicto*, &c. *but* if *for matter out of the writ*, as excommunication, then he ſhall pray judgment *in the concluſion of his plea only.* Brown's Anal. 5.

2. Scire facias upon a fine *by the heir of him in the remainder*; the tenant ſaid that the fine was *to H. for life*, the *remainder to the father and mother of the plaintiff in tail*, and that the *mother* of the plaintiff, *after the death of the tenant for life, entred* into the land,

land, *and was ſeiſed* by force of the fine, *judgment of the writ;* and admitted a good plea to the writ. Quære if it be not to the action of the writ; and the other ſaid that H. infeoffed his mother, and prayed execution. And per Perſey, Kirton, and Clapton, *this is a ſurrender*, and ſo ſeiſed by force of the fine; and if the ſaid H. tenant for life had charged and infeoffed him in remainder, yet he ſhould hold charged for life of the tenant for life, and not after; and yet Belknap awarded the writ good. Quod mirum! Br. Scire Facias, pl. 53. cites 50 E. 3. 6.

3. *Interlining* in a bond, and the writ is made according to it, ſhall not abate the writ; per Thirn. But a *raſure* goes to the action, but the variance by the interlining is to the writ; per Hort. Br. Brief, pl. 129. cites 14 H. 4. 18.

4. Where the tenant pleads the entry of the demandant pending the writ, he ſhall conclude to the writ, &c. Thel. Dig. 215. lib. 15. cap. 4. ſ. 5. cites 4 H. 6. 27. Mich. 34 H. 6. 8. and 4 E. 4. 35.

5. Where a man pleads that the plaintiff is an alien born, or a villein, or outlawed, he may chooſe to conclude to the writ, or to the action. Thel. Dig. 215. lib. 15. cap. 4. ſ. 4. cites Hill. 32 H. 6. 27. and 10 H. 7. 11. [77]

6. *Annuity* of 11*s.* per ann. *by preſcription.* The *defendant ſaid that he held the advowſon of D. of him by* 11*s. per ann. which is the ſame rent*, and demanded *judgment of the writ*, and the defendant was awarded to anſwer over; for *it is only argument.* Br. Brief, pl. 30. cites 33 H. 6. 34.

7. In treſpaſs of goods taken, the defendant may *ſay that the plaintiff bailed them to him, and ſo he may have writ of detinue;* judgment of the writ; this is a good plea; per Choke J. Quod non negatur. Br. Brief, pl. 340. cites 2 E. 4. 25.

8. *Plenarty by* 6 *months of the preſentation of a ſtranger* is no plea for the *incumbent* to plead; per tot. cur. For *it is not to the writ;* for he does not give a better writ againſt any perſon certain, *nor* it is not *to the action;* for it does not intitle him to the patronage. Br. Plenarty, pl. 9. cites 16 E. 4. 11. Br. Quare Impedit, pl. 134. cites S. C.

9. In ceſſavit, if the *tenant ſays*, that *he holds of the plaintiff by ſeveral tenures, and not by one intire payment*, this goes to the writ, and not to the action; per cur. Br. Ceſſavit, pl. 42. cites 10 H. 7. 24.

(Y. a) Pleadings to the Action of the Writ.

1. LAST *ſeiſin in writ of poſſeſſion without title* is to the writ, and *by title* it is to the action *in every writ, but in writ of right.* Br. Mortdanceſtor, pl. 16. cites 5 Aſſ. 1.

2. *Debt upon a bond by J. T. grocer of L.* which words *(grocer of L.) were interlined* in the bond, and Horton pleaded it to the writ. Thirn. Ch. J. ſaid, that that which is interlined *is only to give addition*, and therefore the plea goes to the action, and not to the writ, by which he awarded that the defendant anſwer,

contrary to the opinion of Hank. and Hill, two of the other juſtices. Br. Variance, pl. 85. cites 14 H. 4. 18.

3. Avowry *becauſe the plaintiff held* 4 *rod of land by* 10*s.* The *plaintiff ſaid that he held two houſes by* 5*s. abſque hoc that he held the* 4 *rod by* 10*s.* Judgment of the avowry. And per Martin, and Hull, this is to the action of the avowry, and not in abatement of the avowry; but if he *ſays, that the four rod are held by one ſervice, and the two houſes by other ſervices*, this is a good plea in abatement of the avowry. Br. Avowry, pl. 49. cites 5 H. 5. 4.

4. Quare impedit quod permittat ipſum preſentare *ad eccleſiam de B.* Weſton demanded judgment of the writ; for the *defendant is parſon of H. and B. is a chapel and parcel of H.* and thoſe of B. take their ſacrament at H. and B. is only a chapel of eaſe, and has been adjoined, and is parcel of the church of H. time out of mind, and demanded judgment of the writ; and per Newton, this goes in bar, and not to the writ. Br. Quare Impedit, pl. 76. cites 8 H. 6. 32.

5. Detinue *of* 2 *deeds*, the *one by which A. leaſed to W. for life, the remainder to the plaintiff*, and the *other by which A. releaſed all his right to the ſaid tenant for life, who is dead.* And the beſt opinion was, that becauſe the one deed appertained to the plaintiff, and the other not, *it goes to the action of parcel, and not only to the writ;* for *action may lie in parcel, and in parcel not*, as of dower of land in common, or præcipe quod reddat of land and advowſon, and the like; *but if a man confeſſes that his action*
[78] *does not lie in parcel, or* if *it be falſe in parcel*, it goes to all the writ. Note the diverſity. Br. Brief, pl. 18. cites 9 H. 6. 54.

6. Where a man is *outlawed upon capias ad ſatisfaciendum, by name of W. S. of S.* and comes by capias utlagatum, and *ſays, that he was of D.* &c. *and not of S.* if *this iſſue* be *tried between the parties it ſhall bind the king, and if it* be *found between the king and the party defendant, it ſhall bind the plaintiff;* per Brown prothonotary: but ſcire facias was awarded to warn the plaintiff, notwithſtanding his ſaying; and by him, if this matter had been *pleaded to the writ before the outlawry*, it had not gone but to the writ; *but* now *after judgment* it goes to loſe all, or gain all; ſo that now it is peremptory, where at firſt it had gone but to the writ if it had paſſed for the defendant; but if it had paſſed againſt him, then it had been peremptory on the part of the defendant; contrary on the part of the plaintiff. Br. Peremptory, pl. 17. cites 21 H. 6. 21.

7. In quare impedit, where the plaintiff in his *count makes title to the advowſon appendant*, and the *defendant ſhews fine levied of the moiety*, ſo that the moiety is in groſs, judgment of the writ; and it was doubted if this goes to the writ, or to the action. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

But it is no plea in action perſonal, that the plaintiff is an *alien born*; contra in action real or mixt. Br. Nonabilitie, pl. 40. cites 38 H. 8.——Br. Denizen, pl. 10. cites S. C.

8. In *aſſiſe by* 2, the *defendant ſaid* that the *one is alien born*, judgment, &c. This is to the action againſt him. Quod nota bene. Br. Nonabilitie, pl. 51. cites 7 E. 4. 29.

9. In

9. In *debt upon recovery of* 10*l.* if the *defendant ſays that the plaintiff has levied part*, it is no plea to the writ, but to the action; per Littleton. So of acquittance. *Contra* it ſeems if it was *levied pending the writ*. Br. Brief, pl. 486. cites 7 E. 4. 32.

S. P. Br. Brief, pl. 428. cites 9 H. 5. 4.—

10. *As* in *dower againſt guardian*, who *ſaid that he was not guardian*, judgment of the writ, and admitted for a good plea to the action of the writ. Br. Brief, pl. 490. cites 9 E. 4. 31.

Where it appears by the plaintiff's declaration, or the defendant's plea, that the plaintiff ought *not to have the ſame but another writ*, it is in the defendant's *election* to conclude either to the writ, or to the action of the writ; as where *dower* is brought *againſt a guardian* who pleads that he is not guardian, and prays judgment of the writ. Brown's Anal. 5. ——— Heath's Max. 22. in totidem verbis.

11. It ſeems that he who *pleads to the action of the writ*, ſhall *conclude to the writ*. Br. Brief, pl. 490.

If a man pleads to the action of the writ, he *may chuſe to conclude judgment of the writ, or judgment ſi actio*; per Fitzherb. and Shelley, juſtices. Br. Brief, pl. 492. [488] cites 26 H. 8. 1. ——— Br. Brief, pl. 405. [409] cites S. C.

(Z. a) Pleadings to the Writ, and over to the Action.

1. IN *mortdanceſter by* 3 *parceners*, as *to one of them the tenant ſaid that ſhe was ſole ſeiſed of that which belonged to her portion the day of the writ purchaſed*, judgment of the writ, and admitted, without pleading over to the points of the writ. But it was ſaid that he *might have pleaded non-tenure of this portion, and* if it be found, &c. Thel. Dig. 216. lib. 15. cap. 5. ſ. 5. cites 8 E. 2. It. Kanc. Mortdaunc. 40. & 22 Aſſ. 19.

*2. In *jurus utrum*, the tenant *pleaded that a ſtranger held parcel not named*; and if it be found, &c. *that the demandant is ſeiſed of his fealty of thoſe tenements, &c. and* if found, &c. he ſaid *that is lay-fee, and not frankalmoigne*, &c. and held a good plea. Thel. Dig. 215. lib. 15. cap. 5. ſ. 1. cites 12 E. 2. Juris Utrum 12.

So in juris utrum the *tenant vouched*, and the demandant *counter pleaded the voucher, that he who is vouched, nor none of his anceſtors*, &c. To which the *tenant ſaid that ſeiſed, priſt*, &c. *And* if it be found that not, &c. *that the tenements are his lay-fee*, &c. and admitted. Thel. Dig. 215. lib. 15. cap. 5. ſ. 2. cites Hill. 17 E. 2. Counterple de Voucher 112.

So where the tenant in juris utrum *pleaded miſnoſmer of the demandant, and* if found, &c. *that the demandant has recovered his fealty, and* if found, &c. he pleaded *a ſpecial title, with ſo his lay-fee, and not*, &c. all was admitted per cur. Thel. Dig. 216. lib. 15. cap. 5. ſ. 9. cites Paſch. 11 E. 3. Juris Utrum 3.

*[79]

3. In *aſſiſe of nuſance*, the tenant *pleaded that he had nothing in the place where, &c. but only in parcenary with* ſuch a *one not named*, &c. *And* if it be found, &c. he ſaid *the plaintiff had nothing in the tenements to which*, &c. *at the time* of the nuſance, *but ſuch a one* was ſeiſed, &c. and prayed that it be inquired by aſſiſe, and ſo it was. Thel. Dig. 215. lib. 15. cap. 5. ſ. 3. cites Mich. 18 E. 2. Aſſiſe 374.

4. In *mortdanceſter*, the tenant *pleaded non-tenure of parcel, and* if it be found, &c. he is *ready to hear the recognizance*. Thel. Dig. 216. lib. 15. cap. 2. ſ. 4. cites 2 Aſſ. 10. and that ſo he ought to plead; and cites 12 Aſſ. 8.

5. In *aſſiſe*, one who *pleaded miſnoſmer of himſelf* did *not plead over to the aſſiſe*, and admitted. Thel. Dig. 216. lib. 15. cap. 5. ſ. 7. Mich. 5 E. 3. 224.

6. In *cui in vita of tenements in* 3 *vills*, the tenant *pleaded that all the land in demand is in one of the vills, and* pleaded *over in bar by the deed*

deed of the anceſtor of the demandant, with warranty, and was received, and the demandant was received to maintain his writ, and to reply to the bar. Thel. Dig. 216. lib. 15. cap. 5. ſ. 6. cites Mich. 6 E. 3. 290.

But ibid. cites Paſch. 16 E. 3.

7. It is ſaid, that *in attaint* a man ſhall not plead *ſi trove ſoit*, &c. Thel. Dig. 216. lib. 15. cap. 5. ſ. 8. cites Mich. 8 E. 3. 439.

Nontenure 14 and 21 H. 6. Maintenance de Brief 23. that in attaint the tenant *pleaded nontenure generally, and* if found, &c. *they have made good oath.* And *ſo* where *tenancy in common was pleaded to the writ*, he was forced to *plead over to the falſe oath.* Ibid. cites 27 Aſſ. 61. 29 Aſſ. 9.

8. Where the tenant *pleads not attached by* 15 *days, and* it is *found that he was* by examination of the bailiff upon his oath, yet the tenant *may plead over* quia nulla pœna. Thel. Dig. 216. lib. 15. cap. 5. ſ. 10. cites 22 Aſſ. 19.

9. In *aſſiſe*, the tenant may *plead that he is an earl not named earl, without pleading over* to the aſſiſe, &c. becauſe it is triable by record if he be an earl or not. But otherwiſe it is of abbots, priors, &c. Thel. Dig. 216. lib. 15. cap. 5. ſ. 11. cites 22 Aſſ. 24.

10. A man ſhall *plead jointenancy of the part of the plaintiff, and miſnoſmer* of the plaintiff, *without pleading* over *to the aſſiſe*. Thel. Dig. 216. lib. 15. cap. 5. ſ. 12. cites 28 Aſſ. 36. Quære.

11. In *aſſiſe, with every plea to the writ* that is *triable by aſſiſe, he ought to plead over to the aſſiſe. But* a man ſhall plead *outlawry* or *excommunication* in the plaintiff, *without* pleading over to the aſſiſe. Thel. Dig. 216. lib. 15. cap. 5. ſ. 13. cites Trin. 40 E. 3. 29.

12. *But in* aſſiſe of *nuſance before the ſheriff in the county*, the defendant *ſhall plead to the writ matter triable by aſſiſe, without pleading over, if* it be found, &c. becauſe the jurors ſhall not have the view but the party himſelf. *But before the juſtices he ought to plead* over, *if* found, &c. *nul tort*, &c. *or not levied to nuſance.* Thel. Dig. 216. lib. 15. cap. 5. ſ. 14. cites Hill. 50 E. 3. 11.

[80] 13. In *ceſſavit* the tenant *pleaded that he held by ſeveral ſervices, &c. and as to this parcel*, that it *was open and ſufficient* to his diſtreſs, &c. Thel. Dig. 216. lib. 15. cap. 5. ſ. 16. cites Paſch. 10 E. 4. 2.

(A. b) In what Caſes there ſhall not be any Plea in Abatement.

1. IN recordare which removes the plea, the words of the garniſhment which ſhould be to the plaintiff were to the the defendant, by which it was pleaded to the writ, & non allocatur; for *pone or recordare* cannot be abated; for the *plea is not held upon them*, and therefore ſpecial writ of garniſhment was awarded, for the court is lawfully ſeiſed. Br. Brief, pl. 494. cites 3 H. 6. 2.

2. *8 & 9 W. 3. cap. 31. ſ. 3. No plea in abatement ſhall be admitted in a ſuit for* partition, *nor ſhall the ſame abate by reaſon of the death of any tenant.*

(B. b) What Pleas ſhall be ſaid Pleas in Abatement, and what in Bar.

1. THAT *the demandant himſelf is ſeiſed of parcel*, may be to the writ or to the action, at the election of the tenant. Thel. Dig. 149. lib. 11. cap. 35. ſ. 19. cites Trin. 22 E. 3. 8.

2. Aſſiſe againſt 2. The *one pleaded in bar, and the other pleaded jointenancy to the writ*, and the *plaintiff choſe him who pleaded in bar for his tenant*, and ſaid that the other had nothing; and *found* by the aſſiſe *that he who pleaded in bar had nothing, and that the other was tenant.* And they were in opinion that the plaintiff ſhall anſwer to the jointenancy; and ill by the reporter; for by the *miſ-electing of his tenant* the writ ſhall abate, *as well where each pleads in bar ſeverally, as where the one pleads in bar and the other to the writ;* and after, becauſe the plaintiff could not deny the jointenancy, the writ was abated. Quod nota. Br. Aſſiſe, pl. 25. cites 44 E. 3. 23.

3. A man ſhall not plead *entry of the plaintiff pending the writ to the writ*, nor *acquittance of the debt in writ of debt pending the writ, unleſs it be pleaded after the laſt continuance.* Br. Brief, pl. 88. cites 50 E. 3. 4. per Perſey & Hamm.

4. Treſpaſs for taking of 20 iron bands for a waggon. Yelverton ſaid, that the vill of B. is an ancient vill, in which has been *held a fair* ſuch a day yearly, time out of mind, and the cuſtom is that *every one who brings any thing to the vill to ſell, ſhall pay ſo much* to the vill *for cuſtom, and that the plaintiff* at ſuch a fair *brought his merchandizes* there to ſell, *and he as bailiff of the vill required him to pay* his cuſtom, *and he refuſed, by which we took the ſame goods for cuſtom*, and *after he came to us and paid* the cuſtom, *and we delivered them to him*, and ſo he was poſſeſſed of them the day of the writ purchaſed, judgment of the writ; and he was awarded to anſwer; for *this is no plea to the writ;* for he *ſhall have this in evidence to qualify damages*, but ſhall not have it for plea. Br. Treſpaſs, pl. 130. cites 19 H. 6. 34.

5. *So of beaſts taken, and they come back to the owner*, yet the *writ ſhall be general*, and the matter ſhall be in evidence; and ſo it ſeems here that it is a *good plea in bar*, but ſhall not conclude to the writ. Br. Treſpaſs, pl. 130. cites 19 H. 6. 34. [81]

6. *Debt upon an obligation againſt A.* who demanded oyer of the obligation, and had it; and that it appeared by the obligation that *this A. and one B. were bound, which B. is in full life not named*, judgment of the writ, and ill; for he *ſhall ſay in fact that A. and B. were bound, which B. is in full life*, &c. Quod nota by award. Br. Pleadings, pl. 139. cites 28 H. 6. 2.

7. *In debt*, if the *defendant pleads receipt of parcel pending the writ*, by the beſt opinion this does not go to the writ, but *to the action of this parcel.* Br. Brief, pl. 498. cites 34 H. 6. 1, 2. *Contra of receipt of parcel before the writ; it is falſe in parcel.* Br. ibid.

8. Debt againſt R. W. late of London, gentleman. Laicon prayed judgment of the writ; for the *Tower of London is within London,*

don, which is a county in itſelf, and *not of London, but is out of the juriſdiction of London*, and extends into the county of Middleſex; and that the *defendant the day of the writ purchaſed, and all times after, dwelt in London in the tower of London, abſque hoc that he ever dwelt in the city and county of London, out of the tower of London*, & hoc, &c. and becauſe it was *pleaded by attorney*, and this plea is *contrary to his warrant* of attorney, therefore no plea by the opinion of the court. Br. Brief, pl. 347. cites 4 E. 4. 16, 17.

Br. Dette, pl. 153. cites S. C. Brooke ſays, quod mirum; for plea to the writ may be without ſpecialty; contrary of plea in bar.

9. Debt upon a *bond of* 20 *l.* The defendant pleaded, that the *plaintiff had received* 5 *l. thereof pending the writ*; judgment of the writ, & non allocatur, *without ſhewing ſpecialty* thereof againſt ſpecialty; for it was held, that it goes in bar for this parcel; but if it was merely to the writ, it ſeems there that it ſhall be a good plea to the writ. Br. Brief, pl. 361. cites 7 E. 4. 15.

10. In *detinue* the defendant *ſaid, that the deeds were delivered to him by the plaintiff, and by J. B. and his feme, upon certain conditions, and prayed garniſhment*, and had ſcire facias returned ſerved, and the *baron came and demanded judgment of the writ, becauſe it is of the delivery of the baron and feme* made *during coverture*, which ſhall be ſaid the delivery of the baron only. But, per Piggot & Choke, the writ is good; for there is *a diverſity between writ original and* writ *judicial* as here; for ſuch writ of detinue ſhall abate, for it is the proper ſuit of the plaintiffs; but this is the act of the court, and therefore if it be *awarded by the court againſt* 2, *where it ſhall be but againſt one*, yet it is good againſt the one. Br. Brief, pl. 367. cites 8 E. 4. 15, 16.

11. Treſpaſs *againſt M. and R. of* 20 *ſheep* taken, the *defendant ſaid, that the property of* 10 *the time of the treſpaſs ſuppoſed was to M. only, abſque hoc*, &c. that it was in both, *and that the property of the reſt was in R.* as above, &c. *abſque hoc*, &c. judgment of the writ brought by them in common, and a good plea. Br. Brief, pl. 369. cites 10 E. 4. 4.

12. *Aſſiſe by the maſter and confreres of the fraternity of the Nine Orders Angels in B.* the *defendant ſaid that no ſuch corporation*, this is in bar, and not to the writ, by which he ſaid, that the fraternity was incorporated *by the name of maſter and confreres of the fraternity of All Saints and the Nine Orders of Angels in B. Abſque hoc that* it is incorporated by the name as above, and if, &c. Nul tort, and this is to the writ, quod nota. Br. Brief, pl. 398. cites 22 E. 4. 34.

Thel. Dig. 192. lib. 12. cap. 30. f. 28. cites S. C.

13. In ſcire facias *of* 200 *acres* of land, the *defendant pleaded a recovery againſt him by A. pending the writ, of* 100 *acres of the ſaid land inter alia*; judgment of the writ, and no plea becauſe he did *not ſay* 100 *acres parcel of the* 200 *acres*. Br. Brief, pl. 461. cites 22 E. 4. 8.

[82] In *debt upon bond*, defendant pleads *pay*.

14. In *debt upon contract*, and *receipt of part*, puis darrein continuance was pleaded. And it was held to be *no good plea, becauſe it might be given in evidence: but* if it had been upon *debt*

upon ſpecialty, it muſt have been pleaded in bar. Per Holt Ch. J. 12 Mod. 542. cites 3 H. 7. 3. b. *ment of part puis darrein continuance,*

which the plaintiff accepted in bar. Per Holt Ch. J. the defendant could not have pleaded it in abatement, but muſt have done it in bar. 12 Mod. 541. Trin. 18 W. 3. Pierce v. Packſton.

15. Formedon *againſt A. M. who vouched R. who entered and vouched over W.* who *entered and vouched an infant*, and after the *plea was ſine die by deniſe of the king*, and *re-ſummons was ſued*; the tenant ſaid, that *after the plea was put ſine die, J. N. brought formedon againſt him, and recovered by confeſſion of the action, and he entered que eſtate he has* in the land *and had in the life of the recoveror, and the title of the demandant meſne between the title of the recoveror and the judgment*, judgment of the writ; and was not ſuffered to the writ, but in bar by reaſon that it was upon re-ſummons. And it was agreed, that recovery upon confeſſion had upon elder title, and averred accordingly, is good, notwithſtanding that it be *upon confeſſion* and cannot be to the writ, for it appears that he had purchaſed it pending the writ. Br. Brief, pl. 535. cites 5 H. 7. 38, 39.

16. *So in waſte* quas *tenet* the *tenant may plead that he has ſurrendered*, judgment of the writ, quas tenet. Br. Brief, pl. 543. cites 10 H. 7. 11.

17. In *annuity till* he be *promoted to a competent benefice*, if the *defendant tenders to him a competent benefice pending the writ* and *he refuſes it*, this is to the action. Br. Brief, pl. 441. cites 15 H. 7. 1. *So* if the *annuity expires* or determines *pending* the writ is gone, and

the plaintiff is put to action of debt. Br. ibid.

18. When a man *pleads a plea which goes to the action of the writ, he may* chooſe if he will *conclude to the writ or to the action* of the writ, per Fitzh. and Shelley juſtices. Br. Brief, pl. 405. cites 26 H. 8.

19. One who had *letters of adminiſtration being ſued as executor* may plead this in abatement of the writ which named him executor, &c. Quære. D. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon. In debt *againſt S. as executor, and after imparlance* ſhe *pleaded actio non, for that her baron died inteſtate and ſhe took adminiſtration abſque hoc* that ſhe is executor or ever adminiſtered as executor; per cur. This plea is only in abatement and not pleadable after imparlance; and judgment for the plaintiff. 2 Lev. 190. Paſch. 29 Car. 2. B. R. Granwell v. Sibly.

The pleading that he is adminiſtrator is no plea in bar. 1 Salk. 296. pl. 4. Mich. 5 W. & M. in B. R. Harding v. Salkill. ——— S. P. *But* he may plead this in abatement. And per Holt Ch. J. if a judgment be had againſt him in ſuch action, and afterwards he is ſued as adminiſtrator in another, he may plead the former judgment in bar ultra quod, &c. and the caſe of D. 305. b. was denied to be law. 12 Mod. 46. Mich. 5 W. & M. S. C.

20. *Two brought debt upon a bond*, the defendant *pleaded, that the bond was made to them and to another, and that all 3 had an action of debt pending againſt him*, and demanded *judgment ſi actio*. Upon demurrer it was adjudged, that the bond being made to 2, upon which they counted, cannot be intended a bond made to 3; and if it be a plea it is an abatement of the bill, and not in bar. Cro. Eliz. 202. pl. 31. Mich. 32 & 33 Eliz. B. R. Iſham v. Hitchcock.

21. In

21. In debt upon *bond*, the condition was *to deliver* 20 *quarters* of wheat, defendant pleads, that *pendente billa the plaintiff had accepted* 15 quarters, and demands judgment of the bill. And adjudged no plea, for it is *collateral* and not parcel of the ſum contained in the obligation, and if it be a plea it is in bar and not in abatement. And adjudged for the plaintiff. Cro. E. 253. pl. 23. Mich. 33 & 34 Eliz. B. R. Stone v. Radiſh.

[83] 22. In debt on bond, defendant pleads *foreign attachment of part pending the bill.* This is a plea in bar and not in abatement. Cro. E. 342. pl. 21. Mich. 36 & 37 Eliz. B. R. May v. Middleton.

23. There is a *difference between a plea in abatement* and a plea *in bar*, for in a præcipe quod reddat it is a good plea that the *demandant entered* into the land after the laſt continuance without alleging any eſtate in him; quod fuit conceſſum, per Coke Ch. J. And the reporter remarks, that it ſeems ſuch plea ſhall be good only in ſuch actions where by intendment the entry of the plaintiff is not taken away, for there by his entry he is ſeiſed in fee having a right. Roll. Rep. 322. Hill. 13 Jac. B. R. Loyd v. Bethel.

Cro. J. 507. pl. 19. S. C. and S. P. per Haughton, and it being in a real action the plea was allowed good, but that the writ ſhould not abate, and that the defendant would not anſwer till the other was warned, and therefore adjudged for the defendant. ——— 2 Roll. Rep. 54. ſays, judgment was quod breve caſſetur, and that a new writ of ſcire facias ſhould iſſue againſt the perſon not ſummoned and the other tertenants.

24. The plea that there are *other tertenants not ſummoned* is good in *perſonal actions*, but not in *real* actions; for in real actions, if one tertenant anſwers without the other, he is at no prejudice, for more land cannot be recovered againſt him than what he is ſeiſed of. But in perſonal actions this plea ſhall not be allowed, for the one may be charged with the intire debt. Per Haughton J. and agreed per Doderidge J. & non negatum. 2 Roll. Rep. 54. Mich. 16 Jac. B. R. Michell v. Croft & al.

S. P. in debt upon *bond*. Paſch. 16 Car. 2. B. R. Sid. 189. Burden v. Ferrars. ——— S. P. in treſpaſs, where defendant pleaded in abatement, *that he with others did the treſpaſs*; and it was prayed, that though he pleaded this in abatement, yet inaſmuch as he had confeſſed the treſpaſs, judgment final ſhall be given; but the court were of opinion, that it is only a reſpondeas ouſter, inaſmuch as he had ſo pleaded it. Sid. 190. pl. 18. Paſch. 16 Car. 2. B. R. Wright v. Bright.

25. When a plea *concludes in abatement*, it is not peremptory; but if a *plea in abatement be pleaded in bar*, it is peremptory. Allen 65. Trin. 24 Car. B. R. Beaton v. Foreſt.

26. Twiſden J. ſaid, that it hath been always agreed for law, that if debt or trover, &c. be brought for a moiety, and nil debet pleaded by the defendant who is a ſtranger, this hath made the declaration good. And if ſuch plea as here be pleaded *by a ſtranger*, this is in abatement. And if it be *by a tenant in common againſt* his companion, this plea is in bar; which was granted. Sid. 49. pl. 11. Mich. 13 Car. 2. B. R. Cole v. Banbury.

2 Keb. 503. pl. 70. Merrey v. Hanway, S. C.

27. If an *original* bears *teſte before the money is due*, it is abateable; but a *latitat* may be taken out before the money is due, yet the party muſt not be arreſted on it before. Vent. 28. Paſch. 21 Car. 2. B. R. Hanway v. Merry.

28. In

28. In *trover* the defendant *pleaded, that the plaintiff never had any thing in the*, &c. *niſi conjunctim & pro indiviſo with two others, and concluded in abatement.* The court held the plea good in bar, though pleaded in abatement; for the defendant ſhews that the plaintiff hath no cauſe of action, and ſo it ſhall be taken in bar. 2 Mod. 63. Hill. 27 & 28 Car. 2. Stubbings v. Bird & al'.

In *trover* declares, that N. J. S. and himſelf were poſſeſſed, that the others died, and the goods came to the defendant's hands, &c. Defendant pleads, that they were *joint merchants*, and no ſurvivor by law amongſt them; and ſo prays that the plaintiff, as to the joint goods, may be barred. Demurrer and judgment pro quær', for though no ſurvivor, yet the *plaintiff had right to a purpart*, and *jointenancy* ought to be pleaded in abatement, and not in bar. 12 Mod. 3. Mich. 2 W. & M. Kemp v. Andrews.

29. In debt on a judgment the defendant pleaded in abatement *a writ of error pending;* upon demurrer and argument it was held per tot. cur. to be no plea; and that the law was always ſo taken till one caſe in Pemberton's time, when a difference was made between ſuch plea in bar and in abatement. But the court held it all one, and judgment * for the plaintiff. And afterwards it was pleaded in bar, and the plaintiff had judgment. Show. 146. Hill. 1 W. & M. Rottenhoffer v. Lenthall.

12 Mod. 48. Mich. 5 W. & M. Anon. S. P. and Holt ſaid he would be bound by conſtant reſolutions in this court, which are, that this is no plea in bar or in abatement, though there had been ſome contrary reſolutions in Lord North's and Lord Chief-Baron Turner's time, but that was a new notion; and Dolbin and Eyre J. (abſente Gregory) agreed; and that there was no difference between its being pleaded in abatement and in bar; and that ſo it was 8 W. 3. per tot. cur.——In *debt upon a judgment* in B. R. the defendant pleaded, that after the judgment a *writ of error* was brought in Cam. Scacc. directed to the Chief Juſtice of B. R. upon which the cauſe was removed before the judges there, where it yet *remains undetermined*, and *prayed judgment if he ſhall be compelled to anſwer quouſque* the cauſe be determined there; upon which the plaintiff *demurred*, and adjudged that the defendant anſwer over; for this is not a plea either in bar or in abatement; and ſuch a concluſion quouſque is not good; for it is not like a plea of excommunication; for there he is only ſtopt till the ſentence diſcharged, and the party may have a re-ſummons or re-attachment, but the law does not give any ſuch remedy here; and Holt Ch. J. ſaid, that this might be pleaded in abatement, but not in bar; for though the plaintiff has commenced *his action too ſoon*, it is not a reaſon why he ſhould be barred, though it may be a reaſon why the ſuit ſhould be abated; *but* if a *ſcire facias* in ſuch caſe had been brought, *quare executionem* habere non debet, in ſuch caſe a writ of error pending might be pleaded in bar of the execution. Skin. 590. Mich. 7 W. 3. B. R. Rowley v. Ralphſon.

Debt on a judgment in B. R. the defendant pleaded in abatement error depending in the *Exchequer Chamber*, and held good; but if the defendant concludes *non debet reſpondere quouſque*, it is not good becauſe we have no re-ſummons. 5 Mod. 68. Mich. 7 W. 3. Daſhwood's caſe.

Lutw. 600. 602. Mich. 11 W. 3. DENTON v. EVANS, S. P. And Powel J. ſaid, that this action has been allowed ever ſince H. the ſixth's time, and that ſometimes it has been pleaded in abatement, and ſometimes in retardatione of the ſuit; but he ſaid it cannot be good, becauſe there can be no certain time for re-ſummons of the party when the judgment ſhould be affirmed, as there is in the caſe of protection. But no reſolution was given whether the plea was good or not, or what concluſion ought to be made. But there is a nota, that in Mich. 9 W. 3. C. B. ALDRED v. HAVERING, ſuch plea was adjudged ill, becauſe it concluded petit judicium de brevi.——See tit. Superſedeas (B) pl. 4. and the notes there.

* [84]

30. In *debt on bond*, the defendant *pleaded that the day of payment is not yet come*, and concluded in abatement. Adjudged that it was no good plea in abatement, for it ought to be pleaded in bar; for in every plea in abatement, the defendant ought to ſhew the plaintiff how to bring a better writ, whereas here he ſhews that the plaintiff ought to have none at all. Comb. 483. Trin. 10 W. 3. B. R. Owen v. Bulkley.

Ld. Raym. Rep. 345. OWEN v. BUTLER, S. C. a reſpondeas ouſter was awarded.

31. If plea to the writ be for any *matter appearing in the writ*, he ſhall begin it with a petit judicium de brevi, and ſhall conclude in the ſame manner; *but if* it be for any thing out of the writ,

Dal. 33. pl. 22. S. C. accordingly. —S. C. cit.

ed by Holt Ch. J. 12 Mod. 525. Trin. 13 W. 3. in caſe of Slanney v. Slanney.

as jointenancy, nontenure, or the like, the concluſion only, and not the beginning of the plea, ſhall be in ſuch manner; per Dyer, quod Browne conceſſit. Mo. 30. pl. 99. Trin. 3 Eliz. Anon.

32. *Whenever a thing which in its nature is a bar* happens, *and is pleaded puis darrein continuance*, it admits of no anſwer; and this he ſaid was *not like the caſe of* * *foreign attachment*, though that has been held to be matter of payment, and therefore a good plea in bar; *nor like* the caſe of the demandant's *entry into part* of the land puis darrein continuance; for that is the *party's own act only*: per Holt Ch. J. 12 Mod. 541, 542. Trin. 13 W. 3. in caſe of Pierce v. Packſton.

* See May v. Middleton.

Carth. 243. Butcher v. Porter.—— 1 Salk. 94. S. C.

33. In *replevin*, *property in a ſtranger* may be pleaded either in bar or in abatement; for it utterly deſtroys the plaintiff's action. Mich. 2 Ann. B. R. 1 Salk. 5. Preſgrave v. Saunders.—6 Mod. 81. S. C.—2 Lev. 92. Wildman v. North.—Vent. 249. S. C.—S. C. cited per Holt Ch. J. Carth. 244.

34. A plea that goes *to the action*, *and not to the perſon* of the plaintiff, ought to be pleaded in bar, and not in abatement; and if pleaded in abatement, it may after a reſpondeas ouſter be pleaded in bar. L. P. R. 4. cites M. 4 Annæ.

11 Mod. 93. Mich. 5 Ann. Hacket v. Tilly is not S. P.

* 35. In *debt by H. as adminiſtrator* to T. F. *quoad one bond only*, the defendant *pleaded in abatement*, *that adminiſtration was granted before to J. C. of this bond*, *which J. C. took on him the adminiſtration*, *and is alive*, *and thoſe letters of adminiſtration in full force*, &c. Exception was taken that this was matter in bar, and could not be pleaded in abatement, becauſe it *perfectly deſtroys all right of action* in the plaintiff; whereas in a plea in abatement the defendant muſt always give the plaintiff a better writ; and the difference is where it is pleaded in the plaintiff or defendant himſelf, or in a ſtranger; as if the ſuit is againſt the defendant as executor, who pleads that J. C. died inteſtate, and adminiſtration was granted to him, this is pleadable only in abatement; but where the plea is, that a ſtranger is executor or adminiſtrator, it is a bar. And per tot. cur. accordingly; and therefore a reſpondeas ouſter was awarded. 2 Ld. Raym. Rep. 1207. Mich. 4 Ann. Hackett v. Tilly.

*[85]

36. A man *covenanted not to ſue* huſband and wife upon *a bond* entered into *by the wife during the life of her huſband*, afterwards, contrary to this agreement, he *puts the bond in ſuit*. This covenant cannot be pleaded in bar, but muſt be pleaded in abatement only. Arg. 10 Mod. 162. Trin. 12 Ann. B. R. in caſe of Williams v. Miles.

37. In *debt againſt an heir* on the bond of his anceſtor, the defendant *pleaded infancy*, and prayed that the parol demur. The court (abſente the Ch. J. and Lee J.) held this a temporary plea in bar, and not in abatement. 2 Barnard. Rep. 145. Paſch. 5 Geo. 2. More v. Eyles.

(C. b) Concluſion of Pleas in Abatement.

See (X. a) See (B. b) pl. 30.

THE concluſion of the plea of *divorce, and ſo not his feme*, waved the precedent, which was triable by the certificate of the ordinary, and made the concluſion to be triable per pais. Br. Waiver de Choſes, pl. 18. cites 30 Aſſ. 8.

2. In *formedon* upon grant *of a reverſion*, the concluſion ſhall be per formam donat' & conceſs' præd' Thel. Dig. 113. lib. 10. cap. 23. ſ. 15. cites Hill. 50 E. 3. 2. and the Regiſter, fol. 239. and if it be per formam doni & finis præd' cites eod. fol.

3. In *forger of falſe deeds*, the bill was, that the deed was wrote in the time of H. 5. and the publication and proclamation in the time of H. 6. and concluded in contemptum domini regis nunc, &c. and held good per Martin J. and Weſton Serjeant, but Rolf contra. Thel. Dig. 114. lib. 10. cap. 23. ſ. 23. cites Mich. 4 H. 6. 4.

4. By 8 H. 6. 18 and 19. in London, or other places where they have ſpecial grant not to be impleaded elſewhere, there they conclude *judgment de brevi*, and ſhall not conclude to the *juriſdiction*. And 38 H. 6. 19. where the defendant's plea doth prove that the plaintiff may have another writ in the ſame court, there he ſhall conclude to the writ and not to the juriſdiction *; but by Priſot 37 H. 6. 24. if the plea be in bar, and the concluſion to the writ, it ſhall be taken in bar; and ſo is 34 H. 9. 1 & 2. Heath's Max. 33.

But contra 37 H. 6. 48. in *forcible entry*, if the defendant pleads to the writ, and concludes to the action, he ſhall be condemned, becauſe by his concluſion he hath admitted the writ to be good. The like law if he pleads to the juriſdiction, and concludes to the writ. Heath's Max 33.

* S. P. Br. Bar, pl. 47. cites 37 H. 6. 23. and ſhall not be taken to the writ, according to the concluſion; per Priſot, quod non negatur.

5. He who *pleads ſeveral tenancy* ſhall not conclude to the writ, but vouch or plead over in bar; and yet the demandant ſhall not anſwer to the bar nor to the voucher, but maintain his writ. [86] Quod nota. Br. Traverſe per, &c. pl. 70. cites 19 H. 6. 13.

6. In forger of deeds, if a man *pleads in bar, and concludes to the writ, or e contra*, the *court ſhall take the plea as it is*; per Pole and Porting. accordingly. And per Newton, if a man pleads in bar, and concludes to the writ, the court ſhall award that he anſwer as to the writ, and ſhall compel the plaintiff to anſwer to the bar. Br. Brief, pl. 440. cites 22 H. 6. 53.

Br. Eſtoppple, pl. 90. S. P. cites S. C. —— In *aſſiſe*, if the *tenant pleads a plea in bar, and concludes judgment of the writ*, it ſhall be taken to the action, and not to the writ; per Priſot. Quod non negatur. Br. Brief, pl. 234. cites 37 H. 6. 24. —— S. P. Br. Barre, pl. 47. cites 37 H. 6. 23. per Priſot, according to the concluſion.

If a plea be good in matter, and wants its ordinary concluſion as affirmative, *& hoc paratus eſt*, &c. and eſtoppel *petit judicium ſi* ad hoc admitti debet, this is vicious, and the plea not good. Br. Faux Latin, pl. 91. cites 22 H. 6. 53. and 37 H. 6. 24.

7. *In aſſiſe*, if the *tenant pleads releaſe with warranty*, and ſays no more, the plaintiff ſhall recover; for he ought to *aver his plea, and conclude* formally. Br. Brief, pl. 440. cites 22 H. 6. 53.

Br. Eſtoppple, pl. 90. S. P. cites S. C.

A man may *plead to the action, and conclude judgment of the writ*;

8. In debt, if the *defendant pleads a plea which goes to the action, and concludes judgment of the writ*, yet it ſhall go in bar. Br. Brief, pl. 498. cites 34 H. 6. 1. 2.

for if he cannot have action he cannot have writ; per Littleton. Quod non negatur. Br. Brief, pl. 243. cites 36 H. 6. 18.

When a man *pleads a plea which goes to the action of the writ, he may* chuſe if he will *conclude to the writ, or to the action* of the writ; per Fitzh. & Shelley J. Br. Brief, pl. 405. cites 26 H. 8.

But in forcible entry, if a man *pleads to the writ, and concludes to the action, judgment ſi actio*, and the *plaintiff demurs*, the defendant ſhall be condemned; for *by the concluſion the writ is affirmed*. Br. Brief, pl. 243. cites 36 H. 6. 18.

9. If *one writ* be *brought where it ſhould be another* writ, he ſhall conclude *judgment of the writ*; but if writ be *brought in one court, where it ſhould be* brought *in another* court, he ſhall conclude *judgment ſi curia cognoſcere velit*. Br. Faux Latin, pl. 105. cites 38 H. 6. 18.

10. *But* [it] is no plea *that* 2 *acres, parcel* of the manor, *extend into C. judgment of the writ*; and ſo the firſt plea was alſo to the writ, as it ſeems, and this is no plea; for *he ſhall not recover the manor in this action, but damages. Contra where the land may be recovered.* Br. Brief, 215. cites 9 E. 4. 3.

11. If a man *cannot plead to the writ, unleſs by ſhewing of the matter of bar*, there he *may ſhew it, and conclude to the writ*. Br. Brief, pl. 543. cites 10 H. 7. 11.

12. *In debt* the *defendant may plead outlawry* in the plaintiff, and *conclude to the perſon*, and yet the matter goes in bar, and after he may plead in bar alſo. Br. Brief, pl. 543. cites 10 H. 7. 11.

If the defendant *pleads a* plea *to the writ, and concludes judgment ſi actio*,

13. When a man *pleads a plea which goes to the action of the writ, he may* chuſe if he will *conclude to the writ, or to the action* of the writ; per Fitzh. & Shelley J. Br. Brief, pl. 405. cites 26 H. 8.

he ſhall be condemned; for the concluſion waves the plea to the writ. *Contra if he pleads* a plea *to the action, and concludes judgment of the writ*, this is good. Br. Waiver de Choſes, pl. 31. cites 36 H. 6. 18.

14. In *debt againſt an executor*, he *pleaded that there was another executor living, who had adminiſtered*, and concluded *judgment ſi actio*, where he ought to have pleaded in abatement of the bill. The plaintiff replied that billa caſſari non debet; and held good, notwithſtanding the bar of the defendant would have eſtopped him from concluding to the action. Mo. 692. pl. 958. Onely v. Fontleroy.

*[87]

Ibid. The reporter makes a quære if the demurrer had been ſpecial.——Cro. J. 519. pl. 1. S. C. but S. P. does not appear.——Mod. 214. pl. 48. Paſch. 28 Car. 2. in C. B. Major & Stebbing v. Birde & Harrison, Reſolved that a plea may be a good plea in abatement, though it contains matter that goes in bar, and relied on the caſe in 10 H. 7. 11. as a caſe in point, and the caſe of Salkell v. Skelton above; and judgment was given accordingly. —— S. C. cited Arg. Comb. 483. and 1 Ld. Raym. Rep. 343.——S. C. cited 2 Mod. 63. per cur.

* 15. In *replevin*, the *defendant made conuſance, and alleged the property in H. S.* and not in the plaintiff, and therefore demanded *judgment of the writ*. The plaintiff demurred generally, and it was adjudged againſt the plaintiff; for it was reſolved that the defendant has election to conclude his plea in abatement, as here, or to plead in bar, viz. Et ſic petit judicium ſi actio. 2 Roll. Rep. 64. Hill. 16 Jac. B. R. Salkill v. Skelton.

16. In

16. In debt on bond the defendant *pleaded* a plea *in bar, and concluded in bar*, whereas the *plea itſelf was only a plea in abatement*, and conſequently a reſpondeas ouſter would in ſuch caſe be awarded; yet per cur. it being pleaded in bar, judgment final ſhall be given, and ſo it was. Sid. 189. pl. 18. Paſch. 16 Car. 2. B. R. Burden v. Ferrers.

But where *in treſpaſs* the defendant *pleaded* in abatement, *that he w th others did the treſpaſs*; and it was moved that though he had pleaded it in abatement, yet having confeſſed the treſpaſs, judgment final ſhall be given; but the court held, that only a reſpondeas ouſter ſhould be awarded. Sid. 190. pl. 18. Paſch. 16 Car. 2. B. R. Wright v. Bright. ——— Keb. 715. pl. 41. S. C. and reſpondeas ouſter was awarded.

17. The nature of a plea in abatement is to intitle the plaintiff to a better writ; but where the defendant *ſhews that the plaintiff hath no cauſe of action*, though he concludes his plea in abatement, yet it ſhall be good in bar. 2 Mod. 64. 65. Hill. 27 & 28 Car. 2. C. B. Stubbins v. Bird.

18. In treſpaſs againſt 4 defendants they all appeared, and after diverſe continuances 3 of them pleaded the death of the 4th after the laſt continuance; & petunt judicium de brevi & quod breve prædict' caſſetur. And upon demurrer it was adjudged ill in the concluſion, which ought to be et petunt judicium ſi curia ulterius procedere vult, and not judicium de brevi & quod breve caſſetur; for the writ was actually abated by the death of the other defendant, and a reſpondeas ouſter was awarded. 3 Lev. 120. Trin. 35 Car. 2. C. B. Hallowes v. Lucy.

3 Salk. 117. pl. 3. Elwayes v. Lucy, S. C. adjudged accordingly. ——By the courſe of the *B. R.* whereſoever you *commence by bill*, a *praying judgment of the count* is a plea in bar; and in that caſe, if you *plead in abatement of the count*, you muſt *not* pray judgment of the count, and that the count may be quaſhed; but you *muſt pray judgment of bill*, and that the bill may be quaſhed. Judgment affirmed. 12 Mod. 133. Trin. 9 W. 3. in Cam. Scacc. Leaves v. Bernard.

19. A *difference* was taken by Holt Ch. J. upon 33 H. 6. 18. that a plea which *begins in abatement*, though it *concludes in bar*, is a plea in abatement; and that e contra a plea *concluding in bar*, though it *begins in abatement*, is a plea in bar. Show. 4. Paſch. 1 W. & M. * Carneth v. Priour.

If the plea *be in bar*, and *concludes to the writ*, it ſhall be taken as a plea in bar.

If the defendant *pleads to the writ*, and *concludes to the action*, the plaintiff ſhall have judgment againſt him, for admitting the plaintiff's writ to be good by the concluſion of the plea. The like law where the defendant pleads *to the juriſdiction*, and *concludes to the writ*. If he pleads *to the action* of the writ, he muſt *conclude to the writ*. Brown's Anal. 8. ——— * Comb. 106. 107. S. C. by the name of CALVERT v. PRIOR, and S. P. accordingly, and that if it ſhould not be ſo, yet the plaintiff having replied *caſſari non, &c.* hath made it ſo.

20. In debt on a judgment in B. R. it is a good plea in abatement that *error* is *pending in the Exchequer-Chamber*; but if the defendant concludes *non debet reſpondere quouſque*, it is not good; for B. R. has no re-ſummons: per Holt Ch. J. 5 Mod. 68. Mich. 7 W. 3. Daſhwood's Caſe.

21. In caſe for ſelling a lottery ticket affirming it to be his own, whereas it was another's; defendant pleaded that he bought it bona fide, and ſo ſold it; *et petit judicium de narratione & quod narr. prædicta caſſetur*; plaintiff demurred. The court took this plea in the concluſion of it to be in bar; but becauſe it was ſafeſt for the plaintiff they gave judgment to anſwer over; ſaying that could not be aſſigned for error by the defendant, becauſe it was for

[88] Ld. Raym. Rep. 593. S. C. and Northey argued that petit judicium de narratione is always in bar in B. R.

and that in abatement it is *petit judicium de billa & quod billa caſſetur*, and that judgment quod billa caſſetur cannot be given in this caſe, becauſe it is not prayed. Holt Ch. J. admitted this true *in demurrers*, but not *in pleas*, becauſe there it is *actio non*; for a man may plead in abatement of the declaration. Per Gould J. the matter of this plea is plainly in bar, it being *new matter out of the declaration*, and the defendant ſays, in quo caſu the plaintiff ought not to have his action, which is in bar. Holt ſaid *, if one *pleads matter which goes in bar* but *begins and concludes* his plea *in abatement*, it will be a plea in abatement, for it is the beginning and concluſion that makes the plea. But if he *begins in bar*, though he *concludes in abatement or vice verſa*, it will be a plea in bar.

for his advantage. 1 Salk. 210. Trin. 12 W. 3. B. R. Medina v. Stoughton.

* S. P. by Holt Ch. J. accordingly; quod non fuit negatum. Show. 4. Paſch. 1 W. & M. in caſe of Carneth v. Prior.

But where it *only traverſes a particular matter* as *abſque tali warranto*, &c. it ought to be averred. Ibid.

22. The court ſeemed to think that where an *abſque hoc compriſes the whole matter generally as abſque tali cauſa*, it may conclude *& de hoc ponit ſe ſuper patriam.* 1 Salk. 4. Mich. 1 Ann. B. R. Haywood v. Davis.

But if the plea *commences in bar with a good matter*, and concludes to the writ in abatement, it will be well; for the plaintiff cannot have a good writ, if he has not a good cauſe of action. Per Holt Ch. J. 12 Mod. 525. cites 36 H. 3. 18.

23. If one begins *in abatement and concludes to the action* 'tis ill, if the *plea be not ſufficient in bar*, according to the concluſion; and if demurrer be to ſuch plea, in that caſe judgment ſhall be againſt the defendant, for his *concluſion affirms the writ* good. Per Holt Ch. J. 12 Mod. 505. Trin. 13 W. 3.

24. If a *writ be abateable in itſelf*, as being for a wrong man, defendant may ſay *petit judicium de billa*, becauſe there the action is ill conceived; but where the writ *is well conceived but bad for miſnoſmer*, defendant cannot conclude ſo. Per. cur. 7 Mod. 150. Hill. 1 Ann. B. R. Silveſter's caſe.

10 Mod. 192. B. R. Johnſon and Altham. S. P.

25. If a man pleads in *form of a plea in abatement that which for the matter might be pleaded in bar*, this is a plea in abatement, and ſo vice verſa; for it is the *concluſion* of the plea and not the matter of it that makes a plea in abatement, or in bar. 10 Mod. 112. Mich. 11 Ann. B. R. Alice and Gale.

26. To a *ſcire facias* the plea in bar is always concluded by an *executio non*, as *in other caſes* by an *action non.* 10 Mod. 112. Mich. 11 Ann. B. R. Alice and Gale.

But if there *is neither writ nor bill* (which is error) neither of theſe two forms are proper,

27. The concluſion of a plea in bar generally is *petit judicium de narratione*; for where there is either a writ or a bill, the demanding judgment of the declaration is a confeſſion that the writ or bill is good. 10 Mod. 192. Mich. 12 Ann. B. R. Johnſon and Altham. And the form of pleading in abatement is petit judicium *de billa.* 10 Mod. 210. S. C.

for as to petit judicium de billa it cannot be, there being no bill; nor judicium de narratione, for it was not the caſe in the declaration, but the want of a bill that is the error, ſo the plea ſhould be *petit judicium ſi reſpondere compelli debeat.* 10 Mod. 211. B. R. Johnſon and Altham.

28. In action for ſeveral promiſes, defendant *pleaded that he is chargeable as bailiff*, and therefore the action ſhould have been in account, and concludes *& ideo petit quod narratio caſſetur.* Per cur. the plea is in bar, and the difference is where a plea concludes as this does, and where it concludes *quod billa caſſetur*; for that is only

only in abatement. Judgment was given in bar. Barnard. Rep. in B. R. 45. Paſch. 1 Geo. 2. Felila v. Rawlins.

(D. b) Rules as to Pleas in Abatement. And what is to be done.

1. WHERE a man may have a *writ according to his caſe*, he muſt have ſuch an one, or otherwiſe 'tis not good. Arg. 2 And. 97. pl. 191. Trin. 24 Eliz. in caſe of Arden v. Darcy.

2. It is a general rule that in all actions where the *thing demanded cannot be had, or the perſon againſt whom* the thing is demanded *cannot yield the thing*, the writ ſhall abate. As in a writ of annuity by grantee for years, if the term expires, the writ ſhall abate. Arg. Leo. 330. Trin. 30 Eliz. B. R. in caſe of Wade v. Preſchall.

3. Where the *pleading is ſuch as your writ cannot be good*, there it is a ground that *you ought to maintain your writ; but* if a *præcipe quod reddat* be brought *againſt two*, and the *one pleads non-tenure* and the *other accepts the intire tenancy, abſque hoc, &c. and pleads in bar*, there you *may anſwer to the bar*, becauſe there peradventure the writ is good notwithſtanding; as if a writ be brought againſt the feoffor and feoffee upon condition, or mortgagor or mortgagee; and ſo there is a diverſity. Goldſb. 98. pl. 1. Mich. 30 & 31 Eliz. by Anderſon, in caſe of Hazelwood v. Haſelwood.

Where *ſpecial matter is pleaded to writ*, the plaintiff in his replication muſt *only maintain his writ*. L. P. R. 7. cites 3 Ann. B. R.

4. A plea in abatement muſt be pleaded certainly. Co. Litt. 203. a.

5. There needs no plea to abate that which is abated *of itſelf*. See 2 Roll. Rep. 272. Anon.

6. Upon a *demurrer* to a plea in abatement, the *faults in the declaration* cannot be examined. Adjudged. 2 Lutw. 1592. Trin. 9 W. 3. in caſe of Bellaſis v. Heſter.

Cited by the reporter, ibid. 1604. —*After a plea* in abatement there muſt be no exceptions to the declaration. But becauſe it appeared by the plaintiff's own ſhewing that he had no cauſe of action when it was brought, the pluries mandamus being after Mich. Term begun, and the memorandum of the bill entered generally of that term which fault might be ſhewn as amicus curiæ, the plaintiff had leave to amend, and judgment was given quod reſpondeat ulterius. Carth. 171. Hill. 2 & 3 W. 3. B. R. Rich. v. Pilkington.

7. One can *not plead twice in abatement*. 12 Mod. 230. Mich. 10 W. 3. Anon.

8. Where one pleads in abatement *another action* depending ex eadem cauſa, he need *not plead all the continuance*, but yet he muſt *ſhew the action* is *not determined*. Per Holt Ch. J. 12 Mod. 578. Mich. 13 W. 3.

9. If *excommunication* in the plaintiff be tendered for plea in abatement, though it be ſigned by counſel, by the courſe of the court it is not to be received unleſs it be *produced under ſeal*, though the plea need not mention that it is ſo produced. And ſo of an outlawry; per cur. 6 Mod. 180. Trin. 3 Ann. B. R. Anon.

10. 4 & 5 *Ann. cap.* 16. *ſ.* 11. enacts, That *no dilatory plea ſhall be received in any court of record, unleſs the party offering ſuch plea,*

Appellee in murder pleaded in

abatement, that the vill in which he

plea, do by affidavit prove the truth thereof, or ſhew ſome probable matter to the court, to induce them to believe that the fact is true.

was commorant was (Shauford) and not (Shalford.) It was objected, that this being a dilatory plea, could not be *received without an affidavit*. And the court at firſt inclined to that opinion, criminal * cauſes not being excepted out of the act (the exception in the act relating only to the preceding clauſe;) but the next day they held otherwiſe, becauſe though this plea be for the moſt part dilatory, yet in this caſe it is not, becauſe the appellee muſt plead over, and the iſſue be joined on that as well as upon not guilty, and both may be tried at the ſame time. 11 Mod. 217. pl. 5. Paſch. 8 Ann. B. R. Young v. Slaughterford.

A plea in abatement, *that the original is not returned, nor pledges found* by the plaintiff, was ſet aſide for want of an affidavit; and though it was urged that this appeared upon oyer of the original, and where ſuch matter appears upon the record (as variance) an affidavit is not neceſſary by this act; but per cur. This does not appear on oyer of the writ; for nothing appears but the writ itſelf. 2 Ld. Raym. 1209. Mich. 12 Geo. B. R. Hughes v. Alvarez.

*[90]

11. Pleas in abatement *muſt go to the whole*, and not to part. 10 Mod. 285. 286. Hill. 1 Geo. 1. B. R. Aylwood v. Woodley.

(E. b) Where in Pleas in Abatement the Defendant muſt give the Plaintiff a better Writ.

In writ of *entry ad terminum qui præteriit, in which the tenant had not entry unleſs by Jo. to whom the*

1. IN *writ of entry*, in which the tenant had not entry, unleſs by A. to whom B. leaſed, &c. the tenant was received to *plead to the writ that B. did not leaſe to A. without ſaying to whom he leaſed; but if he traverſes the entry he ought to ſay by whom he entered.* Thel. Dig. 212. lib. 15. cap. 1. ſ. 1. cites Mich. 14 E. 2. Brief 817. and Mich. 4 E. 2. Entre 65.

father of the demandant leaſed a term which is paſt, &c. the tenant *cannot ſay that he did not enter by Jo. without ſhewing by whom he entered*, becauſe it is to the *ſecond degree*. But *otherwiſe* it ſhould be, *if the plea was to the firſt degree*; for then it ſhould be to the action. Thel. Dig. 212. lib. 15. cap. 1. ſ. 3 cites Hill. 6 E. 3. 244.

In *writ of entry into which the tenant had not entry unleſs by P. to whom Ro. leaſed, who diſſeiſed the father of the demandant*, &c. the tenant was received to *ſay that P. did not enter by Ro.* without ſaying by whom he entered, &c. but the iſſue was taken that Ro. did not leaſe to P. &c. Thel. Dig. 212. lib. 15. cap. 1. ſ. 7. cites Mich. 9 E. 3. 480. Quære.

2. In *writ of a manor*, if the tenant *pleads that parcel* of the manor *is in another county*, he *ought to ſhew how much* is in the other county, ſo that the demandant may have a good writ with forepriſe. Thel. Dig. 212. lib. 15. cap. 1. ſ. 2. cites Paſch. 4 E. 5. 137.

3. And *ſo where two manors are demanded*, the tenant ſhall not *plead nontenure of parcel* of the demand, *without ſaying of which* manor he pleads the non-tenure. Thel. Dig. 212. lib. 15. cap. 1. ſ. 2. cites Paſch. 5 E. 3. 184.

4. In *dum fuit infra ætatem, upon a demiſe made by the demandant himſelf*, the tenant was received to *plead* to the writ, *that the demandant and another leaſed to him* the tenements, without giving other writ, becauſe the *plea was to the matter of the writ, and not to the form* of the writ; by which the demandant to maintain his writ ſaid that the other was dead. Thel. Dig. 212. lib. 15. cap. 1. ſ. 4. cites Hill. 6 E. 3. 245. 296.

5. In writ of *waſte againſt tenant for life of the demiſe of the father of the plaintiff*, it is ſufficient for the tenant to *ſay that the father*

father of the demandant did not leaſe to the tenant modo & forma, without giving another writ. And ſo it is in dum fuit infra ætatem. Thel. Dig. 212. lib. 15. cap. 1. ſ. 5. cites Paſch. 6 E. 3. 260.

6. *Aſſiſe againſt A. and B.* who *pleaded* that *non diſſeiſiverunt*, &c. and it was *found that the ſaid B. diſſeiſed the plaintiff, and infeoffed A. and that A. did not diſſeiſe the plaintiff*, by which the plaintiff recovered, and was amerced for his falſe plea againſt A. and ſo where verdict ſhall be found againſt the plaintiff, and yet [91] he ſhall recover. Quod nota; for he *cannot have other writ but* that both *diſſeiſiverunt eum, and he ought to name diſſeiſſor and tenant.* Quod nota. Br. Verdict, pl. 25. cites 7 Aſſ. 14.

7. In *præcipe quod reddat of rent againſt* 2, *each* of them *took ſeveral tenancy of parcel of the land out of which*, &c. in abatement of the writ, and were not received *without ſhewing matter by which the demandant might have another good writ*, by ſaying that the rent was *rent-ſervice* or other ſuch like; for if it be *rent-charge* the writ ſhall not abate by ſuch ſeveral tenancy. Thel. Dig. 212. lib. 15. cap. 1. ſ. 6. cites Paſch. 9 E. 3. 453.

8. *Interpleader of nontenure of parcel*, he ought to *ſhew that he was tenant* of this parcel *the day of the plea pleaded.* Thel. Dig. 212. lib. 15. cap. 1. ſ. 8. cites Paſch. 10 E. 3. 497.

9. In writ of *waſte againſt tenant for life upon demiſe made by the plaintiff himſelf*, the tenant was received to *ſay that the plaintiff and his feme leaſed to him*, &c. Judgment of the writ, *without ſaying* in certain *what eſtate he had* by this demiſe, &c. *becauſe the plea was to the matter of the writ.* Thel. Dig. 212. lib. 15. cap. 1. ſ. 9. cites Trin. 10 E. 3. 525.

10. In *dower of the* 3*d part of a manor in ſuch a vill*, the tenant was received to *plead* to the writ, *that parcel of the manor extended into another vill not named*, &c. *without ſhewing how much* extended itſelf into the other vill; for it is ſufficient to give a good writ without giving a good demand. Thel. Dig. 212. lib. 15. cap. 1. ſ. 10. cites Trin. 17 E. 3. 44.

11. *Detinue of a writing of* 100*l. in which A. was obliged to the plaintiff, which was delivered to the defendant by the plaintiff and A. upon certain condition in indifferent hands, and the condition is broke of the part of A.* The *defendant ſaid that a writing of a greater ſum was delivered to him by them, upon condition contained in an indenture remaining in the hands of the defendant, abſque hoc that he received a writing of the ſum in the count*, and a good plea, though he *does not ſay of what ſum*: for he *pleads it to the action.* But if he had pleaded it *to the writ*, he ſhould ſhew what ſum, to the intent to give a better writ; and the iſſue was entered that he did not receive writing of ſuch a ſum as the plaintiff counted, Priſt, and the others e contra. Br. Charters de Terre, pl. 27. cites 21 E. 3. 30.

12. *In debt* the *ſpecialty was obligari ad reddendum compotum*, &c. The defendant demanded *judgment of this writ, becauſe he ought to have writ of account*, &c. Sed non allocatur; for the plaintiff may chuſe the one writ or the other. Thel. Dig. 213. lib. 15. cap. 1.

ſ. 15. cites Mich. 28 E. 3. 98. and Paſch. 42 E. 3. 9. and ſee Paſch. 41 E. 3. 10.

13. The *writ was of tenements in Dale and Sale.* The tenant *ſaid to the writ, that Sale is a hamlet of Down,* &c. *without ſaying how many of the tenements* were in Sale, &c. but the tenant afterwards relinquiſhed the plea. Thel. Dig. 212. lib. 15. cap. 1. ſ. 11. cites Paſch. 29 E. 3. 39.

But in treſpaſs *of a horſe taken,* the defendant *ſaid that the plaintiff lent him*

14. In *treſpaſs of goods taken,* the defendant may *ſay that he had them of the delivery of the plaintiff,* judgment of the writ, inaſmuch as he gave the plaintiff writ of detinue. Thel. Dig. 213. lib. 15. cap. 1. ſ. 16. cites Mich. 43 E. 3. 30. 16 H. 7. 3. and Mich. 2 E. 4. 26.

the horſe for 20d. *to ride to ſuch a place,* &c. *and concluded to the action.* Thel. Dig. 213. lib. 15. cap. 1. ſ. 17. cites Mich. 1 H. 5. 13. ——— *And in* treſpaſs *of goods carried away,* the defendant *ſaid that one Ro. was poſſeſſed of the goods, and made the plaintiff and one Alice his executors, and died, after whoſe death Alice was ſole poſſeſſed of the goods, and made the defendant her executor, and died; after whoſe death the defendant found the goods among other goods of the ſaid Alice, and took them for ſafe-keeping to the uſe of the plaintiff,* &c. *judgment of the writ; for he ought to have* writ of *detinue,* &c. But it was held that *the plea is to the action.* Thel. Dig. 213. lib. 15. cap. 1. ſ. 17. cites Paſch. 7 E. 4. 3. Quære.

But in treſpaſs againſt Jo. S. of M. it is no plea for the defendant to

* 15. In *writ of maintenance againſt Ro. Poynings of Poynyngs,* the defendant *ſaid that he was never of Poynyngs, without ſaying of what vill he was* the day of the writ purchaſed, and held good. Thel. Dig. 213. lib. 15. cap. 1. ſ. 12. cites Mich. 11 H. 6. 13.

ſay that M. is a great place, containing in it ſeveral vills, &c. *without ſaying in certain of what vill he is,* and ſo give a better writ. Thel. Dig. 213. lib. 15. cap. 1. ſ. 12. cites Paſch. 5 E. 4. 1. b. and ſo it is where addition is of a pariſh which contains ſeveral vills. ——— And *in debt where the addition is of ſuch a vill, or late of ſuch a vill,* it is no plea to *ſay that he was never abiding at ſuch a vill, without ſaying at what vill he was abiding.* Thel. Dig. 213. lib. 15. cap. 1. ſ. 13. cites Mich. 33 H. 6. 38.

Thel. Dig. 213. lib. 15. cap. 1. ſ. 13. cites S. C.

16. If a man pleads non-tenure, or no ſuch vill in rerum natura, he *ſhall* not *give the plaintiff a better writ;* and in ſeveral other caſes e contra. Br. Brief, pl. 496. cites 33 H. 6. 38.

[92]

17. Where one *pleads entry pending the writ,* he ſhall not give a better writ, and ſuch like, &c. Thel. Dig. 213. lib. 15. cap. 1. ſ. 14. cites Mich. 34 H. 6. 8.

18. Treſpaſs by G. of goods taken. Jenny ſaid, *before the plaintiff any thing had, L. was poſſeſſed ut de propriis, and made E. his feme and R. his executors, and died; and E. married the plaintiff, and was covert at the time of the treſpaſs, and after E. died, and ſo the action ought to have been brought by R. the other executor who ſurvived, not named;* judgment of the writ. And it was held no plea to the writ, becauſe he did not give the plaintiff a better writ; for R. and the plaintiff cannot join in action. Br. Brief, pl. 386. cites 20 E. 4. 18.

2 Salk. 601. pl. 11. S. P. in S. C. ——— 2 Roll Rep. 54. S. P. in caſe of Mitchell v. Crofts & al.

19. Judgment ſhall not be to abate a writ, but where the plaintiff *may have a better.* 6 Mod. 226. Mich. 3 Ann. B. R. in caſe of Adams v. Tertenants of Savage.

10 Mod. 208. Arg. ——Yelv. 112. in S. C. ——

20. Every one that will abate the plaintiff's writ, *muſt give him a better.* Brownl. 139. Mich. 5 Jac. in caſe of Thompſon v. Collier.

And therefore if defendant be *ſued by the name of E. J. baronet,* it is not enough for him to ſay that he is not a baronet, *without ſhewing what he is.* Ld. Raym. Rep. 117. Trin. 4 Ann. Warner v. Irby.

21. When

21. When the *defendant pleads a matter which gives the plaintiff a better writ*, he ſhall abate the other; *as* if *treſpaſs* be brought *by one tenant*, the defendant may *plead that he was tenant in common with a ſtranger;* for this falſifies the plaintiff's demand, and ſhews that he has no right to the action he has commenced. G. Hiſt. of C. B. 204.

(F. b.) When to be pleaded.

1. AFTER *errors* are *aſſigned, and the tenant has replied* thereto, he cannot plead in abatement of the writ of error. Thel. Dig. 209. lib. 14. cap. 15. ſ. 1. cites Paſch. 3 E. 3. 81.

2. A writ was abated for want of form *after non-tenure pleaded*, and ruled over. Thel. Dig. of Writs, lib. 10. cap. 1. ſ. 18. cites 19 E. 3. Brief 244.

3. *Præcipe* quod reddat *againſt* 3, who *made default*, and *at the grand cape they came*, and *every one alledged ſeveral tenancy of parcel, and tendered their law of non-ſummons.* Per Belk. You ſhall not have plea to the writ *before your default ſaved*, and may take this matter by proteſtation; and becauſe the demandant did not deny the ſeveral tenancy, Mombray abated the writ. Br. Brief, pl. 142. cites 38 E. 3. 28. [93]

4. If a man pleads *that a ſtranger has recovered the land in demand againſt him after the laſt continuance, judgment of the writ*, he *ought to ſay that the recoveror had execution;* for otherwiſe it ſhall not abate the firſt writ which was brought againſt the tenant. Br. Brief, pl. 16. (bis) cites 9 H. 6. 41.

5. Debt *againſt J. B. citizen of York*, and *does not give to him vill nor addition*, if he *appears and pleads, and is convicted*, he cannot plead this in arreſt of judgment; for the *ſtatute is, that the writ ſhall abate by exception of the party;* and therefore becauſe he did not plead it, he has loſt it. Br. Brief, pl. 500. cites 35 H. 6. 11.

6. Entry ſur diſſeiſin of rent, the *defendant pleaded bar of rent-charge*, and the *plaintiff made title of rent-ſervice by tenure;* to which the *defendant ſaid, that pending this writ the demandant had diſtrained for the ſame rent-ſervice in the ſame land, and of the diſtreſs is yet ſeiſed*, judgment of the writ. Per Pigot, by the bar he has affirmed the writ; and by all the juſtices he ſhall have the plea to the writ; for *it may be that the demandant has two rents out of the ſame land*; and when the demandant has made title to other rent which is not in bar, the defendant ſhall have a new anſwer to it, and may plead to the writ of this rent. Br. Brief, pl. 373. cites 12 E. 4. 10. 11.

Br. Enter en le per, pl. 35. cites S. C. and ſays, that the tenant had new anſwer to the writ; for the bar was not pleaded to this rent-ſervice.

7. *As in treſpaſs* the defendant pleads bar, the *plaintiff aſſigns the treſpaſs in a new place*, the defendant pleads jointenancy in it with a ſtranger, or tenancy in common. Br. Brief, pl. 373. cites 12 E. 4. 10. 11.

8. Where a *man appears as attorney for a corporation which is miſnamed, and imparles*, they ſhall not plead miſnoſmer in abatement of the writ after, notwithſtanding that he has not put in his warrant; for the *court ſhall compel him to ſhew warrant, and if the party* comes and

and *tenders to diſallow him, it ſhall not be admitted;* but he ſhall have action upon the caſe againſt the attorney; *and the corporation was not ſuffered to put warrant in according to their true name.* Quod nota. Br. Garrant de Attorney, pl. 15. cites 15 H. 7. 14.

9. A man ſhall not *take advantage of* a plea in abatement of the writ *after a plea in bar*, where it does not *appear to the court* that the writ ought to abate; but where it does appear to the court that the writ ought to abate, there the court *ex officio* ought to abate the writ, though the party admits it by pleading in bar. Roll. Rep. 176. Paſch. 13 Jac. B. R. Anon.

In indebitatus aſſumpſit it was held, that the defendant cannot plead in abatement after imparlance. Vent. 183. Hill. 23 & 24 Car. 2. B. R. Butcher v. Cowper.

10. In an *indebitatus aſſumpſit againſt an executor of J. S.* the *defendant appeared and imparled*, and afterwards *pleaded* in abatement of the writ, *that J. S. made other executors not named.* Upon demurrer, exception was taken that this plea is not good after imparlance, becauſe it is of a thing in the defendant's knowledge, and ſo might have pleaded it before; and cited 35 H. 6. 36. And Jerman J. abſente Roll, held this exception good; for by the *imparlance* he had *admitted the writ good*, and ordered him to plead in chief, niſi, &c. Sty. 220. Trin. 1650. Blackden v. Harvy.

——The defendant pleaded *after a general imparlance*, that ſhe was *covert* with one Y. and prayed judicium de billa; this is ill, and a reſpondeas ouſter was awarded. 2 Keb. 143. pl. 16. Hill. 18 & 19 Car. 2. B. R. Linch v. Beale.

S. P. in indebitatus aſſumpſit, that before the action brought ſhe was married, and her huſband living, and not named, & petit judicium ſi ipſa ad actionem præd' reſpondere debeat. Judgment was quod reſpondeat ouſter, becauſe the plea was only in abatement, and not pleadable after imparlance. Lutw. 22. Paſch. 3 Jac. 2. Bartelot v. Burton.

[94]

11. No plea in abatement ſhall be received *after a reſpondeas ouſter;* for then this would be pleaded in infinitum. G. Hiſt. of C. B. 151. cites 2 Saund. 41.

In *formedon* one cannot plead in abatement after the view, unleſs it be *a thing which cometh upon the view.* Kitch. of Courts 426. cites 41 E. 3. 39. 40 E. 3. 35.

12. *After a view* there can be no plea in abatement, unleſs ſuch as ariſes upon the view. 3 Lev. 219. Trin. 1 Jac. 2. C. B. Dinghurſt v. Batt.

Formedon after view, the tenant cannot plead in abatement, that *ſome of the degrees* were *omitted*; for it is not apparent to the court. Kitch. of Courts 426. cites 49 E. 3. f. 20.——But he may plead *antient demeſne* after the view; for it may be that parcel in the town is ancient demeſne, and parcel frank-fee, and it cometh upon the view to know that. Kitch. of Courts 426. cites 50 E. 3. f. 9.

In formedon where there is *matter apparent in the writ, to abate* it he may plead it after the view. Kitch. of Courts 426. cites 11 H. 4. f. 70.

After the view one cannot plead *no ſuch town, but* he may ſay *that the tenements are in another county*, for that cometh upon the view; but after the view he *cannot plead to the juriſdiction*, yet he *may plead that they are in C. and* that they are *impleadable there, and demand judgment of the writ*, and *not* judgment, *if the court will* take conuſance. Kitch. of Courts 426. cites 7 H. 6. f. 39.——*So in dower of a freehold in D. and S.* after view one cannot plead *no ſuch town of D.* for he is eſtopped of that, for that he hath knowledge of the town before the view; but he may plead *jointenancy and non-tenure*, which comes upon the view. Kitch. of Courts 426. cites 19 H. 6. fo. 10.

Formedon of a houſe, and *in the perclose* of the writ, there *is a houſe and meadow*; and after view the tenant cannot ſhew this in abatement, for it is but a *ſurpluſage*. Kitch. of Courts 426. cites 44 E. 3. f. 14.

2 Show. 443. pl. 408. S. C. adjudged in B. R. and affirmed in Cam. Scacc.

13. In aſſault and battery, the defendant *imparled ſpecially*, and after making a *full defence* pleaded outlawry in abatement; and upon a demurrer a reſpondeas ouſter was awarded. Lutw. 5. Trin. 35 Car. 2. Gawen v. Surby.

for the plaintiff; for after full defence the plea was too late.

14. If

14. If one will plead in abatement, he muſt do it *before the rules are out*, and ſhall not have till *eſſoigns of next term* for it; and formerly the courſe was to give rules for pleading generally, and after they were out to ſerve rules peremptory; per cur. 12 Mod. 522. Trin. 13 W. 3. Anon.

If *declaration* be *delivered before Craſt. Animarum* or *menſ. Paſch.* the defendant has *not time till next term* to plead in abatement, *but only till the rules are out*; *but if* it be *delivered after that time*, the defendant has till the eſſoign-day of the next term to plead in abatement; per cur. 12 Mod. 522. 523. Anon.

Though a *declaration* be *delivered as of a term before*, yet if the *rules of pleading* be *not out*, one may plead in abatement the ſubſequent term; per cur. 12 Mod. 504. Anon.

15. If a *declaration be delivered the laſt day of a term*, the defendant ſhall have 4 *days in a ſubſequent term* to plead in abatement; and if a declaration be *delivered* the laſt day of a term, *as of a precedent term*, the party ſhall have 4 *days after the actual delivery* of the declaration to plead in abatement. But judge Powell ſaid, one could not plead as of a precedent term without imparlance; to which Mr. Clarke anſwered, he might *enter it upon the poſt-roll without any imparlance*, and then the plea is of that term of which the declaration is. 7 Mod. 62. Mich. 1 Ann. B. R. Fiſh v. Horner.

19. *And* note, the declaration muſt be as of that term in which bail is filed, and the defendant in another term is not bound to accept a declaration as of a term precedent. And Mr. Clarke ſaid, that though *by conſent* the *defendant does accept a declaration the laſt day of Trinity Term as of Hilary Term*, yet he ſhall have 4 *days in Michaelmas Term* to plead in abatement. 7 Mod. 62. Mich. 6 Ann. B. R. Fiſh v. Horner.

17. *Marriage* after ſuit in inferior court commenced, is pleadable in abatement in the ſuperior court, after removal; but the courſe of the court is to move the matter to the court upon the return of the habeas corpus, and the court will grant a *procedendo*. 1 Salk. 8. pl. 20. Mich. 6 Ann. B. R. Hetherington v. Reynolds. [95]

19. Nothing ſhall be pleaded in abatement *of a 2d ſcire facias upon a judgment* that was pleadable in the action; for it would be unreaſonable he ſhould diſable the plaintiff from having execution, ſince he admitted him able to have judgment; all *matters in and before the writ muſt be pleaded in abatement*, for no advantage can be taken of it by error. G. Hiſt. of C. B. 208.

But *otherwiſe* it is *where it is after the writ*. Ibid.

(G. b) Plea to the Writ after other Plea pleaded.

1. IN *aſſiſe* after that the tenant has pleaded in bar, he *cannot* waive it, and *plead that the tenements are in another vill, nor other plea to the writ*. Thel. Dig. 209. lib. 14. cap. 14. ſ. 1. cites 1 Aſſ. 17.

2. In aſſiſe *of rent*, the *tenant pleaded hors de ſon fee*, &c. and the defendant *after would have pleaded miſnoſmer* of his name. And if, &c. to the aſſiſe, and was not ſuffered becauſe he had pleaded in bar before. And ſo it ſeems that he who pleads in bar

Thel. Dig. 209. lib. 14. cap. 14. ſ. 2. cites S. C. ac-

cordingly. ——So after ſuch plea he ſhall not plead

bar in aſſiſe *may waive the bar, and plead to the aſſiſe nul tort, but* not miſnoſmer, *nor no other plea to the writ.* Quod nota. Br. Aſſiſe, pl. 111. cites 3 Aſſ. 9.

that the plaintiff is *ſeiſed of parcel.* Thel. Dig. 209. lib. 14. cap. 14. ſ. 7. cites 30 Aſſ. 12.

3. In *treſpaſs by baron and feme of treſpaſs done to the one and to the other*, the defendant *pleaded not guilty*, and after the court abated the writ; becauſe the feme ſhall not recover damages for the treſpaſs done to the baron. Thel. Dig. 209. lib. 14. cap. 14. ſ. 13. cites 3 E. 3. It' North. Brief 737.

4. Thel. Dig. 88. lib. 10. cap. 1. ſ. 7. ſays, it ſeems by the opinion of Mich. 1 E. 3. 139. that where the defendant pleads *a plea which goes to the action*, and *concludes to the count, and waives it, or is ruled over*, he ſhall plead another plea to the writ.

5. *And* he who *pleads miſnoſmer and over to the aſſiſe* ſhall not be ſuffered to *plead in bar afterwards*, becauſe he has pleaded to the aſſiſe before; quod nota bene. Br. Aſſiſe, pl. 111. cites 3 Aſſ. 9.

6. The *writ of land in Dale and Sale*, and the tenant *after the view pleaded the releaſe of the anceſtor of the demandant in bar for all*, but *the releaſe ſhewed did not comprehend any land but in Dale only*, and after the tenant would have pleaded *that all was in Dale and nothing in Sale* and was not received. Thel. Dig. 209. lib. 14. cap. 14. ſ. 3. cites Trin. 6 E. 3. 273.

7. After the tenant has *pleaded to the count in the form of eſplees, and ruled over*, he *was received to ſhew that there was not any vill named in the writ*, by which it was abated. Thel. Dig. 89. lib. 10. cap. 1. ſ. 12. cites Mich. 7 E. 3. 361.

8. After the tenant had pleaded in bar he was received to ſay *that the writ was without date;* for it was Aguſti where it ought to be Auguſti. Thel. Dig. 209. lib. 14. cap. 14. ſ. 4. cites Mich. 10 E. 3. 533.

9. In writ of *entry of diſſeiſin made to the grandfather of the demandant*, thoſe words *(quæ clam' eſſe jus & hæred' &c.) were left out.* But it was held that after plea to the action the defendant could not ſhew this omiſſion in abatement of the writ; becauſe *there was matter ſufficient in the writ without thoſe words of form.* Thel. Dig. 209. lib. 14. cap. 14. ſ. 15. cites 21 E. 3. 18. 32. and adds Quære, and ſays, ſee the New Nat. Brev. fol. 21.

[96] 10. If the *plaintiff in avowry prays aid*, and has the aid, *he ſhall not plead in abatement of the avowry after;* for the aid prayer and voucher are in lieu of bar, and for bringing a bar, and therefore it is contrary to the order of exceptions to plead in abatement after it; quod nota. Br. Exceptions, pl. 7. cites 24 E. 3. 26. 27. 51. 52.

11. In *bill of treſpaſs containing diverſe treſpaſſes*, after that the defendant had pleaded he was not received to ſay, *that a thing done out of the county was ſuppoſed to be done by the bill*, &c. Thel. Dig. 209. lib. 14. cap. 14. ſ. 5. cites Trin. 27 E. 3. 82.

12. In oyer and terminer of the *raviſhment of an heir in ward*, the *writ was rapuit, where it ought to be cepit & abduxit*, &c. If the defendant pleads to the action he ſhall not plead this matter to the writ, for *the writ is affirmed.* Thel. Dig. 209. lib. 14. cap. 14. ſ. 6. cites 29 Aſſ. 35.

13. In *debt againſt baron and feme and another upon contract made during the coverture;* for the feme it was *ſaid, that a feme covert cannot make a contract, judgment ſi actio*, and *for the baron, and the third was pleaded the ſame matter to the writ*, and were not received, by which they pleaded to the action. Thel. Dig. 209. lib. 14. cap. 14. ſ. 8. cites Hill. 34 E. 3. Brief 923.

14. *Debt againſt two*, the *one came*, and *the other made default*, ſo that *exigent was pronounced* againſt him, and the *plaintiff counted upon a joint contract or cauſe*, there he who appeared was compelled to anſwer, notwithſtanding that he alleged he ought not to anſwer without the other becauſe it is upon a joint obligation, by which the *defendant pleaded the death of him who is outlawed before the exigent pronounced;* and becauſe the other could not deny it the writ was abated by award after he had pleaded that he ſhould not be compelled to anſwer without the other; and the reaſon ſeems to be becauſe the plea of the other was not recorded. And with this agrees 41 E. 3. 1. that in account againſt 2, if the one dies or be outlawed the other ſhall anſwer for the whole; Nota. Br. Reſponder, pl. 4. cites 40 E. 3. 26.

15. In writ *againſt an hoſtler* after plea in bar pleaded, the defendant was received to ſhew that the plaintiff by his count had *not ſhewn that the defendant was a common hoſtler*, upon which the writ was abated. Thel. Dig. 209. lib. 14. cap. 14. ſ. 14. cites Hill. 11 H. 4. 45.

16. In *waſte* againſt Beatrice, who was the feme of the earl of Arundel, firſt the *exception* was taken *to the count in the aſſignment of the waſte*, and *after to the name of dignity of the defendant*, inaſmuch as ſhe was not named counteſs, and *then to the form of the writ* by which waſte was ſuppoſed in hominibus and not exilium, *and laſtly no ſuch vill.* Thel. Dig. lib. 10. cap. 1. ſ. 26. cites Trin. 2 H. 6. 11.

17. After that the defendant has *pleaded to the form of the addition*, he *may plead that he was commorant at another place abſque hoc*, &c. Thel. Dig. lib. 10. cap. 1. ſ. 27. cites Mich. 4 H. 6. 4.

18. Where a man *pleads to the writ, or prays in aid*, and the *demandant demurs* thereupon, if it be *adjudged againſt the tenant he ſhall not plead newly to the writ, nor pray in aid;* per Fulthorp. Thel. Dig. of Writs, lib. 10. cap. 1. ſ. 31. cites Hill. 22 H. 6. 46.

19. In *writ againſt* 2, if the *one pleads to the writ, and the other to the action*, he who pleads to the action cannot reſort to the other plea to the writ. Thel. Dig. 209. lib. 14. cap. 14. ſ. 16. cites Paſch. 11 H. 6. 42.

20 In *ſcire facias* out *of a fine*, if the *demandant does not ſhew by the writ, or in the roll, how he is couſin* to his anceſtor, the *tenant* after

after pleading in bar, and admittance thereof, *may plead this matter in abatement* of the writ, and it ſhall abate by judgment. Thel. Dig. 209. lib. 14. ſ. 9. cites 38 H. 6. 4. 20. 22.

[97] 21. In *attaint* the defendants *pleaded quod bonum & legale fecerunt ſacramentum*, and afterwards they would have pleaded *variance between the writ of attaint and the firſt record*, and were not received. But it was ſaid that it ſhould be otherwiſe if the *record* be *in the ſame court*. Thel. Dig. 209. lib. 14. cap. 14. ſ. 10. cites Trin. 9 E. 4. 24. Quære.

22. In *treſpaſs of a cloſe broken*, after *plea in bar, and new aſſignment* made by the plaintiff, the defendant may plead to the writ *that the plaintiff has nothing but in common with ſuch a one not named*, &c. Thel. Dig. 209. lib. 14. cap. 14. ſ. 11. cites Mich. 12 E. 4. 11.

23. In *writ of entry of rent* the tenant *pleaded in bar a rent-charge*, and the *plaintiff made title to a rent-ſervice*, and after the *tenant ſaid that the demandant took diſtreſs pending the writ for the ſame rent, and of this diſtreſs he is yet ſeiſed;* and held a good plea, after the plea in bar, by all the juſtices. Thel. Dig. 188. lib. 12. cap. 23. ſ. 4. cites Mich. 12 E. 4. 11.

24. If an *aſſiſe in treſpaſs* be made of land in A. and the defendant does not take exception to the writ, but pleads over, he cannot plead in abatement of the writ afterwards. 2 Roll Rep. 175. 176. Arg.

(H. b) In what Caſes the Defendant may plead ſeveral Pleas to the Writ, one after another.

1. *EXCEPTIONS out of the writ lie after the exceptions which a man may have by view of the writ;* per Shard, who pronounced this as a rule. And there, after an *exception* taken *to the form* of the writ, and ruled over, the defendant was admitted to plead that there was *another writ pending* of the ſame thing, &c. Thel. Dig. of Writs, 88. lib. 10. cap. 1. ſ. 6. cites H. 3 E. 3. 70.

2. In *dower* the demand was *of the 3d part of a manor, and of a meſſuage*, &c. The defendant *pleaded that the houſe was parcel of the manor*, &c. and demanded judgment of the demand; and it was awarded no plea; and yet the tenant was admitted afterwards by the court to plead miſnoſmer of the vill, &c. viz. *nul tiel vill*, &c. For it was ſaid that he had pleaded to the matter of the demand, and * therefore his plea to the demand was matter in fact, & dehors, &c. as I think. But it was granted there that a man ſhall plead *in aſſiſe to the plaint, and after to the writ*. Thel. Dig. 89. lib. 10. cap. 1. ſ. 9. cites Mich. 4 E. 3. 166.

* The orig. is (pur ceo gue.)

3. In writ of *waſte againſt tenant for years, upon leaſe* made *by the plaintiff to one W. who leaſed over to the defendant for the ſame term*, &c. The defendant *pleaded* in abatement of the writ, *that the demiſe was made by the plaintiff to one A.* and awarded no plea.

And

And after the defendant would have pleaded *non-tenure*, and was not received. Thel. Dig. 89. lib. 10. cap. 1. ſ. 10. cites Mich. 5 E. 3. 228.

4. In *juris utrum* the tenant, *after plea* taken *to the form of the writ, and ruled over, pleaded to the juriſdiction* that the land was *ancient demeſne*; but the jury was awarded to inquire if the land be frankalmoigne or lay-fee only. Thel. Dig. 89. lib. 10. cap. 1. ſ. 13. cites Hill. 8 E. 3. 373.

5. In writ of *aiel of an office*, the tenant took exception to the writ, inaſmuch as it was *not brought in any vill*; and after was received to take *another plea* to the writ *upon cauſe apparent in the writ*, viz. the ſuppoſal of the ſeiſin in demeſne of an office, which ought to be only ut de feodo. Thel. Dig. 89. lib. 10. [98] cap. 1. ſ. 15. cites Mich. 8 E. 3. 424.

6. In *ſcire facias* out *of a recovery againſt a prior*, after *miſnoſmer of himſelf* pleaded, he was received to plead *that he is ſucceſſor to him againſt whom the recovery paſſed, not named ſucceſſor*, by which the writ was abated. Thel. Dig. 89. lib. 10. cap. 1. ſ. 17. cites Mich. 16 E. 3. Brief 656.

7. In *formedon in reverter* the tenant pleaded *non-tenure*, and was ouſted, inaſmuch as this writ was purchaſed by Journies accounts; but he was afterwards received to falſify the deſcent, as to ſay that *another not named was iſſue* in tail who ſurvived, *and held the eſtate*. Thel. Dig. 89. lib. 10. cap. 1. ſ. 16. cites Mich. 18 E. 3. 42.

8. In *formedon in remainder*, after *age had, and oyer* had *of the deed of remainder*, the tenant was received to *plead non-tenure*; for the ſhewing of the deed is only to make the demandant anſwer. Thel. Dig. 89. lib. 10. cap. 1. ſ. 20. cites Hill. 26 E. 3. 57. and ſays, contra it was held of jointenancy Hill. 45 E. 3. 2.

9. In writ of *entry againſt baron and feme, ſuppoſing that the feme had not entry, unleſs by*, &c. Exception was taken to the writ that the *entry of the baron was not ſuppoſed* with the feme, and ruled over, &c. The tenants were received to plead matter, which proved *that the writ ſhould be en le poſt*, for *the firſt aroſe upon matter apparent in the writ*. Thel. Dig. 89. lib. 10. cap. 1. ſ. 22. cites Mich. 39 E. 3. 33.

10. In *quare impedit de prebenda vocata major pars altaris in eccleſia de Sarum*, the defendant *pleaded* to the writ *that there were ſeveral collegiate churches of divers ſaints in Sarum, and alſo* 2 *Sarums, &c. ſcil. New Sarum and Old Sarum, &c. that the plaintiff does not ſpecify in which church or vill the prebend was*. It was held by Finchden, that after this plea the tenant *cannot plead* to the writ by monſtrans *that the writ does not make mention of what ſaint the church was*, as he ought, becauſe the *firſt plea was matter in fact*. Thel. Dig. 89. lib. 10. cap. 1. ſ. 23. cites Paſch. 40 E. 3. 17.

11. *Waſte againſt M. late wife of Thomas earl of A.* the *defendant pleaded to the writ* becauſe *ſhe was a counteſs not named counteſs*, & non allocatur; for theſe words (late wife of Thomas, earl) *imply* that ſhe is a counteſs, unleſs ſpecial matter be ſhewn to the contrary;

contrary; for writ præcipe Thomas earl of A. and M. his wife is good, by which ſhe *pleaded yet to the writ*, becauſe *it is fecit vaſtum in domibus & hominibus*, where it ſhould be *exilium in hominibus*, ſcil. villeins, & non allocatur; for the writ ſhall be *general*. And ſo in dower, it ſhall be de libero tenemento, and ſhe ſhall have ſpecial declaration of villeins, by which ſhe pleaded further to the writ, becauſe it is *brought in A. B. and C.* and *no ſuch vill as C. in the ſame county*. And per Martin, it is a good plea to all the writ, without anſwering to the reſidue; for it goes to all the writ. *Contra* 9 H. 6. 42. if he *ſays that there are two C.'s and none without addition*, for there, there is ſuch a vill with addition, and the plaintiff ſhall recover by view of jurors, note the diverſity. And ſo ſee here that the defendant *ſhall have* * 3 *pleas to the writ one after another*; but it does not appear if any of them were pleaded and demurred to, and adjudged after demurrer. For quære then if ſhe ſhall plead it again. Br. Brief, pl. 6. cites 2 H. 6. 11.

* Br. Dilatories, pl. 3. cites S. C.

12. *But* it appears 3 H. 6. 5. that if a man prays aid of the king, and the *cauſe is not ſufficient*, but he is put over; yet *he may allege new cauſe and ſo infinite, in one and the ſame term, contra after adjournment*; and quære if the ſame law be not upon pleas to the writ, for in 3 H. 6. 1. he ſhall have ſeveral pleas to the writ likewiſe. Br. Brief, pl. 6.

[99]

(I. b) By whom it may be. By Plaintiff or Demandant himſelf, or Garniſhee *, Vouchee, &c.

* See tit. Voucher (K. c)

1. IN *quare impedit againſt baron and feme*, the *plaintiff would have abated his own writ by the death of the feme to extort the damages*, and was not received, for the baron prayed writ to the biſhop for himſelf. Thel. Dig. 196. lib. 13. cap. 9. ſ. 1. cites Mich. 7 E. 3. 364.

But in *quare impedit by two parceners*, the *one was received to ſay that the other was dead*, and to pray that the writ be abated, and that he might ſue a new writ. Thel. Dig. 196. lib. 13. cap. 9. ſ. 2. cites Mich. 38 E. 3. 42.

2. If a man ſees that his writ is abateable, he may *pray leave to acquire a better writ* to have advantage in the ſecond writ *by Journies accounts*. Thel. Dig. 197. lib. 13. cap. 9. ſ. 6. cites Paſch. 34 E. 3. Journies Accounts 23.

But Mich. 33 H. 6. 34. the *demandant confeſſed that the tenant was not tenant*; and prayed leave to purchaſe a better writ, and could not, but the writ was abated. Thel. Dig. 197. lib. 13. cap. 9. ſ. 7.

3. Formedon *againſt A. who vouched E.* who *entered into the warranty and vouched D.* and proceſs returnable Octavis Michaelis, at which day *D. came, and ſaid that T. had brought formedon againſt A. the tenant, and had recovered by action tried*, judgment of this writ; and he ſhall have the plea clearly, per Finchden juſtice; for *he is in place of the tenant*, and the tenant himſelf cannot now have it, for he is out of court. Br. Brief, pl. 506. cites 41 E. 3. 10. 11.

4. In

4. In *quare impedit for the king* where it was *found for the defendant*, the opinion was, that *the king could not abate his own writ*, notwithſtanding that there was matter apparent to abate it. Thel. Dig. 196. lib. 13. cap. 9. ſ. 3. cites Mich. 3 H. 4. 2. for the *plaintiff ſhall never be received* to ſuggeſt a thing to the court, which ſhall abate his own writ. Per Hank. ibidem. Quære.

5. But in *recaption* it was moved, per Fulthorpe, *that the plaintiff was dead after the laſt continuance*, and prayed leave to acquire a better writ by which the writ was abated. Thel. Dig. 196. lib. 13. cap. 9. ſ. 4. cites Hill. 11 H. 6. 17.

6. In *forcible entry againſt* 2, the *one made default after imparlance*, and the *other pleaded to iſſue*, and after the plaintiff came, and *ſaid that he who had pleaded to iſſue was dead*, and prayed writ to inquire of damages againſt the other at his peril. Thel. Dig. 197. lib. 13. cap. 9. ſ. 5. cites Hill. 31 H. 6. 15.

7. In replevin, the *prayee in aid* ſhall not plead in abatement of the writ or avowry, *unleſs as amicus curiæ* to inform the court for error, per tot. cur. Br. Brief, pl. 499. cites 34 H. 6. 8. *So of the garniſhee in detinue*; for it ſeems that *none can plead to the writ but the party to the original*, by whoſe death the writ may abate. Br. Brief, pl. 499. cites 34 H. 6. 8.

8. *Baron and feme* are *jointenants*. Action is brought againſt the baron, who makes default, the wife cannot be received, not being party to the writ. But the reverſioner may be received and plead *join-tenancy* in abatement of the writ. Mo. 242. pl. 381. Mich. 29 Eliz. C. B. Cane's Caſe.

(K. b) Ex Officio. In what Caſes. [100]

1. NOTE by the juſtices, That where *declaration*, *indictment*, &c. is *inſufficient by matter apparent*, the court ought ex officio to ſee it in pain of error, as indictment of conſpiracy wanted *the year*, *day*, *and place where it was done*, and was of *impriſonment of certain perſons till they ſhould make fine*, &c. whereas this *ſounds in oppreſſion*, and not in conſpiracy; and becauſe they condemned him, it was reverſed by writ of error. Br. Office del &c. pl. 5. cites 24 E. 3. 74.

2. Writ was *filio & heire*, inſtead of *filio & hæredi*, and abated per cur. Br. Office del &c. pl. 6. cites 41 E. 3. 21.

3. *Formedon as couſin and heir* of the donee, and *did not ſhew how couſin in the writ*, *but in the count*; and therefore the writ was abated ex officio curiæ *after the view*. And therefore it ſeems that the party is paſt pleading to the writ. Br. Office del &c. pl. 2. cites 12 H. 4. 1.

4. In *formedon* it was ſaid, That the court ex officio ought to abate the writ, if it appears to them *by a thing apparent that it is not good*, as by falſe Latin, want of form, &c. notwithſtanding that the demandant makes default; and the matter was that it was *rex Hiberniæ*, in the writ *for dominus Hiberniæ*, and the

eſſoignee or ſtranger as amicus curiæ may ſhew it. Br. Office del &c. pl. 6. cites 4 H. 6. 16.

5. Writ of debt may be abated or adjudged upon matter apparent without demurrer tendered by the defendant, viz. the action was againſt the executor, upon ſimple contract of the teſtator, who might have waged his law; and therefore Littleton awarded, upon appearance of the plaintiff's attorney to the action, that the plaintiff take nothing by his writ. Quod nota. Br. Office del &c. pl. 4. cites 15 E. 4. 25.

3 Keb. 768. pl. 5. S. C. 6. *Scire facias* brought by an adminiſtrator, *teſted* 12 *Feb. upon oyer of the letters of adminiſtration* after imparlance, it appeared that the letters of adminiſtration *bore date* 26 *March afterwards*, whereupon defendant pleaded it in abatement; the plaintiff demurred, becauſe a plea in abatement could not be after an imparlance; but *it appearing upon the record that* the plaintiff's *writ* was *before the cauſe of action*, the ſame was ex officio abated; per cur. 2 Lev. 197. Trin. 29 Car. 2. B. R. Harker againſt Moreland.

S. P. For if the matter of abatement be extrinſick, the defendant muſt plead; if intrinſick, the court will take notice of it themſelves. 1 Salk. 220. pl. 7. Trin. 3 Ann. B. R. Dockminique v. Davenant. ——6 Mod. 198. S. C. accordingly; and the court ſaid they would turn all ſuch demurrers into bars, though Eyre quoted WIMBISH v. WILLOUGHBY in Plowd. a precedent of a demurrer in abatement. ——G. Hiſt. of C. B. 208. S. P. and cites S. C.

7. There cannot be a *demurrer in abatement*; per Holt Ch. J. 6 Mod. 195. Trin. 3 Ann. B. R. Anon.

S. P. Per cur. though the defendant admits the writ and count. Br. Actions ſur le Caſe, pl. 41. cites 11 H. 4. 45. ——S. P. Per cur. accordingly, though the party admits it by pleading in bar. Roll. Rep. 176. pl. 13. Paſch. 13 Jac. B. R.

8. Where it *appears* to the court *from the writ itſelf*, that it ought to abate, the court ex officio ought to give judgment againſt the plaintiff, though the defendant does *not plead in abatement*. Arg. 10. Mod. 170.

* I do not obſerve this at 1 Roll. Rep. 2. but ſee 2 Roll. Rep. 272, 273. Hill. 20 Jac. B. R. in an anonymous caſe.

9. *But* if it does *not appear in the writ* it is otherwiſe. Arg. 10. Mod. * 170. cites 1 Roll. Rep. 2.

[101] (L. b) Where it is only in Delay, or Peremptory.

1. CONUSANCE *was demanded* by the mayor and bailiffs of Coventry, and they ſhewed a charter to this purpoſe, that if the *demandant in a plea of land counterpleads the franchiſe, and* the *tenant joins with the claim* of the franchiſe, and it is found againſt the franchiſe, the demandant ſhall recover the land; but if it be found againſt the demandant the writ ſhall abate. Jenk. 18. pl. 32. cites 20 E. 3. and 35 H. 6. 54.

2. If a man pleads a *plea in abatement of the writ*, or of avowry, which is *demurred to*, and *adjudged againſt him who pleads it*, it is not peremptory, but a reſpondeas ouſter. Quod nota. Br. Peremptory, pl. 6. cites 48 E. 3. 10.

3. *And* it ſeems *iſſue* taken *upon excommunication* is peremptory. Sid. 252. cites 3 H. 4. 3.

4. In

4. In *præcipe* quod reddat, if the *tenant pleads to the writ*, and the *demandant demurs*, and the matter is adjourned to another term, this is not peremptory for the tenant, but ſhall be awarded that he anſwer over. Quod nota, per Newton, Fulth. and Portington. Br. Peremptory, pl. 20. cites 22 H. 6. 55.

5. If a *demurrer* is joined upon *plea to the juriſdiction*, to the *perſon*, to the *writ*, upon *view*, upon *aid*, upon *voucher*, upon *eſſoign*, though adjourned to another term, and adjudged againſt the defendant, it is no more than a reſpondeas ouſter. If the plea to the writ upon *iſſue joined* be found for the tenant or defendant, the writ ſhall abate. If it be to the perſon, or action or juriſdiction, and is found for the demandant or plaintiff, he ſhall recover the thing in demand. Jenk. 306. pl. 82. S. P. Br. Peremptory, pl. 1. cites 34 H. 6. 8.

6. Upon *counterplea of view*, *reſceit*, *eſſoign*, or *aid*, and found for the tenant upon *iſſue joined*, the writ ſhall not abate, but view, reſceit, eſſoign, aid *only ſhall be awarded*. Upon counterplea *of voucher*, if found for the tenant upon iſſue joined, judgment ſhall be that voucher *ſhall ſtand*, if for the demandant that demandant ſhall recover the land. The law intends greater delay and expence upon * trial by jury than upon demurrers; and if upon any of theſe pleas there be a trial by jury, and it be found for the demandant, he ſhall recover the land. Jenk. 306. pl. 82. * S. P. Br. Peremptory, pl. 1. cites 34 H. 6. 8. and 50 E. 3. 20.

7. *Præcipe* quod reddat *of rent of diſſeiſin done to the father of the demandant*, the *tenant pleaded to the writ that the demandant himſelf was ſeiſed*; to which the *demandant ſaid, that he was not ſeiſed*; to which the *tenant ſaid, to this you ſhall not be received, for at another time J. S. brought treſpaſs againſt you, in which you juſtified, becauſe your father was ſeiſed of this rent, and made title by preſcription, and that he died ſeiſed, and you were ſeiſed, and for the rent arrear diſtrained upon which you were at iſſue, which plea is yet pending*; and ſo demanded judgment if he ſhall be received to ſay that he was not ſeiſed, &c. upon which the demandant demurred; and upon long argument it was adjudged no eſtoppel, as appears 33 H. 6. 7. and 50. And it was adjourned and argued three terms; and the demandant prayed ſeiſin of the land, and that this demurrer may be peremptory to the tenant; and by Priſot and the beſt opinion, becauſe *it is only to the action of the writ, and not in bar of the action, nor in diſproof of the title of the demandant*; therefore *it is not peremptory by demurrer, but a reſpondeas ouſter*. Br. Peremptory, pl. 1. cites 34 H. 6. 8.

8. If *plea in abatement* of writ *of replevin* be *confeſſed by the plaintiff, or adjudged againſt him by demurrer*, he ſhall have a new replevin. But *contra upon plea in bar*; *or* if plea *to the writ be found againſt him by jury upon the iſſue*, he ſhall not have a new replevin; for it is peremptory. Note the diverſity. Br. Peremptory, pl. 2. cites 34 H. 6. 37. The diverſity is where the plaintiff *demurs on a* [102] *plea in abatement*, and where *he goes to iſſue upon it*; for if they go to iſſue upon ſuch plea, and it is found againſt the defendant, it is peremptory, and he ſhall loſe the land, &c. but upon demurrer it is not peremptory, but only a reſpondeas ouſter. Per. Williams J. Quod nota. Yelv. 112. Mich. 5 Jac. B. R. in caſe of Thompſon v. Collier.——Brownl. 138. S. C. ſeems a tranſlation from Yelv.——S. P. by Roll Ch. J. All. 65. Trin. 24 Car. B. R. in caſe of Beaton v. Foreſt.——S. P. accordingly of a plea to the writ generally, in caſe of demurrer adjudged or found againſt the defendant, that it ſhall only be a reſpondeas ouſter, and likewiſe that it is contra upon a plea in bar. But if the plea be triable by certificate

ficate of the ordinary, and he certifies againſt the defendant, the judgment ſhall be a reſpondeas ouſter; per Doderidge J. which Jones affirmed. Lat. 178. Mich. 2 Car. ——The court agreed, that plea in abatement on iſſue is peremptory, though the prayer cannot be otherwiſe than breve ceſſetur. Keb. 870. Paſch. 17 Car. 2. B. R. in pl. 18. ——Vent. 22. Paſch. 21 Car. 2. B. R. Anon. accordingly, as to iſſue found againſt defendant. 2 Roll. Rep. 38. ——It is not peremptory upon demurrer, becauſe the party is not ſuppoſed to be conuſant of the matter in law. Sid. 252. pl. 22. in caſe of Amcott v. Amcott. ——Though it be pleaded after imparlance, and iſſue tendered upon it, yet it is not peremptory upon a demurrer; per Roll. Ch. J. All. 65. in S. C.

In all caſes when iſſue is joined upon a dilatory plea, and tried by the country, judgment is peremptory; but otherwiſe in all caſes tried by demurrer, except in one only, and that is in caſe of *demurrer upon evidence*, and there it is peremptory, becauſe no reſpondeas ouſter can be; for by this the parties are at the end of their pleading. Arg. Lev. 163. cites Long. 5 E. 4. 139. 2 E. 4. 10.

9. *And ſo* it ſeems it is of a plea in abatement which is pleaded *after the darrain contin'*, becauſe it is after the plea in bar, and this though it be upon *demurrer*. Sid. 252. cites Lo. 5 E. 4. 139. 2 E. 4. 10. Yelv. 112. F. Aide 122. Iſſue 114.

10. If a *dilatory plea* be pleaded *to the writ or to the count*, or the like, and they *join iſſue*, there always, if the *iſſue paſſes againſt the tenant or defendant*, in action real or perſonal, this *is peremptory* to the tenant or defendant, *and only dilatory on the part of the demandant* or plaintiff. Br. Peremptory, pl. 44. cites 5 E. 4. 90.

11. The defendant after *imparlance pleaded outlawry* in the plaintiff, & petit judicium de billa, and judgment was quod reſpondeat ouſter. Lat. 179. ſays the court agreed this caſe, the record thereof being ſhewn, and was Paſch. 2 Jac. Rot. 331.

So though the plea be adjourned and over-ruled in another Term.

12. *Upon plea* to the juriſdiction, to the perſon, to the writ, aid-prayer, view, eſſoin, voucher, and *demurrer joined*, to ſuch plea or prayer, if the demurrer be *over-ruled*, it is but reſpondeas ouſter. Jenk. 306. pl. 80. Jenk. 306. pl. 82.

13. When a plea *concludes in abatement*, it is not peremptory; but if a *plea in abatement is pleaded in bar*, it is peremptory; per Roll Ch. J. All. 65. Trin. 24 Car. B. R. Beaton v. Forreſt.

Lev. 163. S. C. and judgment affirmed niſi. —— Raym. 118. S. C. argued, but adjornatur. —— Keb. 869. pl. 18. S.C. and judgment affirmed niſi.

14. *Formedon in remainder* was brought there *againſt an infant*. The infant by his guardian *pleaded* that he was *in by deſcent*, and prayed that the parol ſhould demur; and upon this *iſſue was taken*, and *found for the tenant* in the formedon; and after ſeveral arguments in C. B. judgment final was there given, viz. that the demandant ſhould be barred. Writ of error was brought in B. R. and after ſeveral arguments the judgment was affirmed; and the reaſon why upon *iſſue taken upon matter in fact* judgment final ſhall be given, is becauſe the matter in fact is *ſuppoſed to be in the conuſance of the party*; and if he will give ſuch trouble and charge to the party, in ſuch caſe it is reaſon that he ſhall be barred, and ſo are Lo. 5 E. 4. 90. b. and other books. Sid. 252. pl. 22. Paſch. 17 Car. 2. B. R. Amcott v. Amcott.

15. In a *ſcire facias* to repeal a patent, the *matter appearing ſufficient, and not denied* by any plea of the defendant, *but* he having *confeſſed* the ſame *by his demurring in abatement*, a judgment peremptory ought to be given, and not a reſpondeas ouſter, by
[103] the judges attending in domo procerum; and that ſo it was done in the caſe, 17 E. 3. 59. b. 3 Lev. 223. Trin. 1 Jac. 2. The King v. ſir Oliver Butler.

16. In

16. In *ſcire facias* on a judgment in waſte *for the damages recovered*, the *defendant demurred partly in abatement, and partly in bar*. The court gave judgment in chief. Cited by the judges attending in domo procerum, in caſe of the King v. ſir Oliver Butler, Trin. 1 Jac. 2. 3 Lev. 223. as lately adjudged in a ſcire facias, per Hale Ch. J. and the whole court, in the caſe of Cole v. Green.

17. If *matter of fact* is pleaded in abatement *triable per pais*, the plaintiff may conclude his replication in bar, becauſe final judgment is to be given after a verdict in that caſe; per Holt Ch. J. Carth. 433. Mich. 9 W. 3. B. R. in caſe of Bonner v. Hill.

18. In treſpaſs againſt A. B. and C. they pleaded as to part not guilty, and to the reſidue other action pending againſt B. and C. but ſaid nothing as to A. Judgment was given *quod recuperet damna* againſt them, and not quod reſpondeant ulterius, becauſe *the plea commenced and alſo concluded in bar*. Lutw. 41, 42. Hill. 13 W. 3. Wallis v. Savil. 2 Lutw. 1532. S. C. but S. P. does not appear.

19. Upon a reſpondeas ouſter, if the *defendant pleads the general iſſue*, the plaintiff ſhall *ſign judgment, if defendant's attorney on re-delivering back a copy of the iſſue will not pay for it*. And it ſeems the old courſe was to deliver in a copy of the whole record, viz. the declaration, plea in abatement, &c. and iſſue; but the court made a *rule* for the future, that a copy of the declaration and iſſue ſhould only be paid for. 1 Salk. 4. pl. 11. Mich. 1 Ann. B. R.

20. If the defendant *pleads matter of fact* in abatement, *which the plaintiff denies*, if the matter of fact be found for the plaintiff, he ſhall have final judgment. Ld. Raym. Rep. 593, 594. Holt Ch. J. cites it as ſo held in B. R. in the caſe of Biſſe v. Harcourt. S. P. per cur. 6 Mod. 114. Hill. 2 Ann. B. R. Anon.

21. *And* Holt ſaid that in another caſe afterwards, upon a ſcire facias, they held that if the defendant pleads matter of fact in abatement, and the plaintiff replies and denies the fact, he may pray execution; but yet if *judgment* be given *for the plaintiff, upon demurrer to the replication*, it ſhall only be a reſpondeas ouſter. Ld. Raym. Rep. 594. Arg. in caſe of Medina v. Stoughton. If the defendant *pleads a matter debors* in abatement of the writ, and the plaintiff replies, and the defendant *demurs to the plaintiff's replication*, this immediately refers the replication to the conſideration of the court; and ſince, if he had then referred the plaintiff's writ to the court, the judgment would have been to anſwer over, therefore if he at the ſame time refers the replication to the court, to judge whether it is good or not, there is the ſame judgment to anſwer over; *but if he had referred the action itſelf to the court to judge of the legality thereof*, there that not being touching the preſent writ depending in court, but the plaintiff's whole demand, it was admitting the truth of the demand; becauſe ex facto jus oritur, the court never pronouncing what was the law till the fact was firſt ſettled; and therefore the defendant, referring the legality of the plaintiff's demand to the court, admits conſequently the truth of it. G. Hiſt. of C. B. 44.

For more of Abatement in general, ſee **Addition, Amendment, Aſſiſe, Declaration, Jointenants, Traverſe, Writ,** and other proper titles.

* Abatement into Lands.

* Abate *is* both an Engliſh and French word, and ſignifieth in his proper ſenſe to diminiſh or take away; as where one by his entry diminiſheth and taketh away the freehold in law deſcended to the heir; and an abatement is when a man died ſeiſed of an eſtate of inheritance, and between the death and the entry of the heir, an eſtranger doth interpoſe himſelf and abate. Co. Litt. 277. a.

(A) Abatement, Intruſion, &c. on a Dying Seiſed.

1. IN writ of intruſion upon leaſe of his anceſtor, he ought to ſhew quod clamat eſſe jus & hæreditatem ſuam. Thel. Dig. 94. lib. 10. cap. 6. ſ. 14. cites Mich. 10 H. 6. 9.

For none can make abatement but upon a dying ſeiſed in fact; for *dying ſeiſed by preteſtation is not good* to allege abatement thereon. Br. Titles, pl. 14. cites 38 H. 6. 18.

2. Title is not good by *donee in tail, and abatement alleged by him who gave to the tenant, unleſs the demandant alleges the dying ſeiſed of him upon whom the abatement ſhall be made.* Br. Titles, pl. 14. cites 38 H. 6. 18.

3. Abatement *cannot be but after the death of him who died ſeiſed in fee*, and not *after the death of the tenant for term of life:* for this *is intruſion*, and not abatement, per Littleton; but the court did not anſwer to this but to the other things. Br. Traverſe per &c. pl. 163. cites 39 H. 6. 26, 27.

4. None is abator but he who firſt enters by tort upon a deſcent; but yet aſſiſe of mortdanceſtor lies *againſt the heir of feoffee of the abator, or againſt the twentieth heir.* Br. Mortdanceſtor, pl. 61. cites 5 H. 7. 6.

For more of Abatement into Lands, ſee **Traverſe**, and other proper titles.

Abeyance.

(A) Abeyance. What it is; and the Reaſon thereof.

1. IN Abeyance ſignifies, that it is in expectation; for when a parſon dies, we ſay, that the freehold is in abeyance, becauſe a ſucceſſor is in expectation to take it; and then it is

in

in expectation, in *remembrance*, *intendment*, *conſideration*, or *underſtanding of law*, becauſe it is not in any men then living; and a right which is in abeyance is ſaid to be in nubibus. Co. Litt. 342. b.

2. They are allowed only out of neceſſity, but the law never allows it to the act of the party; and therefore if a man makes a leaſe for years, the remainder to the right heirs of J. S. who is then living, the remainder is utterly void; per Hobart Ch. J. Hob. 153.——S. P. And the law admits them only in caſe of neceſſity, as in vacations of biſhops, parſons, &c. or remainders to right heirs upon freeholds. They are not allowed but where the original creation of eſtates, or where the conſequence of eſtates and caſes do in congruity require them; but for eſtates that are of their own nature in their original perfect and intire, the law does not permit them by the voluntary act of the party. Hob. 338.——They are not allowed but in particular caſes; and it would be to make fractions of eſtates; neither could livery of ſeiſin be had in ſuch caſes. Arg. 4 Mod. 280. in caſe of the King and Queen v. Kemp.

3. Abeyance is a fiction in law, per Dodderidge J. and is allowed only where it is neceſſary, and to avoid an abſurdity or inconvenience, and for the benefit of a ſtranger, and to preſerve his right. Jo. 73. Paſch. 1 Car.

No gifts ſhall make things to *paſs in abeyance*, but ſuch as are Arg. Pl. C.

in advantage of *ſtrangers*, and not in advantage of the donors themſelves, or their heirs. 562. b.

(B) What Things may be, or ſhall be ſaid to be in Abeyance.

1. WHERE a *gift* is made *in tail by fine*, *remainder to tenant in tail in fee*, the *tenant had iſſue two ſons by diverſe venters*, and *died*; the *eldeſt entered*, *and died without iſſue*, and his *heir collateral entered*, and the *youngeſt ſon brought ſcire facias to execute the remainder in fee*, and had execution; for the fee was not executed in the eldeſt ſon, by reaſon that he was ſeiſed in tail, and the *fee was in abeyance*, and yet was in him to give charge or forfeit. Br. Executions, pl. 67. cites 24 E. 3. 30, 31.

2. Father and 2 ſons are; the father levied *a fine to N. who granted and rendered to the father for life*, the *remainder to the eldeſt ſon* and his wife *in tail*, the *remainder to the right heirs of the father*; the *father died*, and after the *tenant in tail and* his wife *died without iſſue*; the *youngeſt ſon entered*, and the lord avowed upon him for a relief, as heir to his eldeſt brother to the remainder in fee, and had return by award, notwithſtanding that the youngeſt ſon would have been adjudged in as purchaſor, by name of the right heir of his father, becauſe by his pretence the fee and *the tail* cannot be ſimul & ſemel, *in the eldeſt ſon*. But Brooke ſays, this ſeems to be contrary; for it *may be* in him *the*

one in poſſeſſion and the other in abeyance; and he may give it and forfeit it. Br. Done, &c. pl. 9. cites 40 E. 3. 9.

Co. Litt. 342. b. S. P. accordingly.

3. If a gift is made *to N. for life*, the *remainder to the right heirs of J. who is alive*, the remainder is in ſuſpence or abeyance during the life of J. Br. Done, &c. pl. 6. cites it as ſo ſaid in 40 E. 3. 9.

4. Biſhop, dean, and prebend have fee. But contra of a *parſon*: for there the fee is in abeyance. Br. Confirmation, pl. 17. cites 5 E. 4. 105.

* [106] Parſon has fee ſimple in jure eccleſiæ, per 3 juſtices out of 4.

* 5. A *freehold* can be in abeyance in no caſe but only in the caſe *of a † parſon of a church*. D. 71. pl. 43. Trin. 6 E. 6. in the caſe of Withers v. Iſham.

Br. Faux Recov. pl. 51. cites 12 H. 8. 7. —— † Becauſe the care of ſouls was only committed to him during life; he was not capable of the fee, and therefore the fee was in abeyance: ſo that there was this difference between the characters of the prieſts and biſhops, that the biſhops ſucceeded in their own original right, as the ſucceſſors of Chriſt and his apoſtles, the great biſhop of ſouls; and therefore what they took was to themſelves and ſucceſſors; but the prieſts were only the ſubſtitutes of the biſhops, and therefore could not take but during their lives. The parſon therefore, being only capable to take for life, for he had no proper ſucceſſor to himſelf, the next parſon coming in from the biſhop, and by his inſtitution; and yet the fee being out of the patron, and not given to the biſhop, but appropriated to the uſe of that particular church, it was ſaid to be in abeyance; but to all beneficial purpoſes, the law allows him to ſuppoſe himſelf to have an inheritance, though he has not properly any ſucceſſor; and therefore the parſon may bring an action of waſte, a writ of entry ad communem legem, in conſimili caſu, ad terminum qui præteriit, a quod permittat in the debet, a writ of meſne, a contra formam feoffamenti; and ſhall receive homage, becauſe theſe are for the benefit of the fee in abeyance, the defence of which the law has committed to him; but the law has provided him a juris utrum, and he ſhall not have a writ of right, ſince for the reaſon above mentioned, he cannot claim it as his right and inheritance. Gilb. Treat. of Ten. 105, 106.

S. C. Pl. C. 227. by name of Wyllion v. Lord Barkley.

6. *A. levied a fine of a manor* holden *in capite*, with a render back *to the heirs of his body*, remainder *to king H. 7. and the heirs of his body*; and for default thereof, *to the right heirs of A.* —— A. *died ſeiſed without iſſue*, and king *H. 7. entred and died*; after which it deſcended to king Henry 8. and *E. 6.* who *dying without iſſue, it reverted to B. as couſin and heir to A.* It was reſolved that B. who was an infant, ſhould be in ward to the queen, by reaſon of the tenure, becauſe the tenure was revived on the death of E. 6. and ſhould have eſcheated to her for default of heirs of A. and therefore the fee-ſimple was in conſideratione legis. D. 102. pl. 82. Trin. 1 Mar. The Queen v. lord Barkley.

7. By Hitcham ſerjeant, in the caſe of a *contingent remainder of a copyhold*, the eſtate in the mean time, before the contingency happens, after the admittance of the particular eſtate, is in abeyance, and not in the lord; but Damport ſerjeant thought that the eſtate in contingency is not in abeyance upon the admittance of the particular eſtate, but *in the lord*, as D. 9 Eliz. the lord ſhall be occupant. Arg. Roll. Rep. 318. in caſe of Lane v. Pannel.

Pl. C. 560. b. Hill. 15. Eliz. in WALSINGHAM's caſe, Saunders

8. *Tenant in tail grants all his eſtate* to another; this works no diſcontinuance *quoad his iſſue*, but *quoad himſelf* the reverſion is in abeyance; for he ſhall have none left in him againſt his own grant, ſo as he cannot afterwards have action of waſte. Co. Litt. 331. a.

Ch. B. in delivering the opinion of the court, ſaid they were all agreed that there was no ancient book which warranted Littleton's opinion; that by the grant by tenant in tail of all his eſtate, the eſtate tail ſhould be in abeyance, is not law; and it is all one as if he made eſtate for his own life. Reſolved that by bargain and ſale to another and his heirs, by tenant in tail in reverſion of a leaſe for years, nothing paſſed to the bargainee, but an eſtate deſcendible for the life of the tenant in tail, according to Co. Litt. 329. ſ. 606. Saund. 260, 261. Paſch. 21 Car. 2. Took v. Glaſcock. —— —— If *tenant in tail* by

by leaſe and releaſe, or by bargain and ſale, or by covenant to ſtand ſeiſed, *conveys to B. and his heirs*, the eſtate tail is not in abeyance, but in B. and his heirs; for the law puts nothing in abeyance but of neceſſity, and it is not in the tenant in tail; for he cannot bring waſte, &c. per Holt Ch. J. in delivering the opinion of this court. 2 Salk. 620. pl. 2. Trin. 1 Ann. B. R. Machil v. Clerk. —— 7 Mod. 27. S. P. accordingly. —— 11 Mod. 19, 20. Machel v. Clerk, S. C. accordingly —— And all thoſe books mention, that the caſe in Saund. 260. and Litt. was denied to be law, by Holt Ch. J. and ſo a judgment in C. B. was affirmed.

9. If *tenant for term of another's life dies*, the freehold is ſaid to be in abeyance until the *occupant enters*. Co. Litt. 342. b.

10. *Leaſe for life, remainder to the right heirs of J. S.* the fee-ſimple is in abeyance till J. S. dies. Co. Litt. 342. b.

Deviſe of land to B. for 21 years, remainder *to C. in fee*, or a deviſe for years, remainder *to the right heirs of J. S.* is good if J. S. die during the term, becauſe the freehold in the mean time is *in the heir of the deviſor*, and not in abeyance. Noy 23. Payne v. Ferral. —— If a *feoffment* in fee is made *to the uſe of A. and the heirs of his body*, remainder in fee to the *right heirs of T. S.* who is then living, in ſuch caſe the fee-ſimple is not in abeyance, nor in the feoffee, but the uſe of the fee ſhall *result* to the feoffor, and remain in him till the contingency, viz. till the death of T. S. ſhall happen; per Holt Ch. J. Carth. [107] 262. Hill. 4 W. & M. in B. R. in caſe of Davis v. Speed.

11. If a parſon of a church dieth now, the *freehold of the glebe* of the parſonage is in none during the time that the parſonage is void, but in abeyance, viz. in conſideration and in the underſtanding of the law, until another be made parſon of the ſame church, and immediately when another is made parſon, the freehold indeed is in him as ſucceſſor. Co. Litt. f. 647.

So it is of a *biſhop, abbot, dean, archdeacon, prebendary, vicar*, and of every other ſole corporation, or *body politick, preſentative, elective or donative*, which inheritances put in abeyance, are by ſome called hæreditates jacentes, and ſome ſay, que le fee eſt en abeyance. Co. Litt. 647. b.

12. The *property of goods* cannot be in abeyance, ſo that in caſe of a perſon dying, they muſt be in the executor, adminiſtrator, or ordinary. Brownl. 132. Trin. 7 Jac. in caſe of Hellam v. Ley.

13. It is no good rule that that which doth not paſs by the livery doth remain in him who gives the livery. As if *tenant in tail is attainted and office found*, the eſtate tail is not in the king nor in the perſon attainted, but is in abeyance. Arg. Godb. 301. in caſe of Sheffield v. Ratcliff. Co. Litt. 345. a.

14. *Tenant in tail* covenants to ſtand ſeiſed to the uſe of himſelf for life, *remainder to A. in tail.* Per Holt Ch. J. this produces no alteration in the eſtate tail, becauſe the eſtate in remainder was *to commence after his deceaſe.* 2 Salk. 619, 620. Trin. 1 Ann. Br. Machel. v. Clerk.

7 Mod. 27. S. C. and S. P. per Holt Ch. J. a cordingly —— And at this time the right of the eſtate out of which it would iſſue is in another perſon by title paramount, the conveyance, ſc. per formam doni. 7 Mod. 26. S. C.

15. *Deviſe to A. for life*, and *if A. have iſſue male, then to ſuch iſſue male and his heirs for ever*, and *if A. leaves no iſſue male*, then the lands were deviſed *to B. in fee.* This was held by the maſter of the rolls as the ſame was held before in the houſe of peers, by the aſſiſtance of the judges, to be a contingent remainder; but the queſtion now being whether the remainder in fee was in abeyance or did deſcend to the teſtator's heir at law? his honour thought it to be in abeyance; and that it was much ſtronger than where A. deviſes *to A. for life, remainder to the right heirs of J. S.* becauſe in that caſe J. S. might not die in the life of A. and then the teſtator's heir would take, and ſo there might be ſomething ſaid why in that caſe the *reverſion ſhould deſcend until the contingency, one way*

or

or other, falls out; but that here the intention is expreſſed of giving the inheritance from the heir at law in all events, and that the contingency ſhould be only betwixt the iſſue male of B. and the deviſees over. But upon an appeal Ld. C. Parker much expoſed the notion, and ſaid, that ſince the conſtruing the fee to be in abeyance would tend to deſtroy it, and ſince *nothing but neceſſity in any caſe ſhould occaſion a fee-ſimple to be in abeyance*, and that where the remainder was deviſed in contingency, it was held that the reverſion in fee deſcended to the heir at law in the mean time; and ſo of whatſoever eſtate was not diſpoſed of, his lordſhip ſaid, he ſhould abide by that opinion. Wms's. Rep. 505. 511. 515. Mich. 1718. Carter v. Barnardiſton.

For more of Abeyance in general, ſee **Eſtates, Remainder, Uſes,** and other proper titles.

---

[108]

Abjuring the Realm.

(A.) In what Caſes, and How.

Abjuration of the realm *was* the party's *oath before the coroner* himſelf to depart the realm for ever at the time and place ſet him; going the direct way thither; tarrying there but one flood and ebb, if he can have paſſage; and till he can ſo paſs, going every day into the ſea up to the knees to aſſay if he may paſs over, and if he cannot paſs within 40 days, then to put himſelf again into the church as a felon, &c. And this abjuration is an attainder in itſelf (and that the ſtrongeſt that can be, being by his own confeſſion) and a forfeiture of his land, and there is a writ of eſcheat of land for felony, pro qua abjuravit regnum. And therefore he that is hanged upon judgment againſt him, and becometh alive again, cannot abjure (but an abjuration in that caſe is an eſcape), for one cannot have two judgments for one offence. Fin. of Law, 8vo. 389. lib. 4. 33.——Same points and another part of the oath was, that he would never return without leave of the king, &c. 2 Hawk. Pl. C. 52. cap. 2. ſ. 44.

1. ABJURATION by the courſe of the common law may be thus *deſcribed*, when a man or a woman had committed felony, and the offender for ſafe-guard of his or her life had fled to the ſanctuary of a church or church-yard, and there before the coroner of that place within 40 days had confeſſed the felony, and took an oath for his or her perpetual baniſhment out of the realm into a foreign country, chooſing rather perdere patriam quam vitam. But that foreign country into which he was to be exiled, muſt not be among infidels. And this was the ancient law of this realm, which was, prohibemus autem ne chriſtiana fide tinctus quiſpiam a regno procul amandetur, neque ad eos qui nondum Chriſto fidem adjunxerunt, relegetur, ne eorum aliquando fiat animarum jactura, quos propria Chriſtus vita redemit. 3 Inſt. 115. cap. 51.

2. A man *abjured* the realm and *was taken out of the highway by force*, and *put in priſon, and* afterwards *eſcaped, and* then was *taken and arraigned of it*, and becauſe *he did not endeavour to go to his port when he was eſcaped*, therefore he was not reſtored to the way, *but was hanged*; for it was ſaid that his life was not granted to him upon the abjuration but upon condition that he ſhould go to the port aſſigned him with ſpeed, and if he does not do ſo he ſhall be hanged; but if he be taken out of the way, he ſhall be reſtored if he prays it, if no default be in him. Br. Corone, pl. 144. cites 7 H. 7. 7.

3. If a man *abjures and comes again*, and takes to the church, he *cannot abjure again*, by all the juſtices, and if he does it is void; but quære if he may be taken out within the 40 days. Br. Corone, pl. 226. cites 11 H. 7. 4.

4. A man *took to the church*, and the *coroner* came to him and *demanded of him for what cauſe he took to the church*, who *ſaid that he would be adviſed by* 40 *days before that he would declare his cauſe*, and the coroner drawed him out immediately; but if he would have confeſſed felony to him, he might have remained there by 40 days before that he abjured; but a ſanctuary may hold him for term of life if there be no ſtatute to the contrary. Br. Corone, pl. 180. cites W. N.'s. Readings, in the time of H. 7.

But if he will abjure within the 40 days, the coroner ſhall give him a day certain to do it. And in the time of M. 1.

ann. 5. it was ſaid for law, that a man *cannot abjure for high treaſon*. Quære of *petit treaſon*; for it appears in a chronicle in the time of H. 6. that a *feme who killed her miſtreſs* abjured the realm. Ibid.

5. Abjuration *for felony ſhall diſcharge all felonies done before the* abjuration. Br. Corone, pl. 182. cites W. N.'s Readings. [109]

6. A man can *not* abjure *for petit larceny*, but for ſuch felonies for which he ſhall ſuffer death. Br. Corone, pl. 182. cites W. N.'s Readings.

7. Such abjuration as was at the common law, founded upon the privilege of ſanctuary, is wholly taken away by the ſtat. 21 Jac. [cap. 28. parag. 7.] And yet the abjuration by force of the ſtat. 35 Eliz. cap. 1. before juſtices of peace, or juſtices of aſſiſe, or by force of an act made at the ſame parliament, cap. 2. before 2 juſtices of peace or the coroner *by a recuſant*, remaineth ſtill; becauſe ſuch abjuration hath no dependency upon any ſanctuary. 3 Inſt. 115, 116. cap. 51.

8. One that had abjured the realm for the death of a man, being brought to the bar was demanded what he could ſay, why execution ſhould not be awarded. He *pleaded the king's pardon, which* was diſallowed, becauſe it did *not mention that he had abjured.* Keling. 28.

Abridgment.

(A) Abridgment of Plaint or Demand. In what Cafes or Actions.

In dower of the third part of a manor, it was adjudged that *after the view and after challenge* of the party the demandant may abridge her demand by putting in a *fore-prise*, and this was done becauſe the parcel fore-priſed was in another vill not named. Thel. Dig. 76. lib. 8. cap. 28. ſ. 4. cites Paſch. 13 E. 3. plaint 11.

1. IN *dower of the third part of a manor*, and *after the view* the demandant would have made her demand of the third part of two carves of land, and was not ſuffered to change her demand; but it was agreed that ſhe might abridge her demand. Thel. Dig. 76. lib. 8. cap. 28. ſ. 2. cites Hill. 7 E. 3. 301. and ſo agrees 7 Aſſ. 20.

In dower againſt 4 of the *third part of a maror*, the demandant abridged her demand, and *demanded the third part of four parts of the ſame manor*, &c. becauſe one being in ward the king held the fifth part. Thel. Dig. 76. lib. 8. cap. 28. ſ. 14. cites Trin. 12 H. 4. Aid del Roy 47.

And it was ſaid there, that in *dower* a man may abridge his *demand of all that is in one of the vills*. Thel. Dig. 76. lib. 8. cap. 28. ſ. 18. cites 36 H. 6. plaint 7. and 5 H. 7. 7. 23. And that it is ſo agreed Paſch. 21 E. 4. 28.

2. In *dower* the *demand was of the moiety of part of the tenements, and of the third part of the reſidue in the ſame vill*, &c. And after exception the demandant was received to amend her demand, and to ouſt all of which ſhe demanded the moiety. Thel. Dig. 76. lib. 8. cap. 28. ſ. 21. cites Hill. 7 E. 3. 308. Dower 102.

Where the writ is of *waſte committed in domibus & beſ-* [110] *eis*, and the plaintiff *abridges all the waſte* ſuppoſed to be done *in domibus*, the writ ſhall abate. D. 272. Paſch. 10 Eliz. Burgavenny (Lord of) v. Plummer & others.

3. Upon writ of *inquiry of waſte* the *ſheriff returned the inquiſition* made *of all the waſte, except of waſte aſſigned in a garden*; but the plaintiff was not received to abridge his plaint of the waſte aſſigned in the garden, but was compelled to ſue ſicut alias, and the ſheriff was amerced. Thel. Dig. 76. lib. 8. cap. 28. ſ. 6. cites Trin. 14 E. 3. Waſte 27.

4. It was ſaid by Green, that a man may amend, abridge, or inlarge his plaint *after imparlance*. Thel. Dig. 76. lib. 8. cap. 28. ſ. 9. cites Paſch. 32 E. 3. plaint 8. and 32 Aſſ. 5.

Ibid. pl. 32. cites S. C.--- Thel. Dig. 76. lib. 8. cap. 28.

5. Ward. Per Caund. becauſe there *is no certain demand* in writ of ward, but cuſtodiam terræ & hæredis; therefore if the plaintiff *declares of the manor of D. and* 20 *acres*, where *the* 20 *acres are parcel of the manor* which is pleaded to the writ, the plaintiff

plaintiff may abridge his demand. Br. Abridgment, pl. 10. cites 39 E. 3. 10.

f. 10. cites Paſch. 39 E. 3. 13. 14 H. 6. 4. S. P.

6. Where the demand or plaint is of a manor, or of other *thing intire*, there a man cannot abridge his demand or plaint, &c. per Newton. Thel. Dig. 76. lib. 8. cap. 28. ſ. 15. cites Mich. 19 H. 6. 13. 33 H. 6. 4.

As *in dower de libero tenemento in B.* the demandant made her *demand of the 3d part of the manors of C. and D.* and the *tenant pleaded to the writ*, that 20 *acres of land, parcel of the ſaid manor of D. extended into P.* The demandant cannot abridge her demand of 20 acres, becauſe the manor is intire. *Contra* if the demand was *of* 10 *acres*; for this is a thing ſeveral; per Priſot, & non negatur. Quod nota differentiam. Br. Abridgment, pl. 2. cites 33 H. 6. 4.

If a man makes plaint *of a manor*, the plaintiff cannot abridge his plaint; for this is *intire*. Contra of acres which are ſeverable. But, per Needham J. if a man demands 2 *manors in one vill*, he may abridge his plaint in aſſiſe of the one manor; for the writ ſtands true of the other manor de libero tenemento in the ſame vill. Br. Abridgment, pl. 17. cites 4 E. 4. 33.

A man cannot abridge his plaint where it is of any *thing intire*, or of *parts of any thing intire*, as the moiety of a manor, or 3d part, &c. Thel. Dig. 76. lib. 8. cap. 28. ſ. 18. cites 36 H. 6. plaint 7. and 5 H. 7. 7. 23.

And where the demand was there of *diverſe manors*, the demandant was received to abridge for one of the manors. Thel. Dig. ut ſupra, cites 21 E. 4. 28. —— It was agreed, arguendo in formedon, that a man cannot abridge his demand *nor* plaint *of a thing intire*, as *manor*, *moiety*, *3d part*, and the like, which are intire; *nor unleſs where the demand or plaint may ſtand true after the abridgment*, and therefore of *acres* he may abridge his demand. *But* of a plaint or demand *in D. and C.* a man cannot abridge in D. for then the demand is falſe in D. and C. but as to the demand which is *intire*, it is remedied by the ſtatute 21 *H.* 8. 3. Br. Abridgment, pl. 28. cites 19 H. 6. 13.

7. Note that in *treſpaſs againſt* 2, who pleaded *not guilty*, which is a ſeveral plea in itſelf, and were *found guilty* to the damage of 10 l. and the *one brought attaint alone*; and per cur. it *lies of the principal but not of the damages*, which are intire, by which he abridged his demand of the damages. Quod nota. Br. Abridgment, pl. 4. cites 34 H. 6. 12.

S. P. For they cannot ſever in attaint as to the principal, becauſe their plea was ſeveral in itſelf, and the one may be found guilty and the other not; but as to the damages, thoſe are intire. Br. Abridgment, pl. 24. cites 35 H. 6. 19.

8. *So* upon ſuch a recovery *in conſpiracy*. Br. Abridgment, pl. 4. cites 34 H. 6. 30.

9. *Where the writ does not require any defence*, as in *dower*, *aſſiſe*, *per quæ ſervitia*, and *attaint*, the plaintiff may abridge his plaint or demand. Br. Abridgment, pl. 4. cites 34 H. 6. 33. Per Forteſcue.

Thel. Dig. 76. lib. 8. cap. 28. ſ. 20. cites S. C.

10. In *dower*, &c. [the writ was] *rationabilem dotem* ſuam quæ ei contingit *de libero tenemento*, &c. *in D. C. and E.* and the *demand was of* 3 *manors*, 30 *houſes*, *and* 20 *s. rent*, *with the appurtenances*. And the tenant pleaded to the writ, becauſe the *rent was parcel of one of the manors*, and therefore *twice demanded*. Per Brian, he may abridge his demand of the one manor, and of this the writ ſhall abate; * for in all caſes where the writ is de libero tenemento, he may abridge his plaint or demand thereof, wherefore the writ ſhould abate, and in this writ he may abridge his demand in one vill. Quod Littleton conceſſit. Br. Abridgment, pl. 18. cites 21 E. 4. 28.

In aſſiſe where the plaint is of a meſſuage and 4 acres of land, the plaintiff may abridge his plaint of the meſſuage, becauſe the jury hath view of the land only.

D. 61. b. Paſch. 38 H. 8. Pennington v. Morſe. ——— But where the plaint was of 53 s. 4 d. rent, and abridged to 20 s. it was held by the court to be error; for that rent being an intire thing cannot be abridged. D. 65. b. Mich. 3 E. 6. in caſe of Arundel (Earl of) v. Lord Windſor and others.

* S. P.

* S. P. per June Ch. J. Br. Abridgment, pl. 12. cites 14 H. 6. 4. and in writ of ward the writ is cuſtod' terræ & hæred'. In theſe and all the like caſes, the demandant may abridge his plaint or demand, and the reaſon is, becauſe the *writ remains good de libero tenemento* notwithſtanding this. —— *But* in *præcipe quod reddat* where *acres certain* are demanded, there he cannot abridge; for then he ſhall falſify his own writ, and where writ is *confeſſed falſe in part it ſhall abate in all.* Ibid.

* S. P. Br. Abridgment, pl. 12. cites 11 H. 6. 4. For then his writ is falſe.

11. *But* he cannot abridge his plaint in a * vill *in aſſiſe;* for the jury is ready to paſs, and the jury which is put in pannel for this vill cannot be put in inqueſt after the abridgment. *But it was agreed,* that a man may abridge his demand in a vill *in writ of dower, be it of a manor or of acres,* becauſe there he is to have the *view,* and the writ may be taken of that which remains. Note a difference. Br. Abridgment, pl. 18. cites 21 E. 4. 28.

12. In *writ of right of advowſon,* or aſſiſe of a manor, it is a good *plea* to the writ *that the demandant is ſeiſed of the 5th part of the advowſon,* or of one acre, parcel of a manor, and by this all the writ ſhall abate; for there he cannot abridge his demand, for it is of a thing *intire.* Br. Abridgment, pl. 33. cites 5 H. 7. 7.

Abſence.

(A) What may be done in the Abſence of the Defendants.

1. A Man *cannot be attainted* in his abſence. Br. Challenge, pl. 144. cites 41 Aſſ. 26.

2. A *fine for a battery* may be ſet, though the offender be not preſent; but the courſe is not to hear any thing moved in mitigation of the fine, unleſs the party be preſent, and he was fined 500 marks. Vent. 209, 210. Paſch. 24 Car. 2. B. R. How's caſe.

S. C. 1 Salk. 400. pl. 4. by the name of DUKE's caſe, and held accordingly by Holt Ch. J. and ſaid, that a *capias ad ſatisfaciendum damna*

3. H. and D. were *convicted and outlawed* of *perjury,* and the *exigent filed,* and it was moved that the court would *pronounce judgment* on the defendant's, ſeeing the proſecutor could go no farther; but the court ſaid, they never knew any judgment given for a *corporal puniſhment.* Even in the caſe of an outlawry in the abſence of the party, when a man is outlawed for *felony,* there is never any award of execution againſt him till he be brought to the bar. And ſince in this caſe a corporal puniſhment would be part of the ſentence, they could not do it; and that, upon ſearch, Sir

Sir Samuel Aſhtree could find no ſuch precedent. 12 Mod. 156. Mich. 9 W. 3. the King v. Harriſon & Duke.

regi pro fine is common; but there the King v.

never was a writ to take a man and put him in the pillory.——Skinn. 684. pl. 4. Harris, S. C. per cur. accordingly.——S. P. Arg. 10 Mod. 342.

*4. A court may, perhaps, in *prudence*, not care to *give judgment* in the abſence of the party; per Parker Ch. J. but he ſaid he ſaw no reaſon but that it may be done; and that he took it to be done in Mawgridge's caſe. 10 Mod. 344. in caſe of the Queen and Simpſon.

But execution cannot be awarded but in the preſence of the party, *becauſe* there

may poſſibly be a miſtake of the perſon, or ſome other reaſon may have happened, ſubſequent to the judgment, why execution ſhould not be awarded; per Parker Ch. J. 10 Mod. 344. in caſe of the Queen v. Simpſon.

*[112]

5. Upon the ſtatute 3 & 4 W. & M. cap. 10. againſt deerſtealers, the juſtices of peace may convict the offender in his abſence, upon his default to appear, he having been duly ſummoned. 10 Mod. 378. Hill. 3 Geo. 1. B. R. the Queen v. Simpſon.

See the caſe argued, ibid. 248. 341.

6. Though the office of a *common council-man* is in law accounted a freehold, yet he may be removed from it in his abſence; per Parker Ch. J. 10 Mod. 380.

7. *Judgments* irregularly obtained may be *ſet aſide*, and *attachments* may be *granted*, &c. in the abſence of the parties. Indeed *notice* muſt be given; but if the party will not appear, the court proceeds without ſeeing or hearing; per Parker Ch. J. 10 Mod. 380. in caſe of Queen v. Simpſon.

8. In *ſummary proceedings* there is very often no power given (as to J. of P.) to oblige the party to appear; and where it is not given by the expreſs words of an act of parliament, it cannot be given by *implication*, unleſs it were *of abſolute neceſſity to the doing juſtice*; per Parker Ch. J. 10 Mod. 381. in caſe of Queen v. Simpſon.

(B) The Effect thereof. In reſpect of Nominees, &c. and the Remedy.

1. 19 *Car.* 2. *ſ.* 6. *NOMINEES for whoſe lives eſtates are granted, after ſeven years abſence, and no evident proof be made of their being alive, in any action commenced by the leſſors or reverſioners for recovery of the tenements, they ſhall be accounted as dead.*

A *leaſe* was made *in reverſion* to L. D. *for* 99 *years, to commence after the*

death, or other ſooner determination, of the eſtates *of J. D. the father, and J. D. the ſon*, leſſees in poſſeſſion for the like term, if they or either of them ſo long lived. In ejectment *the death of J. D. the ſon was poſitively proved; but as to the father, proof was that he was reputed dead, and not heard of in* 15 *years*. Holt Ch. J. was of opinion, that this caſe is within this ſtatute, becauſe L. D. the leſſor of the plaintiff in ejectment had a term in reverſion in the lands, and ſo was a reverſioner within the very letter of the ſtatute; and the defendant not being able to prove that J. D. the father was alive at any time within 7 years laſt paſt, the plaintiff had a verdict. Carth. 246. Trin. 4 W. & M. at Exon aſſiſe, Holman v. Exton.——And Holt Ch. J. likewiſe held, that a *remainder-man was within the equity of the law*.

2. 6 *Ann, cap.* 18. *Such nominees, or tenants of particular eſtates, on affidavit in Chancery by any claimant to the reverſion, &c. that they have cauſe to believe ſuch perſons dead, ſhall be ordered to be produced, and if not produced, be taken to be dead, but if it appears afterwards, that ſuch nominee or tenant was alive, ſuch tenant, &c. may re-enter, and recover the meſne profits.*

For more of Abſence in general, ſee **Acceſſary, Beyond Sea, Condition, Feoffment,** and other proper titles.

---

[113]

Acceſſary.

(A) Acceſſary. Statutes relating to Acceſſaries.

The preamble recites the *miſchief*, that *before this act*, in ſome counties it had

1. *Weſtm.* 1. 3 *E.* 1. cap. 14. *FORASMUCH as it hath been uſed in ſome counties, to outlaw perſons being appealed of commandment, force, aid, or receipt, within the ſame time that he which is appealed for the ſame deed is outlawed,*

been uſed to outlaw acceſſaries within the ſame time that the principal was outlawed. Here it is to be underſtood, that in thoſe days *moſt appeals of death, &c. were ſued by bill in the county before the coroner*, in which bill the appellant *did make a diſtinction between the principal and the acceſſary*; and therefore *this act is intended of appeals commenced by bill*; *for* in the appeal *by original writ, both* principals and acceſſaries *are generally charged alike*, without any diſtinction, who be principals and who be acceſſaries, *until the plaintiff makes his count*, and therein he muſt diſtinguiſh them; but if *the defendant* in ſuch an appeal, where ſome are principals and ſome acceſſaries, *makes default*, the *appellant before the exigent ought to declare*, to the end it may be known *who be principals and who acceſſaries*, and to take the exigent only againſt the principals, *and continue the plea againſt the acceſſaries until the principals be attainted*; for if the plaintiff ſhould pray an exigent againſt them all, he is concluded afterward to charge any of them as acceſſaries. 2 Inſt. 183.

This act was made in *affirmance of the common law*, and it *holds* not only in appeal at the ſuit of the party, but *in indictments alſo* at the ſuit of the king; for it is an ancient and fundamental maxim of the common law, juri non eſt conſonum, quod aliquis acceſſorius in curia regis convincatur antequam aliquis de facto fuerit attinctus; yet if the *acceſſary* will, he *may pray proceſs againſt the inquiſts before the principal be attainted*; for quilibet poteſt renunciare juri pro ſe introducto. 2 Inſt. 183.

Acceſſaries are divided into two

It is provided and commanded by the king, that none be outlawed upon appeal of commandment, force, aid, or receipt,

parts, viz. to acceſſaries *before* the fact, and to acceſſaries *after the fact*.

Again, *Acceſſaries before* the fact are divided into 3 branches; of *commandment, force, and aid*: Acceſſaries *after* the fact *is only by receipt*.

Under this word (*commandment*) is underſtood all thoſe that *incite, procure, ſet on* or *ſtir up* any other to do the fact, *and are not preſent when the fact is done*.

Force is a word of art, and properly *ſignifieth* the *furniſhing of a weapon of force to do the fact*, and *by force whereof the fact is committed, and he that furniſheth it is not preſent when the fact is done*; and

as

as for theſe two words, commandment and force, Bracton ſaith, *ubi factum nullum, ibi fortia nulla, nec præceptum nocere debet:* And again, vulnus, fortia & præceptum, generant unicum factum; non eſſet vulnus forte, ſi non adfuiſſet fortia; nec vulnus, nec fortia, niſi præceptum præceſſiſet: And *ſometimes, in a large ſenſe, is taken for any that is acceſſary before the fact.*

Under this word (*aid*) is comprehended all perſons *counſelling, abetting, plotting, aſſenting, conſenting,* and *encouraging* to do the act, and are *not preſent* when the act is done; *for if* the party commanding, furniſhing with weapon, or aiding, be *preſent* when the act is done, then *he is principal.* 2 Inſt. 182.

Until he that is appealed of the deed be attainted; ſo that one like law be uſed therein through the realm. Nevertheleſs, he that will ſo appeal, ſhall not, by reaſon of this, intermit, or leave off to commence his appeal at the next county againſt them, no more than againſt their principals which be appealed of the deed; but their exigent ſhall remain until ſuch as be appealed of the deed be attainted by outlawry, or otherwiſe.

If the *principal wage battle, and is ſlain in the field,* yet he is not attainted; but the *judgment muſt be, that he was vanquiſhed in the field, ideo conſideratum, quod ſuſp' per coll',* &c. And this was agreed by the juſtices; for *otherwiſe* in this caſe the lord ſhould have *no eſcheat, nor* any *outlawry* could be ſued by the appellant *againſt the acceſſary.* 2 Inſt. 183.

Though the act ſays *appellee* in the ſingular number, yet in an *appeal brought againſt* 2 *as principals, and againſt another as acceſſary* to them, in this caſe *both* of them *muſt be attainted before the acceſſary be outlawed*; and *if one* of the principals *be found not guilty,* the *acceſſary is diſcharged,* for the plaintiff made him acceſſary to two, and therefore he cannot be found acceſſary to one. † *But where* there be *divers* * *principals,* the *appellant may have his appeal againſt any one* of them, and *make the acceſſary neceſſary to him only,* if he will, *for the felony is ſeveral* ‡; but the appellant cannot have ſeveral appeals of one death. 2 Inſt. 183.

† Br Corone, cites pl. 118. cites 40 Aſſ. 25. S. P. accordingly.

‡ In one caſe of felony *all are principals as well before as after, though* they be *abſent at the* doing of the felony; but that is ſpecially provided by ſtatute of 3 H. 7. cap. 2. of *taking of women againſt their wills,* &c. 2 Inſt. 183.

But if the *principal pleads not directly to the felony a plea to bar the plaintiff, as autrefoits attaint,* or *unques accouple,* or the like, there the *acceſſary ſhall not plead until that plea be determined*; and *ſo* if the principal plead a *plea to the writ,* the acceſſary ſhall not be driven to anſwer until the plea be determined. 2 Inſt. 184.

For further explanation of this act, ſee the following diviſions.

* [114]

2. 3 & 4 *W. & M. cap.* 4. *ſ.* 4. *Perſons buying or receiving ſtolen goods, knowing the ſame to be ſtolen, ſhall be deemed acceſſaries to the felony, after the felony committed, and puniſhed as ſuch.*

3. 11 & 12 *W.* 3. *cap.* 7. *ſ.* 9. *Perſons ſetting forth any pirate, or aiding or aſſiſting, maintaining, procuring, commanding, counſelling, or adviſing the ſame, either on the land or ſea, ſhall be adjudged acceſſary to ſuch piracy. And if any perſons, knowing another to have committed piracy, ſhall, on the land or ſea, receive, entertain, or conceal him, or receive or take into their cuſtody any ſhip, veſſel, or goods, which have been piratically taken, ſhall be adjudged acceſſary to the piracy; and all ſuch acceſſaries ſhall be tried as the principal pirates are, and ſuffer pains of death, and loſs of lands and goods, in like manner.*

4. 5 *Ann. cap.* 31. *ſ.* 5. *If any perſons ſhall receive or buy any goods, knowing them to be ſtolen, or ſhall receive, harbour, or conceal any burglars, felons, or thieves, knowing them to be ſo, they ſhall be deemed acceſſary to the felony, and being convict by teſtimony of one witneſs, ſhall ſuffer and incur the pains of death as a felon convict.*

See tit. Murder (O) and (O. 2)

(B) Who.

3 Inſt. 139. S. P. accordingly; for that he did not receive the felon.—

1. IF a man *receives a felon in aid or favour of the felon*, he is acceſſary; *but* if he aids him *by good words, or ſues for his deliverance*, or ſends a letter for his deliverance, this is not acceſſary. Br. Corone, pl. 103. cites 26 Aſſ. 47.

——A vicar inſtructed an illiterate approver in priſon to read, whereby he eſcaped, yet the vicar was adjudged not acceſſary to the felony. 3 Inſt. 139. cap. 64. cites Mich. 7 R. 2. and 7 H. 4. 27.

2. Felons came to the houſe of D. and M. his *wife*; M. *knew* them to be *felons*, but D. did not, and both D. and M. *received and entertained them, but* M. *conſented not to the felony*. Adjudged that this made not M. acceſſary. 3 Inſt. 108. cap. 47. cites Mich. 37 E. 3. Dey's caſe.

Br. Corone, pl. 19. cites 7 H. 4. 27 & 25. S. C. & P.

3. It is agreed, that he *who procures and is preſent* is principal, *though he did not ſtrike*, and if he be *abſent* he *is only acceſſary*. Br. Appeal, pl. 19. cites 7 H. 4. 27.

4. If diverſe commit any murder or other felony, *one* man *may be both principal and acceſſary* to the other. 3 Inſt. 139. cap. 64. cites 7 H. 4. 27.

5. If a man *receives a felon knowing of the felony*, and *takes* 40 *s. of him to ſuffer him to go, he is acceſſary* to the felony. Br. Eſcape, pl. 43. cites 9 H. 4. 1.

6. In appeal of rape of his feme, though two come and the *one does the act*, the *other being preſent*, yet both are *principals*. Br. Appeal, pl. 32. cites 11. 4. 13.

S. P. per Harpur J. of ſeveral coming together to do a burglary or murder, &c. And Dyer and Weſton ſaid, that in thoſe things, in reſpect of the medling with the perſon of a man, the intent is adjudged according to the event, and when the fact is perpetrated it ſhall be adjudged the intent of all from the commencement, and ſo all are principals; but yet it may be found, that the one of them did it ex malitia præcogitata, and the other not. Mo. 53, 54. in pl. 155.

7. *So* where *ſeveral come to do felony, robbery*, &c. and one does the act, the others are principals. Ibid.

If ſeveral perſons come into a houſe together with an intent to ſteal, if only one of them ſteals goods, they are all equally guilty. Per Kelyng Ch. J. Kelyng 47. at the Old Bailey, 5 Apr. 1665.

*[115] 8. If a *mortal wound* be *given*, and the *party languiſhes* for a month, and *A. knowing thereof receives the murderer*, or if conſtables arreſt him and permit him to eſcape, and then the perſon wounded dies, the receivers are not acceſſary to the felony, nor are the conſtables felons. 2 Ld. Raym. Rep. 827. cites 11 H. 4. 12. b.

9. If 20 *come to do a felony*, and the *one only does the act*, yet all are principals by reaſon of their preſence. Br. Corone, pl. 187. cites 11 H. 4. 13.

10. *But* if any *procure* or command *and be not preſent*, thoſe are acceſſaries only. Ibid.

11. The lord cannot be principal of the *goods of his villein*; for if he takes them ſecretly, it is not felony, for he *has a title*

to

to take them, and therefore it ſeems that he may be acceſſary. Br. Corone, pl. 215. cites 29 H. 6.

12. If *ſeveral are preſent for the ſame purpoſe when a man is killed*, and one kills him, yet all the others are principals. Br. Corone, pl. 166. cites 21 E. 4. 70, 71.

13. They who *reſcue* a felon out of ward or priſon are principal felons, and not acceſſaries, per cur. Br. Corone, pl. 129. cites 1 H. 7. 6.

14. If a man *be preſent at the death of a man, and moves another to ſtrike, which he does, and kills the man;* by all the juſtices of both benches, he who moved is principal and not acceſſary, tho' he did not ſtrike; for the wound of him who ſtruck is alſo the wound of him who procured it, and it is only formal in appeal to ſay that every one is principal who ſtruck him mortally. Br. Corone, pl. 140. cites 4 H. 7. 18.

S. C. cited Pl. C. 100. a. and the reporter ſays the reader may ſee in the reports of H. 4. the law frequently adjudged accordingly, viz. that thoſe preſent and abetting to do the fact are principals as well as he that did it; and that it ſeems, in the time of H. 4. the law was changed and corrected in this point. —— 2 Hawk. 312. cap. 29. ſ. 7. the ſerjeant ſays he takes it to be ſettled at this day, that all thoſe who aſſemble themſelves together with a felonious intent, the execution whereof cauſes either the felony intended, or any other to be committed, or with an intent to commit a treſpaſs, the execution whereof cauſes a felony to be committed, and continue together abetting one another, till they have actually put their deſign in execution; and alſo all thoſe who are preſent when a felony is committed, and abet the doing of it, as by holding the party while another ſtrikes him, or by delivering a weapon to him that ſtrikes, or by moving him to ſtrike, are principals in the higheſt degree, in reſpect of ſuch abetment, as much as the perſon who does the fact, which in judgment of law is as much the act of them all as if they had all actually done it.

15. If 12 *come to commit* a robbery, a fray, riot, or the like, which are *unlawful acts*, and *one of them enters into the houſe and kills a man, or does another unlawful act, all* the others who came with him to do the unlawful act *are principals*. Br. Corone, pl. 171. cites 34 H. 8.

If ſeveral combine to ſtand by one another in a breach of peace, with a general reſolution to reſiſt all oppoſers, and in the execution of their deſign a murder is committed, all of the company are equally principals, though at the time of the fact ſome of them were at ſuch a diſtance as to be out of view; alſo upon the ſame reaſon it hath been adjudged, that where a company of rogues aſſault a man in the highway, who eſcapes from them, and then one of them rides from the reſt, in the ſame highway, and robs another out of the view of his companions, and then returns to them, they are all of them equally principals. And the like hath been adjudged in relation to all thoſe who accompany one another with an intent to commit a burglary, in the execution whereof ſome ſtand to watch only in the adjacent places, and the reſt actually break and enter the houſe. 2 Hawk. Pl. C. 312. cap. 29. ſ. 8.

16. *So* in the caſe of Fines Lord Dacres, one of his company *killed a man in hunting in a foreſt*, and the Lord Dacres and other hunters, as Mantel and others, were principals, and *were all hanged.* Ibid.

17. *A. being in gaol for felony*, R. an attorney *adviſed his friends to perſuade the witneſſes not to appear to give evidence againſt him*, and ſo they did. Reſolved, that neither the friends nor R. were acceſſaries to the felony, but that it was a great contempt and miſpriſion, for which they might be fined and impriſoned. 3 Inſt. 139. cites Mich. 11 & 12 Eliz. Roberts's caſe.

[116]

18. V. *perſuaded J. S. to take a potion*, which was mixed with cantharides; and that thereby he would have iſſue by his feme. Accordingly V. drank the potion, *which poiſoned and killed him.* Reſolved,

Ibid. The reporter ſays, nota an eſpecial

caſe, where the *principal and acceſſary* are *both abſent* at the time of the felony committed.—— S. C. cited, and S. P. Keyling 52.

Reſolved, that V. was a principal murderer, though *not preſent at the drinking* the poiſon; for otherwiſe he would be diſpuniſhable. And every felon is either principal or acceſſary, and if there is no principal there cannot be an acceſſary; but if any one had procured V. to do it, ſuch perſon had been acceſſary before the fact. 4 Rep. 44. a. b. pl. 10. Paſch. 33 Eliz. B. R. Vaux's caſe.

as to both principal and acceſſary being abſent at the time of the felony done.——2 Inſt. 183. S. P. and S. C. cited.——S. P. 3 Inſt. 138. cap. 64.——S. C. cited 2 Hawk. Pl. C. 313. cap. 29. ſ. 11. and ſays, that ſo likewiſe all thoſe ſeem to be principals who were preſent when the poiſon was infuſed, and privy to and conſenting to the deſign.

19. A *feme* cannot be acceſſary *to her huſband*, though ſhe knows that he committed larceny, and relieves him, and does not diſcover it. 3 Inſt. 108. cap. 47.

7 Mod. 129. S. C. and held accordingly by 3 judges; but Holt Ch. J. contra, with their ſeveral arguments. —11 Mod. 25. pl. 3.

20. Upon a conviction of deer-ſtealing, on the ſtatute 3 & 4 W. 3. cap. 10. the queſtion was, whether one *not preſent*, *but procuring*, *perſuading*, or adviſing the perſon *to kill the deer*, *and lending him dogs or guns for that purpoſe*, *and horſes* to carry away the ſaid deer before the fact committed, ſhall be ſaid to be abetting and aiding within that ſtatute. Three judges held that it was, but Holt Ch. J. was of another opinion. 2 Salk. 542. pl. 2. Hill. 1 Ann. B. R. the Queen v. Whiſtler.

S. C. adjudged the defendant guilty within the ſtatute, by 3 juſtices contra Holt Ch. J. with their ſeveral arguments.

21. One that is *aiding to a felony*, *and preſent at the doing it*, is a principal felon; but aiders in felony who are *abſent*, are only acceſſaries; per Powell J. and upon this, he ſaid, the diſtinction is grounded, that one ſort are *aiders therein*, *and* the other *thereunto*. 7 Mod. 32. Hill. 1 Ann. B. R. in caſe of the Queen v. Whiſtler.

(C) In what Caſes.

1. IT was admitted by ſeveral, that there may be *principal and acceſſary in præmunire*; *but* Candiſh ſaid, that *if* he who is called *principal dies*, yet the *other ſhall anſwer*. Contra in felony. But Finch. ſaid, it is more like to treſpaſs than to felony; for in treſpaſs, he who firſt comes ſhall anſwer; and if he be convict of damages, and after another comes and pleads, and is convicted, he ſhall be charged of the firſt damages; and if he be acquitted, yet the firſt ſhall be charged; and the writ was, that ſuch manutenentes, & abettatores ipſum expulerunt; and after Finch. awarded, that the defendants who appeared ſhould anſwer. And ſo it *ſeems that all are principals*. Br. Præmunire, pl. 4. cites 44 E. 3. 7.

[117] 2. Hull ſaid, that there may be principal and acceſſary *in præmunire*. Br. Damages, pl. 46. cites 8 H. 4. 6.

3. Of

3. Of *treaſon* is no acceſſary, and one cannot be acceſſary felonice to a treaſon; quod nota. Br. Corone, pl. 134. cites 3 H. 7. 10. per Huſſey Ch. J.

4. There is no acceſſary in ſimony, but all are principals therein as well as in *treſpaſs*. Cro. E. 789. pl. 30. Mich. 42 & 43 Eliz. C. B. in caſe of Baker v. Rogers.

5. There is no acceſſary in *forgery*, but all are principal. Reſolved. Mo. 666. pl. 913. Mich. 44 & 45 Eliz. Booth's caſe.

6. In the *higheſt and loweſt injuries* there can be no acceſſary, but all are principals; as in treaſon, petty larceny, and treſpaſs. 2 Inſt. 183.

There can be no acceſſaries in *high treaſon* or *treſpaſs*; and it ſeems agreed, that whatever will make a man an acceſſary before in felony, will make him a principal in high treaſon and treſpaſs, *as battery, riot, rout, forcible entry, forgery*, and *petit larceny*; and wherever one commands another to commit a treſpaſs, and the treſpaſs is done accordingly, he ſeems to be as guilty of it as if he had done it himſelf; and he may be tried and found guilty before the trial of the perſon who did the fact. 2 Hawk. Pl. C. 310. cap. 29. ſ. 2.

(D) Before or after.

1. PRINCIPAL was found guilty of manſlaughter, but *not guilty of the murder*. The court diſcharged all the acceſſaries before the fact, becauſe *to manſlaughter none* can be *acceſſary before the fact*; but as to the acceſſaries *after the fact*, they ſhall anſwer as acceſſaries to the manſlaughter. Mo. 461. pl. 645. Hill 39 Eliz. Gooſe's caſe.

2. There can be *no acceſſary before the fact in caſe of manſlaughter*, becauſe this muſt be on a ſudden affray; for if it be premeditated it is murder. Reſolved per tot. cur. 4 Rep. 43. b. 44. a. pl. 9. Paſch. 39 Eliz. Goff v. Bibithes.

(E) Charged. How.

1. WHERE the *ſervant* of a man *procures a man to kill his maſter*, which he does, this is not treaſon in the ſervant, becauſe it is only felony in the principal; and where the principal is only a felon, the acceſſary cannot be a traitor. Br. Corone, pl. 118. cites 40 Aſſ. 25.

2. Two were indicted quod ipſi talibus die & Anno *Will. Wane, felon. ſcient. latronem domini regis, apud D. receptaverunt & certa bona*, and declared who, &c. *ipſius W. ad valentiam*, &c. *in cuſtod. ſua exiſtent. vi & armis ceperunt & aſportaverunt*. Per Cheiney, he ought to declare *what felony was committed, and alſo that he knew them to be felons, and received them*; for it ſhall be intended by thoſe words, W. Wane ſcient. felon. domini regis receptaverunt, &c. that this word (*ſcient.*) ſhall have *relation to this word receptaverunt*, which is the verb, becauſe adverbium determinat verbum; for it ought to be *ſciens ipſos talem feloniam feciſſe receptaverunt*, &c. vel hujusmodi; and the priſoner was diſmiſſed for the inſufficiency of the indictment. Br. Indictments, pl. 4. cites 7 H. 6. 42.

3. A man was indicted of *counterfeiting money traiterouſly*, and another was indicted, that he knowing thereof, *traiterouſly and felonioufly helped, maintained, and comforted the principal*, and the *principal was attainted*. And per Brian J. in this caſe, and of *burning of houſes*, the acceſſary may be felon; becauſe thoſe matters were felonies at common law, and are made treaſon by ſtatute, as *to write a letter to burn a houſe unleſs he ſends* 10*l. by ſuch a day*. And it was ſaid there, that it is certain that burning a houſe felonioufly was felony by the common law. And per Huſſey Ch. J. of treaſon there is no acceſſary, and one cannot be acceſſary felonioufly to a treaſon. Quod nota. Br. Corone, pl. 134. cites 3 H. 7. 10.

(F) Forfeiture of what.

1. IF it be *found before the coroner that* J. S. *acceſſary to the felony, fled* for the felony, he ſhall forfeit all his goods as well as if he was principal and fled, viz. of all acceſſaries at the time of the felony done; but contra of acceſſary after the felony; by the juſtices of both benches. Br. Corone, pl. 198. cites 4 H. 7. 18.

2. *And if the principal be attainted, and the acceſſary acquitted*, yet it ſhall be inquired if he fled for the felony or not, as well as it ſhall be of the principal if he was acquitted, by reaſon of the forfeiture of his goods. Ibid.

3. If the *principal be erroneouſly attainted*, whether by error in proceſs, or becauſe the principal, being out of the realm, &c. or in priſon, is outlawed; yet it muſt ſtand good till it is reverſed, and it is a good record till then; and in ſuch caſe, if the acceſſary be attainted and executed, and afterwards the attainder of the principal is reverſed, the heir of the acceſſary may either enter or have his action; for by the reverſal of the attainder againſt the principal, the attainder againſt the acceſſary is entirely defeated. 9 Rep. 119. a. b. per cur. Trin. 10 Jac. in Ld. Sanchar's caſe.

(G) Arraignment of Acceſſary. In what Caſes.

1. A Man was indicted as acceſſary by his *receipt of one A. who was a clerk attaint*, and pleaded not guilty; and the court would not ſuffer him to be tried; for it may be that the clerk *may make his purgation after that the acceſſary is hanged*. Br. Corone, pl. 83. cites 18 Aſſ. 13.

2. If principal and acceſſary are, and both are indicted, per bank, it is a *good plea for the acceſſary to ſay that the principal is dead*, and pray mainpriſe for his deliverance; for if the principal be dead, *or hanged for another felony*, the acceſſary is diſcharged. Quod non negatur. Br. Corone, pl. 86. cites 22 Aſſ. 40.

3. Where a man is *acquitted ſe defendendo*, it ſhall not be inquired of the abettors; for he did the fact. Br. Corone, pl. 89. cites 22 Aſſ. 77.

4. *Contra*

4. *Contra where the party is acquitted that he did not do the act;* there the conſpirators ſhall be puniſhed as conſpirators. Contra, where the party did the act. Ibid.

5. Where there is principal and acceſſary of the *death* of a man, and the *principal is delivered to the ordinary*, the acceſſary ſhall not be hanged. Per Juſticiarios. Br. Corone, pl. 101. cites 26 Aſſ. 27.

6. Principal and acceſſary of felony of the *death* of a man. The acceſſary ſhall not be put to the anſwer before that the principal be attainted, by which he was let to mainpriſe. Br. Corone, pl. 117. (bis) cites 40 Aſſ. 8.

7. Action upon the ſtatute de *muliere abducta cum bonis viri.* The *defendant* was outlawed, and obtained charter of pardon, and there were principal and acceſſary, and the *principal got the pardon*, and by this the acceſſary had no advantage, but was awarded to anſwer. Quære cauſam? It ſeems to me inaſmuch as all are principals in this caſe. Br. Corone, pl. 122. cites 42 Aſſ. 16.

8. *So upon ſuch outlawry where the indictment is* * *inſufficient*, yet the acceſſary ſhall be put to anſwer; but the judge ought to have diſcretionem & æquitatem inde. Br. Corone, pl. 174. (175) cites 2 R. 3. 21.

* The large edition is (ſufficient) but the other editions are as here.

9. If principal and acceſſary are, and the *principal is outlawed by erroneous proceſs*, the acceſſary ſhall anſwer, and ſhall not reverſe the outlawry by plea; for the record is in force till it be reverſed; for it is not void, but error. Br. Corone, pl. 174. (175) cites 2 R. 3. 21. Per all the juſtices of B. R.

S. C. cited per cur. and held accordingly, 9 Rep. 68. b. Paſch. 9 Jac. in Mackally's Caſe.——S. C. cited, and S. P. reſolved, 9 Rep. 119. a. b. Trin. 10 Jac. in Ld. Sanchar's Caſe.——2 Inſt. 184. S. P.——2 Hawk. Pl. C. 321. cap. 29. ſ. 40. ſays, that it ſeems agreed that ſuch attainder, while it ſtands unreverſed, is as ſufficient for this purpoſe as if there had been no error in it.

10. If a man be *indicted, and acquitted by* charter of *pardon, clergy, or forejuring the realm*, or in any other manner, the acceſſary ſhall not be arraigned; for where the life of the principal is ſaved by the law, the acceſſary ſhall go quit; per Thirn. Quod nota. Br. Corone, pl. 18. cites 7 H. 4.

Principal and acceſſary of *murder*. The *principal was arraigned, and pleaded* charter of *pardon* of the king; and yet *it was not allowed for the acceſſary*; for this is no acquittance, but is of the grace of the king to pardon him, which proves much that he is guilty, by which the acceſſary was compelled to plead not guilty, at which Brooke *wonders*; for the principal is not nor cannot be attainted, and therefore it ſeems that the acceſſary cannot be arraigned. Br. Corone, pl. 70. cites 3 Aſſ. 14.——But ibid. pl. 71. a man was *arraigned of felony*, and *took to his clergy*, and was ſent to the priſon of the biſhop, and was *found guilty* by inqueſt of office; and the receiver, viz. acceſſary, was not arraigned, becauſe *it is poſſible that the principal*, who has his clergy, *may make his purgation*. Cites 5 Aſſ. 5.——*But* ibid. 137. *Principal took to his clergy*, and the acceſſary was arraigned and found guilty. And per Townſend, if the *principal has his pardon*, by this the acceſſary ſhall go quit; and all the juſtices in effect ſaid, that it is the common courſe to arraign the acceſſary in ſuch caſe, and if he be found guilty he ſhall be * hanged, and is not like to the caſe of a pardon. Cites 3 H. 7. 12.

* S. P. Br. Corone, pl. 184. cites 4 E. 6.——2 Inſt. 184. S. P.

11. *Attainder of the principal at the ſuit of the king*, upon the indictment, is not ſufficient to put the acceſſary to anſwer in appeal

2 Hawk. Pl. C. 321. cap. 29. ſ.

peal *at the ſuit of the party*; for the principal is not attainted at the ſuit of the party, but at the ſuit of the king. Quod nota. Br. Corone, pl. 19. cites 7 H. 4. 27. & 25.—2 Inſt. 184. S. P.

19. ſays it is agreed that attainder of the principal at the ſuit of the king no ways helps the proceedings againſt the acceſſary at the ſuit of the party, & ſic e converſo.

12. Appeal *againſt* 4, 2 *as principals, and* 2 *as acceſſaries.* The *one principal was outlawed*, and the *other came by ſuperſedeas upon exigent*, and the *plaintiff prayed exigent againſt the acceſſaries.* R. Hull, the one principal is not yet attainted, and they are appealed as acceſſaries to both, and therefore it is no reaſon that exigent ſhould iſſue againſt them till the other principal be attainted. Contra if they were appealed as acceſſary of him only who is outlawed. Per Gaſcoigne, the one principal appeared, and therefore if they had appeared they ſhould anſwer; for there is a diverſity when the principal appears, and the proceſs is determined againſt him, and when he makes default; for upon default of the principal the acceſſary ſhall not be compelled to anſwer till the principal be attainted; but when the principal appears, he ſhall be arraigned, and the acceſſary alſo, and * one inqueſt ſhall make an end of all; for if he be acquitted of being acceſſary to him who appears, yet the ſame inqueſt ſhall inquire whether he be acceſſary to the other who is outlawed or not. Contra per Hulſ. and after the parties agreed. Br. Appeal, pl. 22. cites † 7 H. 4. 36.

[120]

* Br. Corone, pl. 10. Brooke ſays the practice is ſo now, though held otherwiſe in the 44 E. 3. 7. there cited.

† Br. Corone, pl. 20. cites S. C.

13. *Two* were *indicted of* the *death* of a man, the one as principal, the other as acceſſary; and the *principal* was *found* that he did it *ſe defendendo*; by which the acceſſary paſſed quit, and was not arraigned. Br. Corone, pl. 33. cites 9 H. 4. 33.

S. P. For it is not felony in the principal; and this, as it ſeems, is to be underſtood that it is not felony of death. Br. Corone, pl. 80. cites 15 Aſſ. 7.

14. A man was indicted as *acceſſary of procuring one to kill J. S.* and becauſe *they had no record againſt the principal*, nor did not know if the principal be acquitted or attainted, the defendant went fine die, becauſe the *juſtices had ſent to the juſtices of peace of the county where*, &c. who *certified that they had no indictment againſt the principal.* Br. Corone, pl. 56. cites 9 E. 4. 48.

15. In *appeal againſt acceſſary*, the *acceſſory appeared*, and the *principal not*; the *acceſſary ſhall anſwer*, but *proceſs ſhall ceaſe againſt the jury* till the principal comes, or be attainted. Br. Appeal, pl. 28. cites 9 H. 4. 1, 2.

Br. Conſpiracy, pl. 2. cites S. C.

16. Where the *principal dies or gets* charter of *pardon before his attainder*, the acceſſary is acquitted, and ſhall not have conſpiracy. Br. Corone, pl. 5. cites 33 H. 6. 1.

17. Where the *principal confeſſes the felony, and takes to his clergy*, the acceſſary ſhall be arraigned, notwithſtanding that no judgment be given againſt the principal. Br. Corone, pl. 157. cites 13 E. 4. 3.

S. C. cited per cur. 9 Rep. 119. b. Trin. 10 Jac. in lord

18. Two were indicted, the one as principal, the other as acceſſary, and the *principal was outlawed*, and the *acceſſary was taken, and pleaded not guilty*, and was *found guilty, and hanged*, and after the *principal reverſed the outlawry*, and was arraigned upon the indictment,

indictment, and *found not guilty*, and was diſmiſſed where the acceſſary was attainted and hanged before; and it ſhall be intended that the acceſſary is not guilty where the principal was acquitted. And ſo ſee where he reverſes the outlawry, yet he ſhall be arraigned upon the indictment. Quod nota. Br. Corone, pl. 164. [165] cites 18 E. 4. 9.

Sanchar's caſe. 2 Hawk. Pl. C. 321. cap. 29. ſ. 42. ſays it ſeems to have been generally always agreed, that after the principal is attainted, whether after conviction by verdict or outlawry, &c. his death or pardon, &c. ſubſequent, will no way avail the acceſſary, and cites this caſe among others.

19. *Principal and acceſſary* were *arraigned, and both found guilty*, and the *principal took to his book before judgment*. And by all the juſtices and ſerjeants, except Huſſey, the acceſſary ſhall be diſmiſſed. And by the reporter, where the principal confeſſed, and took to his book, it was adjudged that the acceſſary ſhall not be arraigned, becauſe *judgment was not given upon the principal*. Br. Corone, pl. 131. cites 3 H. 7. 1.

[121]

20. If the *principal is pardoned, or hath his clergy*, the acceſſary cannot be arraigned; for it is a maxim, that ubi factum nullum, ibi fortia nulla; and ubi non eſt principalis non poteſt eſſe acceſſarius; and none can be a principal before he is adjudged ſo by law, either *by verdict, confeſſion, or outlawry*; and there being a principal in rei veritate, is not ſufficient; and the accepting a pardon, or praying his clergy, is only an argument of his guilt, unleſs it be after attainder; for then the acceſſary may be arraigned, becauſe it appears judicially, that there was a principal. Reſolved. 4 Rep. 33. b. pl. 8. Trin. 32 Eliz. Syer's caſe.

S. P. accordingly, though it be after conviction or confeſſion; yet if it be before judgment, the acceſſary ſhall be diſcharged, becauſe the principal never was attainted, viz. that no judgment was given againſt him for the felony. 2 Inſt. 184.

After the *principal* had been tried and *attainted for a burglary, and then pardoned*, &c. and the pardon allowed, M. who was acceſſary after the fact, was indicted for the ſame, and prayed that ſhe might be diſcharged. But reſolved, that though where the principal hath his clergy, or is acquitted or pardoned before judgment, the acceſſary ſhall not be queſtioned; yet if the principal is attainted, the acceſſary muſt anſwer, though the principal be pardoned. Raym. 477. Mich. 34 Car. 2. Anon.

21. E. *convicted* for horſe-ſtealing, *and reprieved after judgment, was again indicted for ſtealing another horſe before his attainder*, and *J. S. was indicted as acceſſary before* the felony for procuring it. *E. did not plead his firſt attainder*, as he might, *but confeſſed the 2d indictment*, and was executed; the acceſſary was found guilty, and had the ſame judgment as the principal; but his execution was reſpited, there being ſome doubt whether he ought to be arraigned as acceſſary, ſince E. might have pleaded his former attainder; and if ſo there had been no principal in the 2d felony, and by conſequence no acceſſary. But the judges were very clear in opinion, that *the arraignment of the acceſſary and the conviction were good*, ſince the principal did not take any advantage by pleading his former attainder. Poph. 107. Mich. 38 & 39 Eliz. Everet's caſe.

22. In *appeal of murder againſt B. as principal, and C. as acceſſary before, and D. as acceſſary after* the fact, the *principal was found guilty of manſlaughter only, and had his clergy*. Reſolved that the acceſſary ſhall be diſcharged, for till judgment it does not appear judicially that there was a principal; and therefore they were all diſcharged. *So* if the *principal* in his arraignment had *confeſſed*

Cro. E. 540. 545. pl. 4. Goff v. Byby, S. C. and all the court held that as to the acceſſaries before

39. ſays it is agreed that attainder of the principal at the ſuit of the king no ways helps the proceedings againſt the acceſſary at the ſuit of the party, & ſic e converſo.

peal *at the ſuit of the party;* for the principal is not attainted at the ſuit of the party, but at the ſuit of the king. Quod nota. Br. Corone, pl. 19. cites 7 H. 4. 27. & 25.—2 Inſt. 184. S. P.

12. Appeal *againſt* 4, 2 *as principals, and* 2 *as acceſſaries.* The *one principal was outlawed,* and the *other came by ſuperſedeas upon exigent,* and the *plaintiff prayed exigent againſt the acceſſaries.* R. Hull, the one principal is not yet attainted, and they are appealed as acceſſaries to both, and therefore it is no reaſon that exigent ſhould iſſue againſt them till the other principal be attainted. Contra if they were appealed as acceſſary of him only who is outlawed. Per Gaſcoigne, the one principal appeared, and therefore if they had appeared they ſhould anſwer; for there is a diverſity when the principal appears, and the proceſs is determined againſt him, and when he makes default; for upon default of the principal the acceſſary ſhall not be compelled to anſwer till the principal be attainted; but when the principal appears, he ſhall be arraigned, and the acceſſary alſo, and * one inqueſt ſhall make an end of all; for if he be acquitted of being acceſſary to him who appears, yet the ſame inqueſt ſhall inquire whether he be acceſſary to the other who is outlawed or not. Contra per Hulſ. and after the parties agreed. Br. Appeal, pl. 22. cites † 7 H. 4. 36.

[120]

* Br. Corone, pl. 10. Brooke ſays the practice is ſo now, though held otherwiſe in the 44 E. 3. 7. there cited.

† Br. Corone, pl. 20. cites S. C.

13. *Two* were *indicted of* the *death* of a man, the one as principal, the other as acceſſary; and the *principal* was *found* that he did it *ſe defendendo;* by which the acceſſary paſſed quit, and was not arraigned. Br. Corone, pl. 33. cites 9 H. 4. 33.

S. P. For it is not felony in the principal; and this, as it ſeems, is to be underſtood that it is not felony of death. Br. Corone, pl. 80. cites 15 Aſſ. 7.

14. A man was indicted as *acceſſary of procuring one to kill J. S.* and becauſe *they had no record againſt the principal,* nor did not know if the principal be acquitted or attainted, the defendant went ſine die, becauſe the *juſtices had ſent to the juſtices of peace of the county where,* &c. who *certified that they had no indictment againſt the principal.* Br. Corone, pl. 56. cites 9 E. 4. 48.

15. In *appeal againſt acceſſary,* the *acceſſary appeared,* and the *principal not;* the *acceſſary ſhall anſwer,* but *proceſs ſhall ceaſe againſt the jury* till the principal comes, or be attainted. Br. Appeal, pl. 28. cites 9 H. 4. 1, 2.

Br. Conſpiracy, pl. 2. cites S. C.

16. Where the *principal dies or gets* charter of *pardon before his attainder,* the acceſſary is acquitted, and ſhall not have conſpiracy. Br. Corone, pl. 5. cites 33 H. 6. 1.

17. Where the *principal confeſſes the felony, and takes to his clergy,* the acceſſary ſhall be arraigned, notwithſtanding that no judgment be given againſt the principal. Br. Corone, pl. 157. cites 13 E. 4. 3.

S. C. cited per cur. 9 Rep. 119. b. Trin. 10 Jac. in lord

18. Two were indicted, the one as principal, the other as acceſſary, and the *principal was outlawed,* and the *acceſſary was taken, and pleaded not guilty,* and was *found guilty, and hanged,* and after the *principal reverſed the outlawry,* and was arraigned upon the indictment,

indictment, and *found not guilty*, and was diſmiſſed where the acceſſary was attainted and hanged before; and it ſhall be intended that the acceſſary is not guilty where the principal was acquitted. And ſo ſee where he reverſes the outlawry, yet he ſhall be arraigned upon the indictment. Quod nota. Br. Corone, pl. 164. [165] cites 18 E. 4. 9.

Sanchar's caſe.—— 2 Hawk. Pl. C. 321. cap. 29. ſ. 42. ſays it ſeems to have been generally always agreed, that after the principal is attainted, whether after conviction by verdict or outlawry, &c. his death or pardon, &c. ſubſequent, will no way avail the acceſſary, and cites this caſe among others.

19. *Principal and acceſſary* were *arraigned, and both found guilty*, and the *principal took to his book before judgment*. And by all the juſtices and ſerjeants, except Huſſey, the acceſſary ſhall be diſmiſſed. And by the reporter, where the principal confeſſed, and took to his book, it was adjudged that the acceſſary ſhall not be arraigned, becauſe *judgment was not given upon the principal*. Br. Corone, pl. 131. cites 3 H. 7. 1.

[121]

20. If the *principal is pardoned, or hath his clergy*, the acceſſary cannot be arraigned; for it is a maxim, that ubi factum nullum, ibi fortia nulla; and ubi non eſt principalis non poteſt eſſe acceſſarius; and none can be a principal before he is adjudged ſo by law, either *by verdict, confeſſion, or outlawry*; and there being a principal in rei veritate, is not ſufficient; and the accepting a pardon, or praying his clergy, is only an argument of his guilt, unleſs it be after attainder; for then the acceſſary may be arraigned, becauſe it appears judicially, that there was a principal. Reſolved. 4 Rep. 33. b. pl. 8. Trin. 32 Eliz. Syer's caſe.

S. P. accordingly, though it be after conviction or confeſſion; yet if it be before judgment, the acceſſary ſhall be diſcharged, becauſe the principal never was attainted, viz. that no judgment was given againſt him for the felony. 2 Inſt. 184.

After the *principal* had been tried and *attainted for a burglary, and then pardoned*, &c. and the pardon allowed, M. who was acceſſary after the fact, was indicted for the ſame, and prayed that ſhe might be diſcharged. But reſolved, that though where the principal hath his clergy, or is acquitted or pardoned before judgment, the acceſſary ſhall not be queſtioned; yet if the principal is attainted, the acceſſary muſt anſwer, though the principal be pardoned. Raym. 477. Mich. 34 Car. 2. Anon.

21. E. *convicted* for horſe-ſtealing, *and reprieved after judgment, was again indicted for ſtealing another horſe before his attainder*, and *J. S. was indicted as acceſſary before* the felony for procuring it. *E. did not plead his firſt attainder*, as he might, *but confeſſed the 2d indictment*, and was executed; the acceſſary was found guilty, and had the ſame judgment as the principal; but his execution was reſpited, there being ſome doubt whether he ought to be arraigned as acceſſary, ſince E. might have pleaded his former attainder; and if ſo there had been no principal in the 2d felony, and by conſequence no acceſſary. But the judges were very clear in opinion, that *the arraignment of the acceſſary and the conviction were good*, ſince the principal did not take any advantage by pleading his former attainder. Poph. 107. Mich. 38 & 39 Eliz. Everet's caſe.

22. In *appeal of murder againſt B. as principal, and C. as acceſſary before, and D. as acceſſary after* the fact, the *principal was found guilty of manſlaughter only, and had his clergy*. Reſolved that the acceſſary ſhall be diſcharged, for till judgment it does not appear judicially that there was a principal; and therefore they were all diſcharged. So if the *principal* in his arraignment had *confeſſed*

Cro. E. 540. 545. pl. 4. Goff v. Bayby, S. C. and all the court held that as to the acceſſaries before

the fact, they ought to be diſcharged, it being found that there was not precedent intent to kill; but that the acceſſaries after ſhould anſwer; for every appeal and declaration therein includes as well homicide as murder, which the common plea proves, viz. that he ſhould anſwer to the felony and murder not guilty; but becauſe he had his clergy after conviction, and never was attainted, the acceſſary was diſcharged.

confeſſed the felony, and *before judgment obtained his pardon, or had his clergy allowed*, the acceſſary is thereby diſcharged. 4 Rep. 43. b. 44. a. Paſch. 39 Eliz. Goff v. Bibithe & al'.

23. If the principal dies before judgment, or upon his arraignment *ſtands mute*, the acceſſary is thereby diſcharged. 2 Inſt. 183.

24. If *one* was *indicted as principal, and acquitted*, he *cannot after be indicted as acceſſary before the fact; but* notwithſtanding ſuch acquittal, he may be indicted *as acceſſary after the fact*; and the reaſon is, becauſe he that commands or adviſes a robbery, burglary, or murder, to be committed, is quodam modo guilty of the fact; and therefore if he be found not guilty of the fact, being indicted as principal, he cannot afterwards be tried as acceſſary before the fact, *becauſe* by the former verdict he is *found not to be guilty of the fact, which extends to all* guilt *before the principal fact committed.* But an acceſſary after is not guilty in any ſort of committing the fact, for it was done before he knew any thing of it; therefore if he be tried as principal, and found not guilty, he may after be indicted as *acceſſary after*; for that *is an offence ſubſequent to the committing of the fact*, and is for receiving the felons, or after the fact done; which is an offence of another
[122] nature. So are the books 27 Aſſ. pl. 10. 8 H. 5. 6, 7. And ſo have the precedents upon examination always been at Newgate ſeſſions. Kelyng. 26.

25. Where the *principal* is not attainted, but diſcharged by being *burnt in the hand* only, the *acceſſary* to him *after the fact ought to be diſcharged* without burning in the hand, or being put to his book, *although* he was *convicted* of the offence, becauſe he ought not to be condemned but where the principal is attainted; whereas in this caſe he was only convicted; per Berkley and Crooke J. being only in court; and ſo reverſed a judgment. Cro. C. 566. pl. 3. Hill. 15 Car. B. R. Stevens's caſe.

(F) Pleadings by Acceſſary.

1. ACCESSARY was *indicted of receiving of W. N. who was outlawed of felony*; to which he *ſaid* upon his arraignment, that *notwithſtanding the indictment ſays, that W. N. is outlawed of felony, yet becauſe the court is not aſcertained if he was outlawed in fact, or not, he demanded judgment if he ſhall be compelled to anſwer*, by which he was ſpared upon ſurety; and becauſe no outlawry of it was found he went quit. Quod nota; for *outlawry is matter of record, which cannot be properly found per pais by indictment*, but ought to appear of record. Br. Corone, pl. 87. cites 22 Aſſ. 55.

2. It is a good indictment, *that J. N. knowingly received W. and C. outlawed of felony*, and there J. N. may plead *that no ſuch record*

record of outlawry, and pray allowance, *and to the felony not guilty*; for he ought to plead over to the felony, per Bingham; to which Yelverton J. agreed that he ought to *plead over to the felony*. Br. Corone, pl. 149. cites 8 E. 4. 3.

3. In *appeal* of the death of his brother brought *againſt W. E. de M. as principal, and E. as acceſſary*, the acceſſary pleaded *nul tiel perſona in rerum natura as W. E.* at the time of the writ brought, or at any time ſince; and the truth was *his name was T. E.* and not W. E. It was held, that if *there was* ſuch *another* perſon as *W. E.* yet if he was *not of M. or* if he was *dead before the writ brought*, that it is good. D. 348. b. pl. 14. Hill. 18 Eliz. Howel v. Forteſcue. S. C. cited by Williams J. Bulſt. 74.

For more of Acceſſary in general, ſee HALE's HIST. OF PL. C. AND 2 HAWK. PL. C. AND SEE TIT. Clergy, and other proper titles.

Accord.

* Fol. 128.

(A) What Accord ſhall be a Bar of Actions.

[1. AN accord *that whereas the marriage of the ſon of J. S.* (one of the parties) *was worth* 500*l.* the other *ſhould give but* 400*l.* with his daughter. *Per quod* 100*l. was abated in ſatisfaction of all treſpaſſes*, this is a good bar. Dubitatur. 16 E. 4. 2.]

[123]

[2. In an action it is no good plea in bar that it was accorded between him and the plaintiff, that *if he did his endeavour ſo that he might make an accord between the plaintiff and J. S. for a treſpaſs* which the plaintiff had done to J. S. (then, &c.) and alleges that he *did his endeavour, ſo that* they were agreed; for this is not any ſatisfaction. 15 H. 6. Accord. 1.] Fitzh. tit. Accord, pl. 1. cites S. C.—Pl. C. 5, 6. Arg. in caſe of Reniger v. Fogaſſa S. P. and S. C. cited.

[3. *But* it is a good bar if he ſays, that he did his *endeavour per quod* they did accord at his own coſt. 15 H. 6. Accord. 1.] Fitzh. tit. Accord, pl. 1. cites S. C.——Pl. C. 5. b. in caſe of Reniger v. Fogaſſa cites S. C.

[4. In an *action upon the ſtat. of Rich.* 2. if the defendant ſaith that after the entry an accord was made between them *that* the *plaintiff ſhould re-enter* into the land, and that the *defendant ſhould deliver the evidences of the plaintiff to the plaintiff*; Fitzh. tit. Accord, pl 3. cites S. C. —Br. Accord, pl. 1. cites S. C.

and ſay the defendant ought to ſay that the

tiff; this is not any bar of the action, for the delivery of the plaintiff's own evidences *cannot be any ſatisfaction of the tortious entry*. 9 Edw. 4. 19. curia.]

plaintiff was ſeiſed of the land at the time of the delivery of the evidences; for otherwiſe they will be of no advantage to the plaintiff.——Cro. E. 194. in pl. 8. cites S. C.

The amends *ought not to be of a thing which is the party's own*, as re-delivery, or reſtitution of his own proper evidence. Per Manwood and Dyer. D. 356. pl. 39. in caſe of Onely v. the Earl of Derby.

Br. Accord, pl. 1. cites S. C.—— Fitz. tit. Accord, pl. 3. cites S. C.

[5. *But* otherwiſe it is if he ſays, that the accord was that he *ſhould deliver certain evidences concerning the land to the plaintiff*, and that he delivered them accordingly; this is a good bar *if he makes title* to the evidences. 9 Edw. 4. 19.]

—Per tot. cur. he ought to *ſhew what evidences* in certain; for per Choke and Danby, if they were *the proper evidences of the plaintiff* it is *no ſatisfaction*. Br. Accord, pl. 1. cites S. C.

And ſo it ought to be pleaded; and per Choke, the plaintiff

[6. *But* the delivery of the evidences *muſt be after the plaintiff's entry* into the land, otherwiſe it is not any advantage to him. 9 Edw. 4. 19.]

may *traverſe the accord or the delivery* at his pleaſure. Quod nota bene. Br. Accord, pl. 1. cites S. C.——Br. Traverſe per, &c. pl. 126. cites S. C.

S. C. cited 2 Roll. Rep. 69. Trin. 17 Jac. B. R. in caſe of Covill and

[7. In an action of *treſpaſs for taking his beaſts*, it is not any plea that an accord was that the plaintiff *ſhould have the beaſts again*, for this is not any ſatisfaction. 9 Edw. 4. 19.]

Geffery, and agreed by Doderidge and Haughton J. But Doderidge ſaid, that if it had been agreed in this caſe of 9 E. 4. that the defendant ſhould carry the goods [or drive the cattle] to a certain place, ſo as the doing it would be chargeable to him, then the conſideration would be good.

* Per tot. cur. except Littleton. Br. Accord, pl. 6.—— S. P. in *debt*, the *plaintiff and*

[8. An accord that *each of them ſhould be quit of actions againſt the other* is not good, becauſe it is not any ſatisfaction. * 16 Edw. 4. 8. b. 11. b. per curiam, Hill. 1650. between † *Davies and Oakham*, adjudged, upon a demurrer in an action upon the caſe for words, and ſuch accord pleaded in bar. Intratur Mich. 1650. Rot. 557.]

defendant being indebted to each other, the defendant upon ſuch agreement offered to wage his law, and Anderſon and Periam J. doubted much if he might; for an accord *without ſatisfaction* is no plea, and debt cannot be diſcharged by parol, but Rodes ſaid that it is good by *conſent of the parties*, and ſo ſaid ſome ſerjeants, and Fenner cited 11 R. 2. tit. Bar. 242. where a man had *rent by way of retainer*; and Rodes cited 22 H. 6. and 37 H. 6. payment by way of retainer. Goldſb. 80. pl. 17. Hill. 30 Eliz. Sanderſon's caſe.

† In the caſe of Davis v. Ockham, Sty. 245. the defendant pleaded an accord between him and the plaintiff, that whereas the plaintiff had done a treſpaſs againſt him, the one treſpaſs ſhould be ſet againſt the other. The plea was held not good, per tot. cur. And judgment for the plaintiff, niſi.

[124]

And it is a good plea in treſpaſs, that the plaintiff *accepted* of

[9. *But* it ſeems it is a good accord that *each give the other a pot of wine in ſatisfaction* of actions. Contra 16 Edw. 4. 8. b. 11. b. curia.]

the defendant a pottle of wine in ſatisfaction. Br. Account, pl. 9. cites 34 H. 6. 43.

In like caſe, the defendant pleaded that it was agreed the defendant *ſhould confeſs*

[10. In an action upon the *caſe for ſcandalous words*, if the defendant pleads that after the words ſpoken the plaintiff ſued the defendant in the military court before the lord marſhal, where *it was ordered* by the court, with the aſſent of the plaintiff and defendant, in diſcharge of this ſuit, and of all other

differences between them, *that the defendant ſhould make a ſubmiſſion in writing*, in a place appointed, and before certain perſons, &c. and *avers that he did it accordingly*. Mich. 14 Car. B. R. between *Jeſop and Pegham*, adjudged upon a demurrer. But nota, that the plaintiff traverſed the ſaid order, and the defendant demurred. But the court gave not (*) judgment upon this, but becauſe this order is not any ſatisfaction as to the damages, but in point of honour. Intratur Trin. 14 Car. Rot. 728.]

to the plaintiff that he had done him wrong and ſhould aſk forgiveneſs * Fol. 129. *upon his knees, and that then the plaintiff ſhould releaſe all actions for the ſaid words, and the defendant made the ſubmiſſion accordingly; whereupon the plaintiff immediately releaſed and diſcharged him.* Judgment ſi actio. It was moved that aſking forgiveneſs is not ſufficient conſideration, which Doderidge and Haughton J. agreed. 2 Roll Rep. 96. Trin. 17 Jac. B. R. Covill v. Geffery.——Nels. Abr. tit. Accord, pl. 7. ſays that the plaintiff had judgment, but it ſeems a miſtake.

[11. An accord is not any bar of an action unleſs it *be executed*, becauſe the plaintiff hath not any means to recover that which he ought to have by the accord.]

S. P. Br. Accord, pl. 6. cites 16 E. 4. 8. ——Accord *ought to be a ſatisfaction in fact*; and it is not ſufficient to ſay that he *offered* to him the money, &c. Br. Accord, pl. 5. cites 5 E. 4. 7. ——An Accord is not *executory ad diem futurum*, but ought to be executed before the action brought, and the party at the day appointed may refuſe to accept the amends agreed upon. Per Manwood and Dyer. D. 359. pl. 39. cites 17 E. 4. 8.

But if an accord *is executed*, though it be *deceitfully*, as where it was to deliver good and merchandizable wax, and he delivered corrupt and mixt wax, which the *plaintiff accepted*; this ſeemed a good bar, and that by the plaintiff's own acceptance, though it be not to the 100th part of the value, the injury is diſpenſed with. D. 75. a. b. Mich. 6 E. 6. B. R. Andrew v. Boughes.

Though in Peytoe's caſe and formerly, it hath been held that an accord cannot be pleaded unleſs it appears to be executed, yet of late it hath been held that *upon mutual promiſes an action lies*, and conſequently there being *equal remedy on both ſides*, an action (accord) may be pleaded without execution as well as an arbitrement. Arg. to which the court agreed. Raym 450. Trin. 33 Car. 2. B. R. Caſe v. Barber.——2 Jo. 158. S. C. and S. P.——But in trover for a waiſtcoat, the defendant pleaded a promiſe to pay 26s. and that thereupon the defendant agreed to diſcharge him, &c. and laid mutual promiſes to perform, &c. Upon demurrer it was inſiſted to be now ſettled that the parties may have actions upon mutual promiſes; this accord may be pleaded though not executed, becauſe each party may have his remedy, and cited the caſe of CASE v. BARBER, Raym. 450. and 2 Jo. 158. ſed non allocatur. And the court diſtinguiſhed between arbitrement and accord, that arbitrement be pleaded with mutual promiſes of performance, though the plaintiff has not performed his part, yet he ſhall maintain his action; becauſe an arbitrement is like a judgment, and a remedy lies upon it; but upon accord no remedy lies; and the books are ſo numerous that an accord ought to be executed, that it is now impoſſible to overthrow them all. But had it been a new point it might be worthy conſideration. And judgment for the plaintiff. Ld. Raym. Rep. 122. Mich. 8 W. 3. Allen v. Harris.

[12. In an action it is not any plea that it was accorded between them that the defendant ſhould *give a certain ſum to the plaintiff at a day, which is not yet come*, in ſatisfaction, becauſe the plaintiff has not any remedy for it. * 6 H. 7. 11. b. curia, D. 6 Edw. 6. 75. 26 D. 19 Eliz. 356. 39. 16 Edw. 4. 9. 17 Edw. 4. 3.]

* Br. Accord, pl. 3. cites S. C. accordingly. ——Fitzh. tit. Accord, pl. 4. cites S. C.

[13. *So* if an accord be *to do two things*, and he *does one and not the other*, yet this is not any bar of the action, becauſe the plaintiff has not any remedy for that which is not performed. * 6 H. 7. 10. b. curia. 10 H. 7. 23. Coke 5. 11. b. D. 19 Eliz. 356. 39 Coke 9. *Peyto* 76. b.]

* Br. Accord, pl. 3. cites S. C. —Br. Treſpaſs, pl. 279. cites S. C. [125]

——In treſpaſs upon 5 R. 2. the defendant accorded that he ſhould *pay the plaintiff 6d. and give him counſel when he required it*, and *ſaid that he had paid the 6d.* But by Townſend J. you do *not ſay you have given counſel*, and concord ought to be executed, and it is not like * arbitrement, on which debt lies for the ſum awarded, which does not upon accord. But the other juſtices were in diverſe opinions, becauſe *requeſt ſhall be of the counſel*. Br. Accord, pl. 7. cites 17 E. 4. 2. But Brooke ſaid, that the law ſeemed to be with Townſend.

Every accord *muſt be full, perfect, and compleat*; for if *divers things* are to be performed by the accord, the performance of part is not ſufficient; but *the whole ought to be performed*. Reſolved 9 Rep.

9 Rep. 79. b. in PEYTOE's caſe, and ſays, that with this agrees 17 E. 4. 2. b. 6 H. 7. 10. a. and Pl. C. 5. a.——S. P. per Manwood and Dyer. D. 356. pl. 39. Paſch. 19 Eliz. in caſe of Onely v. the Earl of Derby, cites 6 H. 7.

It is no concord unleſs *all things are done*; per Doderidge J. 3 Bulſt. 325. cites 6 H. 7. 11.——Cro. C. 193. SIMONDS v. MEWDSWORTH.——Nor is it binding in equity. Chanc. Caſes, 302. Mich. 29 Car. 2. Butcher v. Hinton.——Heath's Max. 59. cites S. C.

* S. P. Br. Accord, pl. 3. cites 6 H. 7. 10.——S. P. Accord, pl. 5. cites 5 E. 4. 7.

But the agreement only to do an act at a day to come is not good. But an arbitrement to that purpoſe is good.

[14. If an accord be that the defendant *ſhall do a* certain *thing at a day to come* in ſatisfaction of the action, if he *performs it at the day*, this is a good bar of the action, though it was executory at the time of the accord made, inaſmuch as he hath accepted it in ſatisfaction. 6 H. 7. 11. b.]

Br. Treſpaſs, pl. 79. cites 6 H. 7. 10.

If the thing be *to be performed at a day to come*, tender and refuſal is not ſufficient without actual ſatisfaction and acceptance.

[15. * If by an accord *monies are to be paid* to the plaintiff in ſatisfaction of treſpaſs, it is not any plea in bar of the action that he *tendered it* to the plaintiff accordingly, and he refuſed it. 17 Edw. 4. 8. curia. 16 Edw. 4. 8. b. agreed.]

Reſolved. 9 Rep. 79. b. in Peytoe's caſe.

In treſpaſs for entering a houſe, and continuing poſſeſſion, the defendant pleaded an accord *to give a judgment in the ſheriff's court, and pay* 50s. and that he gave the judgment and tendered the 50s. but adjudged for the plaintiff upon demurrer. 2 Keb. 534. pl. 49. Trin. 21 Car. 2. B. R. Hall v. Seabright.——Sid. 428. pl. 13. S. C. but S. P. does not appear.——Mod. 14. pl. 41. S. C. but S. P. does not appear.——* Br. Accord, pl. 5. cites 5 E. 4. 7.

Accord ought to ſound in ſatisfaction.

[16. *So* it is no plea that he is *ready to pay the money*, but he ought to ſay that the plaintiff is ſatisfied. 30 H. 6. 4.]

Roll Rep. 27. in a nota at the end of the caſe of Lane v. Mallory.——S. P. Pl. C. 5. b. Arg. in caſe of Reniger v. Fogaſſa.——Cro. C. 193. pl. 3. Trin. 6 Car. B. R. Simonds v. Mewdſworth, S. P.

17. A. *leaſed to B. for years, rendering* 10*l. rent* a year, *with clauſe of re-entry*, and afterwards it was *agreed by parol* that *B. ſhould board A. for the rent.* A. demanded the rent, and entered, and B. re-entered. A. brought *treſpaſs*. B. pleaded the leaſe, and the defendant [plaintiff] pleaded the re-entry, and the plaintiff [defendant] pleaded the agreement by parol, and a good replication. Br. Accord, pl. 11. cites 47 E. 3. 24.

18. In treſpaſs the defendant pleaded accord after the treſpaſs, *that the defendant ſhould give the plaintiff 2 partridges in ſatisfaction* of the treſpaſs, and he ſaid that he had given the 2 partridges accordingly; and a good plea, though he did *not ſay that he had given them in ſatisfaction of the treſpaſs*, &c. Br. Accord, pl. 4. cites 4 E. 4. 45.

19. In all caſes *where arbitrement is a good plea*, accord with ſatisfaction is a good plea. 6 Rep. 44. a. cites 6 H. 7. 10. a.

20. In waſte the defendant pleaded accord, *that he ſhould repair the flood-gates of the mill which he had made*, and no plea; for *in action perſonal or mixt*, accord is no plea, and this by judgment. But quære if it be a good accord, inaſmuch as it [126] ought to be *ſatisfaction* to the plaintiff, which it *cannot be to do what is his proper duty* to do. Br. Accord, pl. 13. cites 11 H. 7. 13. and ſays, the ſame caſe was argued again 13 H. 7. 20. but not adjudged; but that the beſt opinion was there that it is no plea.

21. In

21. In treſpaſs of *goods taken*, the *defendant ſaid that he put them into his houſe, and becauſe the plaintiff owed him* 20*l. it was accorded* between them *that the defendant ſhould keep them till paid*; judgment, &c. and the court held the plea good, quod nota, though *without ſhewing the cauſe of the debt.* Br. Accord. pl. 2. cites 21 H. 7. 13. & 14.

22. By the rule of the common law a *right or title*, which any one has *to any land* or tenements *of any eſtate of inheritance or franktenement*, cannot be barred by acceptance of any manner of collateral ſatisfaction or recompence. Reſolved. 4 Rep. 1. Mich. 14 & 15 Eliz. Vernon's caſe.

S. P. reſolved. 9 Rep. 79. b. in Peytoe's caſe.

23. The thing accorded to be given for amends of any tort or injury *ought to be ſome charge to the one party, and commodious* and profitable *to the other*; per Mounſon and Dyer. D. 356. pl. 39. Paſch. 19 Eliz. in caſe of Onely v. the Earl of Derby.

24. The *amends ought to be made in the life of the treſpaſſor*, and not by his executors or heir; per Manwood and Dyer. D. 356. pl. 39. in caſe of Onely v. the Earl of Derby.

25. *In debt on bond*, conditioned *to pay* 11*l. on February the* 12*th*, the defendant *pleaded an accord the* 8*th of February*, that *if he paid* 8*l. upon the ſaid* 12*th of February he would accept it for the payment of the* 11*l.* and pleads a tender at the day, & uncore priſt. But this being but a concord, which is no plea in debt without ſatisfaction, it was adjudged for the plaintiff. Cro. E. 193. pl. 6. Mich. 32 & 33 Eliz. B. R. Taſſal v. Shane.

In debt upon a bond where the ſum to be paid is certain, there a leſſer ſum cannot be paid in ſatisfaction of a greater. Per curiam obiter. 4 Mod. 89. Paſch. 4 W. & M. B. R.

26. In an *indebitatus aſſumpſit* for 50*s.* the defendant *pleaded a concord*, after the aſſumpſit *to give the plaintiff* 15*s. parcel of the* 50*s. and the* 35*s. reſidue the plaintiff ſhould receive in hats*, and *alleged the payment of the* 15*s. and that he was always ready to pay the reſidue in hats.* Adjudged for the plaintiff; for it being a concord *executory in part*, it can be no plea, becauſe a concord is always to be intirely executed, and not to be executory in any part, and cited 6 H. 7. 9. Cro. E. 305. pl. 4. Mich. 35 & 36 Eliz. B. R. Rayne v. Orton.

27. In *waſte* the plaintiff *counts that B. infeoffed C. in fee to the uſe of B. for life, and after of E.* her daughter *for life*, and *that B. died*, and *E. took the defendant to huſband, who did waſte*, and then *E. died*, and after her death this action was brought. The defendant *pleaded* in bar a concord and ſatisfaction, viz. *that C. the feoffee gave and delivered him the deed of feoffment to uſes, which he delivered to the plaintiff in ſatisfaction of the waſte*, &c. Reſolved per tot. cur. to be a good bar, admitting the action to lie; for *damages only are to be recovered*, and not the place waſted; and in this caſe the deed did not belong to the ceſty que uſe, but to the feoffees by the common law, and the ſtatute does not transfer it to him. Cro. E. 356. pl. 15. Mich. 35 & 36 Eliz. C. B. Sacheverell v. Bagnoll.

But where land is to be recovered by writ of waſte, it may perad-venture be otherwiſe; per cur. ibid. cites 11 & 13 H. 7. and 10 Eliz. 2. Dy. 277.—See Waſte, (B. a. 3) pl. 30. and the notes there.

28. The heir in reverſion brought *covenant againſt executor of tenant for life, for not repairing*, &c. who pleaded that teſtator died

died the 19th of March, and that after teſtator's death, viz. 22 Mar. *concordatum*, &c. *fuit* between them, *that the defendant ſhould quietly quit the* * *poſſeſſion* to the plaintiff, *and that in conſideration thereof the plaintiff ſhould diſcharge him of the breach in not repairing; and that afterwards, viz. 25 Mar. he quietly quitted*, &c. But adjudged for the plaintiff; for Fenner held the concord void, as not being any recompence; the executor having *no intereſt, but only a licence in law*, to enter into the houſe and carry away the goods, and ſo the agreement to quit not material. And Yelverton and Crook J. held the plea not good, becauſe *the time of quitting was uncertain;* and though the defendant ſhewed that he really did quit within 5 days after, yet this will not aid the firſt uncertainty, and *the concord ſhould have fixed a certain time for the quitting*, if he would take advantage of it. *And* by Williams J. the time of quitting *being indefinite, the defendant ſhould have ſhewn an immediate execution thereof*, viz. *that he quitted inſtantly.* But all 3 beſides Fenner agreed, that if the plea as to the time of quitting had been certain, and been executed accordingly, it had been good; for though the *action* be *grounded upon the deed*, yet it is only to recover damages. Yelv. 124, 125. Paſch. 6 Jac. B. R. Sanford v. Cutcliffe.

29. Where the condition by deed, by the *original contract* of the parties, *is to pay money*, there by accord between the parties, *any other thing may be given in ſatisfaction* of the money; *but* if the *condition is in* 200 *quarters of wheat, on condition to pay* 20*l.* an *accord to give a horſe or a gold ring in ſatisfaction* thereof, is good; *but* if the obligation be *in* 100 *quarters of wheat, to pay* 50 *quarters*, he cannot give money, or other thing in ſatisfaction thereof, becauſe the contract originally was not for money, but for a *collateral thing*. 9 Rep. 79. a. Mich. 9 Jac. C. B. per cur. in Peytoe's caſe.

Cro. Jo. 304. pl. 6. SALMON v. BRADSHAW, S. C. accordingly.—— When a *covenant* is *broken*, the action is not founded merely on the ſpecialty, as if it were a duty, but *ſavours of treſpaſs*; and therefore an accord is a good plea to it, and ends in damages. Agreed. All. 39 Hill. 23 Car. B. R. Arg. by counſel and court, in caſe of Eeles v. Lambert.——As where the covenant is brought for *default of reparations*, though the action be founded on the deed, yet it *is mixt with tort*, for which damages ſhall be recovered. 9 Rep. 79. b. ſays, that in this caſe accord with ſatisfaction was adjudged a good plea in bar, Paſch. 3 Jac. in caſe of Eden v. Blake.——Accord is a good plea to a covenant to pay a ſum certain. Per cur. 2 Keb. 51. pl. 7. Trin. 18 Car. 2. B. R. in caſe of Outram v. Rolſton.

30. In *covenant* upon an indenture, the defendant pleaded a concord, *that he ſhould pay the plaintiff* 12*l. in full* ſatisfaction and *diſcharge of the ſaid covenant, and of all other* covenants in the ſaid indenture; and that he paid, and the plaintiff accepted the ſame accordingly; but upon iſſue thereupon, it was found for the plaintiff, and damages aſſeſſed, and judgment accordingly. 9 Rep. 60. Trin. 10 Jac. B. R. Bradſhaw's caſe.

31. In *action for words*, the defendant pleaded that the plaintiff had *agreed to accept* 3 *jugs of beer from him in ſatisfaction.* The plaintiff demurred, becauſe he did *not ſhew that the ſame was paid or tendered by the defendant;* and therefore the plaintiff had judgment. Sty. 452. Paſch. 1655. Trevanion v. Penhallow.

32. In

32. In debt on *bond for performance of covenants*, the defendant pleaded, that it was agreed between the plaintiff and him, that defendant ſhould grant an annuity out of certain land for life, in diſcharge of the bond; and that he had granted the ſame accordingly, and the plaintiff accepted it in diſcharge of the bond, &c. but adjudged for the plaintiff; for it is but a concord and verbal agreement, which can never be a diſcharge of a ſpecialty. Cro. J. 649. pl. 19. Mich. 20 Jac. B. R. Noyes v. Hopgood.

33. In covenant, the breach aſſigned was in not paying 8*l.* a year, and not purchaſing lands worth 100*l.* the defendant pleaded an accord that he *had paid part*, not ſaying how much, *and that for the reſt the plaintiff was to enter and take the profits of certain lands*, and *tendered an iſſue that he had performed and paid.* Upon demurrer it was objected for the plaintiff, that accord is [128] no plea, but curia contra held that accord is a good plea to a covenant to pay a ſum certain, or an obligation when joined with other things uncertain. But this accord not mentioning what part in certain he had paid, they conceived it void. 2 Keb. 51. pl. 7. Trin. 18 Car. 2. B. R. Outram v. Rolſton.

35. In an indebitatus aſſumpſit, the defendant pleaded an accord *to pay money to a ſtranger*, and *avers part paid, and a ſpecial promiſe for the reſt.* The plaintiff demurred, becauſe not executed. It was objected, that there being ſufficient remedy, it is well enough; and cited 7 E. 4. 24. and Pl. C. 5. Sed non allocatur; for though an obligation for the money be ſufficient, as being a payment, yet a promiſe is not, unleſs the agreement was, that he promiſed to pay; and judgment for the plaintiff. 2 Keb. 332. pl. 50. Hill. 16 & 20 Car. 2. B. R. Bree v. Sayler.

36. In *treſpaſs*, &c. the defendant pleaded an accord between him and the plaintiff, viz. *that he ſhould pay the plaintiff* 3*l.* *and ſhould undertake to pay the attorney's bill*, and *averred that he had paid the* 3*l.* *and was always ready to pay the attorney's bill, but he never ſhewed him any.* It was argued, that here the accord is executed; for the 3 l. is paid, and the agreement is not to pay, but to undertake payment of the attorney's bill, which he has done; and that upon his undertaking, the plaintiff or the attorney may have a remedy. But the accord not being executed, judgment was given for the plaintiff. Raym. 203. Mich. 22 Car. 2. B. R. Cock v. Honeychurch.

Mod. 69. pl. 20. ſeems to be S. C. but does not mention the attorney's bill. —— 2 Keb. 690. pl. 20. S. C. and though the plea was, that he promiſed to pay the attorney's bill, yet per cur. this promiſe, or any thing in action, is no accord, as to pay and releaſe, becauſe on refuſal the party cannot compel the releaſe; but this might be pleaded by way of diſcharge, but not in bar, unleſs he had averred he had paid the bill.

37. In indebitatus aſſumpſit, defendant pleaded an accord *to pay* 10*l.* *and deliver ſilk ſtockings, which was paid, and that he was ready to deliver the other; and that the plaintiff accepted the defendant's promiſe* in ſatisfaction. Upon demurrer the court held it no plea, not only becauſe it is not executed, but becauſe there is only an action given, and that is no ſatisfaction, any more than one bond againſt another; judgment for the plaintiff. 2 Keb. 851. pl. 104. Mich. 23 Car. 2. B. R. Brown v. Wade.

For after it is broken it is a debt. Mod. 206. S. C.

38. *One promiſe* may be pleaded in *diſcharge of another* before breach, but after breach it cannot be diſcharged without a releaſe in writing. 2 Mod. 44. Trin. 27 Car. 2. C. B. Milward v. Ingram.

39. In aſſumpſit for wares ſold laid ſeveral ways, the defendant pleaded an agreement *to pay 9 l. and ſuch ſum as Mr. Liveſay ſhould tax for coſts, in ſatisfaction of all matters between the parties*, and alledged mutual aſſumpſit to perform it, and then ſhewed the taxation and notice thereof, and tender of the 9 l. and the coſts, & uncore priſt. The plaintiff demurred generally, and reſolved per cur. that *if action be not given upon mutual promiſe at the time of the aſſumpſit, ſuch aſſumpſit is no bar to the prior action.* And judgment for the plaintiff niſi. 2 Jo. 168. Mich. 33 Car. 2. B. R. Witham v. Taylor.

40. In *debt againſt executor upon a bond* entered into by teſtator 23d March 14 Car. 2. Defendant pleaded a concord 30 April, 31 Car. 2. *that defendant ſhould give the plaintiff new ſecurity for this debt, and another upon another bond; and that he* being the executor of the obligor, and the perſon with whom the concord was made, *gave the ſecurity* according to the concord, *by a bill ſealed by himſelf.* Upon demurrer judgment was given per tot. cur. for the plaintiff; for one bond given in ſatisfaction of another is no diſcharge, whether given upon concord or not, and the concord cannot mend the matter; and yet here the new bond binds him de bonis propriis, whereas by the firſt bond he was only bound de bonis teſtatoris. 3 Lev. 55, 56. Mich. 33 Car. 2. C. B. Lobly v. Gildart.

[129] 41. In covenant on an indenture in which defendant *covenanted to permit the plaintiff to receive 100 l. per annum rent, part of which was to go in ſatisfaction of a debt, and the reſidue to be paid to the defendant*, and aſſigned a *breach in diſturbing him to receive the rent.* The defendant *pleaded an accord* between them *that each ſhould deliver his part of the indenture to T. S. to be cancelled, and that each ſhould be diſcharged of all actions upon the ſaid indenture;* and averred that he delivered his part, &c. and upon demurrer this was adjudged ill, becauſe accord is no plea, unleſs executed on both ſides. 3 Lev. 189. Mich. 36 Car. 2. C. B. Ruſſell v. Ruſſell.

42. In *covenant* the breaches aſſigned were, that the *houſes* were *not in repair;* that the *locks were taken away*, the *hedges broken* down, and the *ditches not ſcoured.* Defendant pleaded an *accord, that he ſhould employ a workman 3 or 4 days about repairing the houſe, which ſhould be a ſufficient ſatisfaction; and that he had employed a workman*, &c. It was moved, that this was no more than the defendant was obliged to do; that it was an anſwer only to the repairs of the houſe, and that the ſatisfaction pleaded is uncertain, viz. to employ a man for 3 or four days. And judgment was ſtayed; but [afterwards as it ſeems] the court held, that in covenant where the *damages are uncertain, and to be recovered*, as in this caſe, a leſſer thing may be done in ſatisfaction, and there accord and ſatisfaction is a good plea. 4 Mod. 88, 89. Paſch. 4 W. & M. B. R. Adams v. Tapling.

(B) Pleadable. In what Actions.

1. *IN every action where only amends is demanded by way of damages*, accord executed is a good bar in diſcharge of them. Per cur. Cro. J. 100. pl. 29. in caſe of Alden v. Blague, cites 3 H. 6. 37. 3 H. 4. 1. 47 E. 3. 12. D. 75 & 201. This rule is conſonant to law. See 9 Rep. 78. a. 6 Rep. 44. a.

2 Brownl. 131. per Coke Ch. J.

2. In action of *debt upon a leaſe for years*, there is a certain demand, and yet accord is a good plea. 9 Rep. 79. a. cites 47 E. 3. 24. a. b. and 10 H. 7. 24. a. and 2 R. 3. tit. Debt 100. 2 Brownl. 131. S. P. by Warburton J.

3. In *forger of falſe deeds*, concord was ruled to be a good plea. Br. Accord, pl. 9. cites 19 H. 6. 22. In this and other actions upon

ſtatutes, accord or arbitrement is a good plea. Heath's Max. 59.

4. In *appeal of mayhem*, accord with ſatisfaction is a good plea; becauſe damages only are to be recovered. 6 Rep. 44. a. ſays this is to be collected upon the book of 35 H. 6. 30. a. and that ſo is the general rule in 6 E. 6. D. 75. Though the writ is felonice, yet ſince it includes treſpaſs, accord

is adjudged to be a good plea. 9 Rep. 78. b. in Peytoe's caſe, cites Trin. 26 H. 6. Rot. 27. in B. R. ——— 2 Hawk. Pl. C. 159. cap. 23. ſ. 24. ſays it clearly ſeems to be admitted in ſome books, and is ſaid to have been adjudged in a roll, not printed, that notwithſtanding every ſuch appeal muſt ſuppoſe the fact to have been done feloniouſly, yet inaſmuch as at this day it ſubjects not the appellee to the loſs of member, but only to damages, &c. as in action of treſpaſs does, it may be well barred either by arbitrement, or an accord with ſatisfaction executed.

5. In every *action perſonal*, concord with ſatisfaction is a good plea. Cro. E. 357. pl. 15. Mich. 35 & 36 Eliz. C. B. in caſe of Sacheverell v. Bagnoll. But not in real actions, nor where the action is

mixed as in waſte. Heath's Max. 59. ——— See Tit. Waſte (B. a. 3) pl. 30. and the notes there.

6. In *attaint*, concord with ſatisfaction is a good plea, becauſe it is a perſonal action. Cro. E. 357. pl. 15. in caſe of Sacheverell v. Bagnoll. [130] S. P. For the writ is not founded

only upon the record, but upon matter in fact alſo; for the ſuppoſition of falſity in the oath is matter in fact. 6 Rep. 44. a. cites 13 E. 4. 1. b. & 5. a. b. ——— S. P. And accord is a good plea againſt matter of record, and matter in fact mixed with it, but not againſt mere matter of record. Br. Accord, pl. 9. cites 13 E. 4. 5. per tot. cur. except Laicon. ——— Br. Attaint, pl. 118. cites S. C. ——— Br. Attaint, pl. 9. cites 13 E. 4. 1. S. C. by the beſt opinion. ——— See Attaint (©).

7. *Covenant for not repairing* a houſe. The defendant pleaded in bar an accord, and execution of it in ſatisfaction of the repairs. Reſolved a good plea; for *it is not pleaded in diſcharge of the covenant, but of the damages only*, which are demanded by reaſon of the covenant being broken, *and the covenant remains*, and the plea ſounds only in diſcharge of the defendant, and is not like an obligation which is a certain duty, and there it is no plea, though it be before or after the day of payment. Cro. J. 99, 100. pl. 29. Mich. 3 Jac. B. R. Alden v. Blague. Noy 110. S. C. adjudged a good bar, *though the accord was parol*, and pleaded in diſcharge of a matter in deed, becauſe it is *for a*

thing executory, and is only a bar pro tempore, and not for a perpetual bar of the ſaid covenant. ——— 6 Rep. 43. b. Blake's Caſe, S. C. accordingly; for there is a diverſity when a duty certain accrues by the deed at the making the writing, as by covenant, bill, or bond to pay money, there this certain

duty takes its eſſence and operation originally and only by the deed, and therefore muſt be avoided by a matter of as high a nature, though the duty be merely in the perſonalty; but when no certain duty accrues by the deed, but a tort or default ſubſequent, in conjunction with the deed, gives an action to recover damages, (the which are only in the perſonalty,) accord with ſatisfaction is a good plea for ſuch tort or default; as in the principal caſe the covenant, at the making thereof, does not give the plaintiff any action, but the tort or default afterwards in not repairing, being joined together with the deed, gives action for damages, which being in the perſonalty, the plea is good.

Brownl. 134. S. C. & S. P. cites 38 H. 6. Tit. Bar.

8. In all actions which ſuppoſe the *tenant* to be *vi & armis*, (where capias and exigent lies at the common law) there accord is a good plea for the redemption of his body from impriſonment, ſo that men may do their buſineſs, which is for the public good. Reſolved per tot. cur. 9 Rep. 78. a. Mich. 9 Jac. C. B. Peytoe's caſe.

Brownl. 133. Pats v. Chitty, S. C.—— 2 Brownl. 128. Peto v. Checy, S. C. with the arguments of the judges, and adjudged accordingly.——Godb. 149. pl. 193. Peto v. Chitty, S. C. adjudged accordingly.

9. In *ejectment* accord with ſatisfaction was pleaded in bar, and reſolved per tot. cur. to be a good plea. 9 Rep. 77. b. 78. a. Mich. 9 Jac. C. B. Peytoe's caſe.

10. In *raviſhment of ward* accord is a good plea, becauſe proceſs of outlawry lay in this action at common law. 9 Rep. 78. b. ſays it was reſolved.

2 Brownl. 131. S. P. accordingly by Warburton J.

11. In *detinue of charters concerning franktenement and inheritance* of land, the charters themſelves ſhall be recovered; and yet in ſuch caſe an accord is a good plea, as is held in 7 E. 4. 23. b. and the ſame law in *detinue of a horſe*, or other goods perſonal. 9 Rep. 78. b.

12. In *quare ejecit infra terminum*, accord was reſolved to be a good plea. 9 Rep. 80. a. Mich. 9 Jac. C. B. Peytoe's caſe.

13. Where accord ſhall be a good plea in bar of treſpaſs, ſee tit. Treſpaſs, (R. a) pl. 1, 2. and the notes there.

[131]

(C) The Form and Manner of Pleading.

Heath's Max. 60. cites S. C. ——9 Rep. 80. S. C. cited by the reporter in Peytoe's caſe.——Br. Barre, pl. 22. cites S. C.——9 Rep. 80. b. S. C. cited in a nota of the reporter.

1. IN forger of deeds, *defendant ſaid* that *ſuch a day, year, and place, he gave the plaintiff a bottle of wine in ſatisfaction* of the treſpaſs; *to which he agreed;* judgment if action &c. and a good plea, though he does *not ſay that any accord was made for the bottle* of wine. Br. Accord, pl. 8. cites 19 H. 6. 29.

2. In treſpaſs the defendant *pleaded* concord, *that he ſhould make to the plaintiff certain windows, and pay him* 10 *s. by a day, and that he paid to him the* 10 *s. by the day*, and *the plaintiff ſaid that no ſuch concord*, and found for the plaintiff; and the court would not give judgment becauſe the iſſue is not good, becauſe he did not perform the whole concord by the day, and replication cannot make an ill bar good as a verdict may. Br. Accord, pl. 3. cites 6 H. 7. 10.

3. Debt

3. Debt *againſt leſſee for years of* 20 *l. rent arrear.* The defendant *pleads concord of* 10 *l. paid* to the plaintiff *for all debts and treſpaſſes.* The juſtices at one day were all of opinion that it was no plea, becauſe it was a *matter in fact*, and defendant could not wage his law againſt the leaſe for years; but at another day Fineux, Keble, and Vaviſor held e contra; and after the defendant pleaded ſatisfaction by way of arbitrement. Br. Accord, pl. 12. cites 10 H. 7. 4.

4. Debt on bond *to pay* 40 *l. at Michaelmas eve.* Defendant *pleaded a concord*, that *if he gave the plaintiff a hawk and* 20 *l. at Michaelmas day the obligation ſhould be void*, and ſaid that he *gave the hawk and* 20 *l. at Michaelmas day, and the plaintiff accepted* it. This was held no plea; for it appears that for non-payment at the day the bond was forfeited, and ſo became ſingle, which cannot be diſcharged by ſuch a *naked averment* in fact of ſuch acceptance, although the agreement was before the day; but acceptance before the day was a good diſcharge. Cro. E. 46. pl. 2. Paſch. 28 Eliz. C. B. Anon.

5. In debt on a *bond for* 16 *l. conditioned to pay* 8 *l.* 10 *s. at Michaelmas.* The defendant *pleaded that before that day he, at the plaintiff's requeſt, paid him* 5 *l.* 2 *s.* 2 *d. which he accepted in full ſatisfaction* of the debt; but becauſe he pleaded the payment of part *generally*, whereas he ſhould have pleaded the payment to have been in full ſatisfaction of the whole debt, the plaintiff had judgment. 5 Rep. 117. a. b. Trin. 44 Eliz. C. B. Pinnel's caſe, alias Pinnel v. Cole.

Mo. 677 pl. 923. PENNY v. CORE, S.C. that he pleaded payment of 5 *l.* in ſatisfaction of the 8 l. and the court thought it a good plea, becauſe accepted before the day; and ſo if it had been at another place; but payment at the day and place cannot be, by acceptance, ſatisfaction of all of the ſame kind.——S. C. cited per cur. and ſaid that where a thing is pleaded by way of concord it is iſſuable; but if the concord is not executed by giving and receiving, it cannot be pleaded in bar to the action, and therefore that the beſt way of pleading is, that the thing *was given and received in full ſatisfaction*, &c. according to the reſolution in Pinnel's caſe, but both are traverſable. 5 Mod. 87. Mich. 7 W. 3. Young v. Rudd.

6. Debt was brought on a bond. The defendant *pleaded that after the making the bond, and before it became payable, the plaintiff was indebted to the defendant in a load of lime, to be delivered upon requeſt; and it was agreed* between them, *that if defendant would diſcharge the plaintiff of the ſaid load of lime*, that then in conſideration thereof *the plaintiff would diſcharge the defendant of the bond, and would accept the ſaid load of lime in ſatisfaction of the bond;* and alleged in fact that he did diſcharge * then and there the plaintiff of the lime, *which the plaintiff accepted in diſcharge of the obligation, and then acquitted the defendant of the ſaid obligation*, and demanded judgment of the action. But upon demurrer it was adjudged for the plaintiff, becauſe the defendant had *pleaded his bar* † *in diſcharge of the obligation*, where he ought to have pleaded it in diſcharge *of the ſum contained in the obligation;* for it is not debt ſimply by the obligation, but the breach of the condition makes it to be a debt; ſo that if the condition is not diſcharged the obligation remains in force, and the matter of the bar is not pleaded in diſcharge of the condition, but of the obligation, and therefore

*[132] Cro. J. 254. pl. 9. S. C. accordingly.—Brownl. 109. S. C. ſeems to be taken from Yelv.——Bulſt. 66. S. C. adjudged for the plaintiff.

† Payment of money is no plea in diſcharge of a bond; but in diſcharge of money to be paid by the bond; per Haughton. Palm. 111.

cites it as ſo pleaded 9 Rep. 77. b. in Peytoe's caſe.

therefore not good. Yelv. 192. Mich. 8 Jac. B. R. Neale v. Sheffield.

———If the obligation be with condition to pay a leſs ſum, and a concord is pleaded in diſcharge of the condition of the obligation, in nature of a releaſe, then the concord is no bar of the obligation, per Haughton. 2 Roll Rep. 188. in caſe of Roberts, alias Rabbetts, v. Stoker.

And becauſe accord with ſatisfaction was *pleaded in ſatisfaction of the entry, and not of the covenant*, it was held a good plea. Palm. 111. S. C.—— *Palm. 111. Trin. 17. Jac. S. C. by name of Robards v. Stoker.

7. A leſſor leaſed to B. for 3 years, and *covenanted that B. ſhould quietly enjoy* during his term, *and to perform other covenants in the leaſe*. A. entered within the time, by which that covenant was broken. B. brought action of covenant. A. *pleaded accord and ſatisfaction in performance, and full ſatisfaction of all and ſingular covenants* and promiſes: at this time of the accord only one of the covenants was broken. It was adjudged by all the judges, that this concord was a good *bar as well of covenants executory as executed* [as * well before the breach as after, becauſe it is an action merely perſonal]; for the damages are the ground of the action. 2 Roll Rep. 187. Trin. 18 Jac. Rabbets, alias Robards, v. Stoker.

So per Haughton, a *promiſe cannot be releaſed by parol*; but if concord be pleaded in ſatisfaction

8. *But* per Haughton, accord with ſatisfaction *is no plea in diſcharge* of covenant *without a deed*, becauſe it enures as a releaſe of covenant, which cannot be without deed; *but in ſatisfaction and performance of a thing to be done*, accord with ſatisfaction is a good plea without deed, to which all the court agreed. Palm. 111. Robards v. Stoker.

of the promiſe, it is a good bar of the promiſe; for there is a conſideration given for this promiſe; *but if concord be pleaded in diſcharge of this promiſe, in nature of a releaſe*, then it is not good. 2 Roll 188. ut ſupra.

Palm. 111. ut ſupra.

9. *And* Doderidge J. held, that becauſe the concord was a good bar to this covenant, which was broken before the concord made, (though it was admitted to be no bar for the other covenants) yet the plaintiff cannot have judgment. This caſe was adjudged upon demurrer. 2 Roll Rep. 188. ut ſupra.

S. C. cited 5 Mod. 87. in caſe of Young v. Rudd.

10. In debt upon bond, with *condition that if defendant ſhould make compoſition with one E. for lands, &c.* then *he ſhould pay the plaintiff* 30 *l.* The defendant *pleads that he made no compoſition.* The plaintiff *replies that E. granted to the defendant a rent-charge in fee, in ſatisfaction of his title, which the defendant accepted in ſatisfaction, &c. and ſo he made compoſition.* The defendant *proteſtando that E. non conceſſit*, &c. *pro placito that defendant did not accept* it in ſatisfaction, &c. This was held a good plea; for it is no compoſition without conſent, which depends upon the acceptance, and the grant is at the moſt but argumentative. Hob. 178. pl. 207. Earle v. Tuck.

*[133] *But by way of ſatisfaction he may only ſay that he paid the plaintiff ſuch a ſum in full ſatiſ-*

11. The beſt and moſt ſecure way of pleading an accord is to plead it *by way of ſatisfaction*, and not by way of accord; for if it be pleaded by way of accord, the defendant ought to plead a *preciſe execution* thereof in the whole, and if he fail in any part his plea is naught *; but by way of ſatisfaction he need only ſay, that defendant paid the plaintiff ſo much in full ſatisfaction of the ſame action, the which the plaintiff received; judgment ſi actio,

actio, &c. 9 Rep. 80. b. at the end of Peytoe's caſe, in a nota of the reporter.

faction, which the plaintiff received, &c. Judgment ſi actio. 9 Rep. 80. b. ut ſupra.

12. In caſe upon indeb. aſſump. the defendant pleaded an accord *to do diverſe things*, and *avers performance of part, and tendered to perform the reſidue, which the plaintiff refuſed.* The plaintiff demurred, and the plea was held not good, and judgment for the plaintiff. 2 Jo. 6. Paſch. 23 Car. 2. C. B. Shepherd v. Lewis.

13. In indeb. aſſump. for wares ſold, the defendant pleaded that *poſt exhibitionem billæ*, there was an accord that the defendant ſhould *pay* 20 *l. which he paid and the other received.* Upon demurrer it was objected to be an ill plea, being after the bill exhibited, and *not ſaid puis darreign continuance.* Sed non allocatur; it being *pleaded in bar the ſame term of the declaration delivered*, is well enough, and a good bar, *without ſaying actio non.* Sed adjornatur. 3 Keb. 782. pl. 27. Trin. 29 Car. 2. B. R. Browning v. Denham.

But where the plea was that poſt exhibitionem billæ, viz. the 12 Feb. (which was before the bill was exhibited) an accord was that defendant ſhould pay on the ſaid 12 Feb. 20 l. which he had paid on the ſaid day. The court on a demurrer held, that though the viz. is void, yet the plea in bar is ill; for the accord could never be executed on a day precedent to the making, &c. 3 Keb. 786. pl. 39. Trin. 29 Car. 2. B. R. Browning v. Denham.

14. In debt on bond the defendant pleaded that the plaintiff *accepted a feoffment, with ſeiſin of ſuch land, before the day on which* the money became due by the condition *in ſatisfaction of the bond;* but becauſe it was not pleaded that he *gave* the land *in ſatisfaction, &c.* judgment was given for the plaintiff. Comb. 199. Trin. 4 W. & M. in B. R. Higden v. Higden.

15. *Treſpaſs* quare clauſum fregit, &c. The defendant pleads that the *treſpaſs was done by him and Jane Rowland;* and that after the ſaid treſpaſs it was accorded between the plaintiff and the ſaid Jane, that the ſaid *Jane ſhall abate* 14 *s. due to the ſaid Jane from Edward, father to the plaintiff, in ſatisfaction* of the ſaid treſpaſs, and *avers that* the ſaid *Jane had abated* the ſaid 14 s. &c. And upon this the plaintiff demurred, firſt, becauſe it is a thing to be done for the *benefit of a third perſon*, and therefore the accord not good. 2dly, Becauſe he ſaid that ſhe *had abated* the ſaid 14 s. and *not ſhewn how.* As to the firſt exception the court was e contra; for it being in diſadvantage of one of the treſpaſſers, and made at the requeſt of the plaintiff, though it be to a third perſon it is well enough; but as to the ſecond fault the court held the plea to be ill; for ſhe ought to have ſhewn how ſhe had abated the 14 s. as to ſay the father of the plaintiff owed her ſo much, and had paid her but ſo much, ſo that the 14 s. be deducted and abated out of it; and to plead that ſhe had *abated generally*, as it is pleaded here, *is uncertain* and ill, and adjudged according in the following term. Skin. 391. pl. 28. Mich. 5 W. & M. B. R. Hillman v. Uncles.

16. A *quantum meruit* was brought *pro opere & ſervitio, and an inſimul computaſſet for* 5 *l. ſolvend. cum inde requiſitus eſſet.* The defendant pleaded that it was *agreed that the defendant ſhould give*

and plaintiff ſhould accept a bill of 5 *l. in ſatisfaction* of what was due to him, *and that he did accept ſuch bill* according to the agreement. The plaintiff replied *proteſtando that he made no ſuch agreement*, proteſtando *etiam that no ſuch bill was given, pro placito dicit that it was under ſeal;* and upon demurrer to this replication it was held good. 5 Mod. 136. Mich. 7 W. 3. Taylor v. Baker.

§ Mod. 86. YOUNG v. RUDD, S. C. and per cur. where a thing is pleaded by way of concord it is iſſuable; but if the concord is not executed by giving and receiving, it cannot be pleaded in bar to the action; therefore the beſt way of pleading it is

* 17. In *aſſumpſit* and *quantum meruit*, the defendant *pleaded that he gave the plaintiff a beaver hat in ſatisfaction* of the promiſe, *and the plaintiff accepted it in ſatisfaction.* The plaintiff *proteſtando that he did not give it in ſatisfaction, traverſes that he accepted it in ſatisfaction.* Upon a demurrer it was urged that this could not be pleaded in ſatisfaction of the promiſe, but ſhould have been of the damages: 2dly, it was urged that this traverſe was naught; for if the gift in ſatisfaction be admitted, his acceptance will not be material. And per Holt Ch. J. *the acceptance is material as well as the gift*, and to plead a gift without ſhewing that the other received it, would be naught, and † either is traverſable. Rookby J. ſaid that the gift is neither admitted nor confeſſed in this caſe by the plaintiff, becauſe here is a proteſtando to the gift, ſo that it does not appear here was any receipt at all. 2 Salk. 627, 628. Mich. 7 W. 3. B. R. Young v. Ruddle.

by ſetting forth that the thing was given and received in full ſatisfaction, according to the rule in Pinnel's caſe; but both are traverſable; and judgment for the plaintiff. ——— Comb. 346. S. C. adjudged for the plaintiff. ——— Carth. 347. S. C. adjudged for the plaintiff. ——— 12 Mod. 85. adjudged for the plaintiff.

† S. P. per Roll Ch. J. but he ſaid it was more proper to join iſſue upon the payment. Sty. 239. Mich. 1650. Bois v. Cranfield.

18. *Money paid and accepted in purſuance of a void accord*, may be pleaded or taken as an accord with ſatisfaction; and Holt Ch. J. ſaid that this was all that was proved by Nichols's caſe. 1 Salk. 71. Trin. 9 W. 3. in pl. 3.

‡ Cro. J. 100. Alden v. Blague. § See ſupra pl. 7.

19. In covenant upon indenture between the plaintiff and defendant, the defendant *pleaded bar by accord in ſatisfaction of the covenant, before any breach of covenant.* Exception was taken to the bar that the concord, &c. was pleaded to be in ſatisfaction of the covenant, which the defendant in his plea alleged were not broken at the time of the concord, and that this cannot be; for the covenant's being *created by deed cannot be diſcharged but by deed, but* ‡ accord with ſatisfaction is a *good plea in ſatisfaction and diſcharge of damages upon covenant broken*, and judgment given accordingly, contrary to the opinion in 2 Roll Rep. 187. § [Rabbet and Stoker's caſe.] Lutw. 358, 359. Trin. 12 W. 3. Snow v. Franklin.

20. Action upon the *caſe for ſeveral promiſes;* defendant pleads that he *gave the plaintiff ſuch a quantity of*, &c. And the plaintiff accepted it *in full ſatisfaction* of the ſaid promiſes. Plaintiff demurs, and defendant joins in demurrer. It was inſiſted for the plaintiff, that the defendant's plea was naught; becauſe *not ſaid that* the defendant *gave it in ſatisfaction*, and cited 5 Co. Rep. 117. per cur. If the *defendant gave it with one intention, and*

the

the *plaintiff accepted it with another*, the intention of the donor muſt prevail; but the queſtion here is, whether the words (full ſatisfaction) ſhall not as well relate to the verb *give*, as the verb *accept*; eſpecially becauſe of the conjunction *et*, which ſeems to difference it from the caſe mentioned. Adjurnatur. 10 Mod. 224. Paſch. 13 Ann. B. R. Timber v. Gardiner.

For more of Accord in general, ſee **Agreement**, and other proper Titles.

Account. [135]

(A) For what Thing it lies.

Fol. 116.

[1. IF a man *delivers money* to another *upon condition* that if the defendant *makes a ſecurity of certain land* by a certain day, that then he ſhall have the money, and if not that he ſhall re-deliver it to the deliverer; if he does not make the ſecurity, the deliverer may have a writ of account againſt him for the money. 41 Edw. 3. 10. adjudged.]

S. C. cited D. 20. a. pl. 121. and admits that account lies.—Ibid. 20. b. S. C. cited and S. P. admitted; but the difference is, whether or no debt lies as well as account.——S. P. Br. Accompt, pl. 11. cites 41 E. 3. 7.——S. P. F. N. B. 118. (G)

[2. If money is delivered *to deliver over*, if it is not delivered, account lies. 41 E. 3. 31. 1 E. 5. 2. b. 2 H. 4. 12. b. 20 H. 6. 35.]

Br. Accompt, pl. 24. cites S. C.—S. P. for he cannot have detinue. Br. Accompt, pl. 43. cites 19 H. 6. 5.——The bailor may have account to know what is done with the money; for it might be that he, to whom it was to be paid, would not agree. 2 Roll. Rep. 441. per Doderige.

[3. *But if* it be *delivered over* no account lies. 1 E. 5. 2. b.]

S. P. Br. Accompt, pl. 43. cites 19 H. 6. 5.

[4. If I deliver money *to B. to deliver over to C. to my uſe*, and he *gives it to C.* account lies againſt B. 2 H. 4. 12. b.]

See (D) pl. S. C.

[5. If a man *acknowledges by obligation that he hath received* a ſum ad proficiendum & computandum, the obligee may have an account for it, if he will. 42 E. 3. 9. adjudged.]

Br. Dette, pl. 32. cites S. C.—— D. 20. b. pl. 122. cites S. C.

[6. If a man delivers money *to you to pay to me*, I ſhall have account for this againſt you. 6 H. 4. 8. 41 E. 3. 10. 2 R. 2. Account 45. though he be but a *meſſenger*.]

S. C. cited and S. P. admitted. Arg. Roll Rep. 391. in pl. 11.——S. P. Br. Accompt, pl. 24. cites 2 H. 4. 12.——He may have account or debt. Per tot. cur. Godb. 210. pl. 299. Mich. 11 Jac. C. B. Clarke's caſe.

[7. If

See pl. 12. and the notes there. —— [7. If a man *receives my rent* of my tenant *by my command*, account lies againſt him for it. 6 H. 4. 8.]

So if a man receives my rent of my tenants, without my aſſent, yet I ſhall charge him by the poſſeſſion and by the receipt, per Brian Ch. J. And ſo ſee that never his receiver to render account, ſhall not ſerve in this caſe for him. Br. Accompt, pl. 65. cites 4 H. 7. 6. —— F. N. B. 118. (B) in the new notes there (a) cites 4 H. 7. Brief 65. —— S. P. F. N. B. 117. (A) in the new notes there (e) cites 11 H. 4. 65. per Thirn. —— But if a man *takes rent as his own, as a diſſeiſor*, &c. debt lies, and not account. See Clayt. Rep. 117. pl. 206. Aug. 1647. Walker v. Portington.

Br. Dette, pl. 186. cites S. C. without being put to action of debt. [8. If a man *acknowledges by deed that he hath* in his hands *ſo much* of the *money of J. S. due to him*, account lies for this by J. S. 11 H. 6. 39.]

[9. If the *bailee of goods to deliver over waſtes them*, no account lies againſt him, but detinue. 20 H. 6. 16. b.]

[10. If the *bailee of goods waſtes them*, as a tun of wine, account lies. 20 H. 6. b.]

[136]

D. 151. b. 152. a. pl. 5. by the opinion of the juſtices of both benches. [11. If a man *deviſes* by writing *that his executors ſhall ſell his land*, and deviſes certain legacies out of the money to be received; if the *executor ſells*, the *legatees may have accounts*, if he will not pay the legacies. D. 4. 5. Mar. 152. 5.]

Anon. —— Ibid. Marg. cites it as ſo adjudged Mich. 36 & 37 Eliz. B. R. Ld. Rich's caſe. —— Bulſt. 153, 154. Yelverton J. cited the caſe of D. 151. but that D. 264. pl. 41. 9 Eliz. three juſtices held that to a ſuit for ſuch legacy in the ſpiritual court a prohibition did not lie, for that the money was aſſets in the hands of the executors, and no remedy for a legacy in the temporal court; but Yelverton and the whole court, in the principal caſe of DENS v. DENS, held that ſuch legacy is not to be ſued for in the ſpiritual court, but by an action of account at the common law againſt the executors.

* S.C. cited by Roll Ch. J. that † [12. No account lies for *rent reſerved upon a leaſe* for years. * 20 H. 6. 16.]

rent alone lies not in account, becauſe it is a certain thing, and alſo in the realty; but if mixt with other things, an account will lie. Sty. 287. Trin. 1651. in caſe of HAMOND v. WARD, which was error to reverſe a judgment in an inſimul computaverunt, and aſſigned that the action was brought againſt him for rent as tenant of the land, and not as receiver, and therefore account did not lie; but Roll Ch. J. ſaid, it appears here that the action is brought againſt the defendant as receiver, and if one *receives my rents, without my conſent*, I may have either debt or account againſt him; and affirmed the judgment.

† S. P. 2 Show. 82. in caſe of —— v. Sterne.

Arrearages of a leaſe for years, or at will, does not lie in account; for it *is a thing certain*, quod nota; for a thing uncertain lies in account only. Br. Accompt, pl. 81. cites 10 H. 6. 20.

S. P. and ſo if they are loſt; for he [13. If a *leſſee of goods waſtes them*, no account lies againſt him for them. 20 H. 6. 16.]

ſhall have detinue of the goods waſted or loſt upon bailment, &c. Br. Accompt, pl. 4. cites 20 H. 6. 17. —— Br. Detinue, pl. 8. cites 20 H. 6. 16.

Br. Accompt, pl. 36. cites 21 E. 3. and 27. and 30. [14. If *tenant by elegit* of land *cuts down trees*, the conuſor in reverſion cannot have writ of account againſt him for default of privity of bailment. 21 E. 3. 26. b. contra 21 E. 3. 31. b.]

that account lies againſt him for waſte, and not writ of waſte.

2 Bulſt. 256. S. C. adjudged accordingly; for the co- [15. If A. acknowledges by deed, that he hath *received* 100*l.* of B. *to be adventured to the Weſt Indies*, and thence to England back again, *and covenants to render* a due *account* thereof upon his return, though B. may have a writ of covenant upon this deed,

deed, yet he may alſo have a writ of account thereupon at his election. Trin. 12 Jac. B. R. between *Hawkins and Parke*, adjudged.]

venant does not take away his action of account.——

Roll Rep. 52. pl. 24. S. C. adjudged accordingly, per cur. viz. Crooke, Doderidge and Haughton.

Account does *not lie for a thing certain*, as if a man *delivers* 10*l. to merchandize*, he ſhall not have account of the 10l. but of the profits thereof he ſhall have action of account; for this is uncertain. Br. Accompt, pl. 35. cites 9 H. 5. 3. per Hill J.

16. If one *receives to my uſe money ſealed up in a bag, as my ſervant*, account does not lie againſt him. F. N. B. 116. (Q) in the new notes there (d) cites 29 E. 3. 20. 20 H. 6. 16. 6 H. 4. 8. 2 H. 4. 12. 13 H. 4. 1. 41 E. 3. 10. 22. 33 H. 6. 2. 6 E. 3. 12. F. Baily 4.

17. Account *as bailiff of his houſe*, holding his courts, and adminiſtring certain goods in the ſame, *and alſo was his receiver* of his money. *The defendant ſaid that he was never his bailiff of the houſe, and as to the money, that he was never his receiver*, and as to the goods, that the plaintiff was indebted to him in 20l. and aſſigned the goods to the defendant in ſatisfaction of the 20l. and per tot. cur. where he pleads never his bailiff, he ſhall not plead over to the goods in the manor or houſe; for this ſhall come in upon the account after, if the plea paſſes againſt the defendant, quod nota; by which iſſue was only ne unques ſon bailiff and ne unques ſon receiver. Quære of the aſſignment above. Br. Accompt, pl. 34. cites 14 H. 4. 20. [137]

18. If 40*l. is delivered to render account*, account lies well; *but* if it is delivered *to re-bail when the defendant is required*, account does not lie, but *detinue*, per Martin, quod curia conceſſit. Br. Accompt, pl. 51. cites 4 H. 6. 2.

19. If I *bail certain money to one to keep till after my death, and then diſpoſe for my ſoul*, my executors ſhall not have account againſt him after my death; for he himſelf as to this ſum is my executor, per Needham. Quære if he himſelf cannot have account of it in his life; for in his life he may change his will. Br. Accompt, pl. 70. cites 8 E. 4. 5.

20. He who *takes the profits as guardian in ſocage of his own tort* ſhall account thereof, per Pigot. Quære. Br. Accompt, pl. 76. cites 22 E. 4. 5.

Account does not lie againſt him who *enters in the land of*

one of full age, or an infant not tenant in ſocage. F. N. B. 217. (A) in the new notes there (e) cites 13 E. 3. 35. Dy. 277.——But in the King's caſe he ſhall be charged as bailiff, if he has no title. Ibid. cites 33 H. 6. 3. per Priſot. 4 H. 7. 6.

21. Account againſt J. N. *bailiff of his park of D. having the care, &c. of* 100 *deer, as well male as female*, and the defendant demurred. Per Fiſher, account does not lie of a park; for it is only the incloſure within the pales, not of the deer; for the plaintiff has no property of them; which Vaviſor agreed. But contra per Keble, Rede, Wood, Fineux, and Brian. Br. Accompt, pl. 94. cites 10 H. 7. 6.

* A park is more than the incloſure, for it is alſo the land incloſed; for the licenſe to make a park is con-

cedimus, &c. that he may incloſe 100 acres of land in D. and that thereof he may make a park; per Keble, quod cur. conceſſit; and that in treſpaſs quare clauſum fregit, & cepit damas without ſaying ſuas, his, and without any value alleged, before the ſtatute of Weſt. 1. the damages were aſſeſſed more high for the deer, quod tot. cur. conceſſ. wherefore action of account lies of a park, and this by reaſon of

of the deer. And ſo ſee that *guardian who cannot ſell ſhall account.* Br. Accompt, pl. 94. cites 10 H. 7. 6. ——— *And* Wood ſaid that treſpaſs lies *of wild beaſts taken in my land*, and ſhall not ſay damas ſuas, but that damas cepit; and therefore treſpaſs and account thereof lies. Br. Accompt, pl. 94. cites 10 H. 7. 6.

22. Account lies *of herons and hawks building neſts* in the park, and of fiſh and conies, and by magna charta the guardian ſhall ſuſtain houſes, parks, &c. Br. Accompt, pl. 94. cites 10 H. 7. 6. per Keble.

23. Account lies againſt guardian of a *dove-houſe.* Br. Accompt, pl. 94. cites 10 H. 7. 6. per Rede.

24. *So* of *wreck and ſtray*, though the bailiff does not ſeiſe it; for he *ſhall account of all that he received and might have received.* Br. Accompt, pl. 94. cites 10 H. 7. 6.

25. *So of toll, and* of the profits of *a common pound.* Br. Accompt, pl. 94. cites 10 H. 7. 6.

26. *So* per Fineux of *guardian of an hoſpital or rectory*, and that guardian *cannot ſell the deer*, contra of a bailiff. Br. Accompt, pl. 94. cites 10 H. 7. 6.

27. If a man *deliver goods or money beyond ſea, to deliver him again in England, at a certain place*, he ſhall have an account for thoſe goods, &c. F. N. B. 11. (G).

Cro. E. 82. pl. 1. ROBSERT v. ANDREWS, S. C. and that it was adjudged upon ſpecial verdict, that E. ſhall be ſaid to be receiver of the 100l by the hands of D. prout, &c. and that he ſhall account for the ſame. And it being moved in error that it was found that E. received the 100l. for their relief, and not to account, the court held clearly, that when E. received the money in that manner, he received it to their uſe, and is accountable, if he did not expend it; and that it is as if he had received it to their uſe by expreſs words.

28. In account *by A. and B. the plaintiffs declared that C. had delivered* 100*l. to E. the defendant, by the hands of D. for the relief of M.* The defendant *pleaded ne unques receiver to render account*, upon which they were at iſſue; and judgment was given that the defendant ſhould account. 3 Le. 149. pl. 199. Mich. 29 Eliz. C. B. Cocket v. Robſton.

[138]

29. If a *ſheriff levies money on an execution, and does not anſwer it to the plaintiff*, account will lie. Hob. 206. pl. 260. Trin. 15 Jac. in caſe of Speake v. Richards.

30. Account does not lie for any *ſum certain.* 2 Brownl. 76. Anon.

31. It ſeems admitted that account does not lie *againſt ſuch* perſon *as enters and occupies copyhold lands*, and takes the profits *as guardian.* See Cro. C. 229. pl. 7. Mich. 7 Car. B. R. Hughs v. Harris.

Show. 71. Mich. 1 W. & M. S. C. the plea was over-ruled; and judgment for the plaintiff — Comb. 149. S. C. Holt, Ch. J. ſaid it would be inconvenient to permit an aſſumpſit by reaſon of the trouble and length of accounts; but Dolben J. held that caſe lies, becauſe account

32. In aſſumpſit, the plaintiff declared that he intending to go beyond ſea, *delivered a box and goods to the defendant, which he promiſed to diſpoſe of, and to give an account thereof* at his return; the defendant *pleaded* in abatement, *that he was bailiff ad merchandizandum* the ſaid goods, and that he ought to bring account, and not an aſſumpſit. But it was held, the action being grounded upon an *expreſs promiſe*, an aſſumpſit lies as well as account. And per Holt, where-ever one *acts as bailiff* he promiſes to render an account. 1 Salk. 9. pl. 1. Hill. 2 W. & M. in B. R. Wilkin v. Wilkin.

account is a tedious and troubleſome action. Adjornatur.——Carth. 89. S. C. and by three juſtices the action will lie; but Holt Ch. J. doubted, and told the plaintiff he would not permit him to give all the account in evidence, or to enter into the particulars thereof, but that he ſhould direct his proof only as to damages ſuſtained for not accounting according to the promiſe; for he would not ravel into the account in ſuch actions. Note the trial was to be before him at the ſittings, and a rule was made that defendant anſwer over.

33. Indebitatus aſſumpſit for money received ad computandum, after a verdict for the plaintiff it was moved in arreſt of judgment, that where the *defendant receives money to a ſpecial purpoſe, as to merchandize or account*, there it can never be demanded as a duty till he has neglected or refuſed to apply it according to the truſt on which he received it, and that the declaration muſt ſhew a miſapplication or breach of the truſt. But per cur. it is cured by the verdict, for now it ſhall be intended that proof was made to the jury that the defendant refuſed to account, or had done ſomewhat elſe that rendered him an abſolute debtor. 1 Salk. 9. pl. 2. Trin. 5 Ann. B. R. Poulter v. Cornwall.

(B) Againſt whom it lies, *in Reſpect of his Perſon.*

[1. A WRIT of account does not lie againſt a man *upon a receipt* by him when he was *within age*. * 21 E. 3. 8. admitted by iſſue. 16 E. 3. Account 52.] Account lies not againſt an infant.

Br. Accompt, pl. 82. cites the Regiſter, fol. 135.——F. N. B. 118. (D) S. P. accordingly.——* Br. Accompt, pl. 38. cites S. C. that the defendant ſaid he was within age at the time of the receipt ſuppoſed, and born at D. and prayed Pais there, and yet Pais was where the receipt is ſuppoſed. Brooke ſays, and ſo ſee a good plea by non-age.

[2. *The ſame* law of an account *as bailiff of a manor*. 17 E. 2. Account 121. admitted by iſſue.]

[3. An infant ſhall not be compelled to account, *becauſe* he is not of diſcretion to account. 19 H. 6. 7. b. 16 E. 3. Account 52. 17 E. 2. Account 121.] Br. Accompt, pl. 43. cites 19 H. 6. 5. S. P.——S. P. 7 Br. Coverture, pl. 24. cites S. C.

[4. A *feme ſole*, as well as a man, ſhall be compelled to account in a writ of account, *as receptrix denariorum*. 16 H. 6. 4. b. adjudged.] Br. Accompt, pl. 43. cites S. C.——

F. N. B. 118. (D) S. P. accordingly.——Br. Accompt, pl. 82. Contra, cites the Regiſter 135. but Brooke ſays the contrary ſeems to be law.——Account lies againſt baron and feme eo quod mulier dum ſola fuit was receptrix denar. vel Balliva, &c. and the baron and feme ſhall account for the feme, by divers ſerjeants; but Danby contra, therefore quære. Br. Accompt, pl. 68. cites 4 E. 4. 25.——In ſuch action the writ was *de tempore quo prædicta Catherina fuit receptrix denariorum ipſius J. without ſaying dum ſola fuit*, but thoſe words were in the count. See D. 20. a. pl. 69. Trin. 3 Eliz. no exception was taken thereto, but the defendants pleaded other matter. Clare v. Bartue & Ux.

[5. *So* ſhe ſhall be ſued *by writ of account as bailiff*, for ſhe may well intend the duty of a bailiff. 19 H. 6. 5. b. accordingly.]

6. [A writ of account lies againſt a *prieſt*. 19 H. 6. 5. b.] It lies againſt a chaplain.

Br. Accompt, pl. 43. cites S. C.——F. N. B. 118 (D) accordingly, and cites S. C. and 3 E. 4. 40. but ſays that 15 E. 4. 16. is contra.——Br. Account, pl. 82. cites the Regiſter, fol. 135. contra, but Brooke ſays, that it ſeems it lies againſt a chaplain.

[7. If a *monk* is my bailiff of my manor, and after he is *made an abbot*, he may be charged in an account, becauſe he was my bailiff when he was a monk. 20 E. 3. Account 78.]

8. A *bailff* ſhall not have account *againſt his maſter for a ſurplus* on account. F. N. B. 116. (Q) in the new notes there (c) cites 41 E. 3. Account 33. Quære.

(C) In what Caſes it lies. For *Want of Privity* of Bailment or Receipt.

[*By Jointenants, Joint-Executors, &c.*]

Br. Accompt, pl. 58. cites S. C. but is miſprinted at the beginning (Recover) for (Receiver)——Thel. Dig. lib. 2. cap. 2. ſ. 33. cites S. C. accordingly.——See E. pl. 3. contra.

[1. IF there are 2 *jointenants* for years of a parſonage, and *one receives money* of certain men for offerings, ariſing from corn and other things *to the common profit of them both*, the other ſhall have a writ of account againſt him, for he received the one moiety to his uſe, and ſo his receiver. 39 E. 3. 27. b.]

Br. Accompt, pl. 58. cites S. C. per

[2. [But] if there are 2 jointenants in fee of land, and the *one takes all the profits to his own uſe*, the other ſhall not have an action againſt him for want of privity. Contra 39 E. 3. 28.]

Thorp J. that the other ſhall have account, for otherwiſe he ſhould be without remedy; for he cannot have aſſiſe.——But per Wich. and Kirton, if 2 *tenants in common* are [of land] and *one takes all the profits*, the other ſhall not have account, but aſſiſe. And Brooke ſays, that the reaſon ſeems to be that there is no privity between them. *But* where 2 *coparceners* are, he thinks that one ſhall have action againſt the other. Ibid.

Of *cutting of wood which is in common* pro indiviſo, account lies by one againſt the other; per Hank. Br. Accompt, pl. 20. cites 47 E. 3. 22.

If *one jointenant takes* all the profits or *all the rent*, &c. the other has no remedy; for there is a privity and truſt between jointenants, and it was his folly to join himſelf in eſtate with ſuch perſon as would break the truſt. 2 Rep. 68. a. per Popham. Arg. in Tooker's caſe.—Cro. E. 803. pl. 1. S. P. per Popham in S. C. and that as to the profits of the land, the one may damnify the other, and gives for reaſon as above, that *there is quaſi a privity between them, &c.*——In ſuch caſe either between jointenants or tenants in common, no action of account liee *againſt one tenant in common or jointenant who takes the whole profits*; for in action of accompt *he muſt charge him either as guardian, bailiff, or receiver*, which he cannot do in this caſe, unleſs his *companion conſtitutes him as his bailiff*, and then action of account lies againſt him. And therefore all thoſe books which affirm that an action of account lies for tenant in common, or jointenant againſt another, muſt be intended when the one makes * the other his bailiff; for otherwiſe never his bailiff to render an accompt is a good plea. Co. Litt. 200. b.——Ibid. 172. a. (f) S. P.

* [140]

Br. Accompt, pl. 58. cites S. C. per

[3. [*So*] if 2 have a *ward in common*, and one takes all the profit, the other ſhall not have a writ of account againſt him. Contra 39 E. 3. 28.]

Kirton, that the other ſhall have account againſt him, and count that he was his receiver to their common uſe.——S. P. by Tank. and agreed by Finch, Br. Accompt, pl. 20. cites 47 E. 3. 22. and there in treſpaſs it was held by Hamon, that if 2 have an ox in common, and the one ſells the whole, the other ſhall have writ of account.——The other ſhall have account againſt him. F. N. B. 118. (I) cites Paſch. 45 E. 3.——Ibid. in marg. cites 43 E. 3. 21. and 45 E. 3. 20.——Ibid. in the new notes there (f) ſays, viz. where he was his bailiff, and cites 21 E. 3. 60. Account 66. 24 E. 3. Account 70. 30 E. 1. Account 127. 31 E. 1. Account 126.

It was held that where 2 *bring writ of ward of the body*, and the *one is ſummoned and ſevered*, and the *other recovers*, that he who was ſevered ſhall have writ of account againſt the other of the profits. Thel. Dig. 26. lib. 2. cap. 2. ſ. 2. cites Trin. 45 E. 3. 10. and ſays ſee 47 E. 3. 22. accordingly. And that cutting of wood, which is held pro indiviſo, action of account has been maintained.

[4. If there *are* 2 *executors*, and the one *receives all the debts* of the teſtator, the other ſhall not have a writ of account againſt him, becauſe he hath power to diſpoſe of the whole, and there is no privity of receipt between them. 39 E. 3. 28.] S. P. per Winch, which Brook ſays ſeems to be law; for they have nothing to their own uſe, but the ordinary ſhall compel them to account, as appears elſewhere Br. Account, pl. 58. cites S. C.——S. P. accordingly, Thel. Dig. lib. 1. cap. 18. pl. 5. cites Hill. 13 E. 3. Executors 91. but that Herle J. Trin. 19 E. 2. Executors 117. ſaid, that the one ſhall have account againſt the other; but Thel. ſays the law is not ſo, as appears Trin. 11 H. 4. fol. 79. and 6 H. 4. 3.

Account as his receiver, the *defendant ſaid that J. S. made him and the plaintiff his executors*, and died, and *N. by whoſe hands the receipt is ſuppoſed, was indebted to the teſtator*, and *he as executor, received it*; and demanded judgment if the other executor ſhall have action; and it was held no plea: for the *declaration is of* the plaintiff's money, and the *plea is of the executor's money*; by which the defendant *ſaid that he received it as the teſtator's money, abſque hoc* that he received the money of the plaintiff to render account, and the other e contra. Br. Account, pl. 30. cites 11 H. 4. 79.—F. N. B 118. (I) in the new notes there (f) cites S. C. and 13 H. 4. 1.

5. Where 2 *jointenants* are *of a manor*, and the *one takes upon him to be bailiff to the other of the moiety, and to render account*, &c. then he who makes the other bailiff ſhall have writ of account againſt his jointenant, otherwiſe not. Thel. Dig. 26. lib. 2. cap. 2. ſ. 32. cites Mich. 21 E. 3. 60. Mich. 8 E. 2. Account 115. and 122. Trin. 17 E. 2. where it was held, that the one ſhould not have writ of account againſt the other, notwithſtanding that he took, &c. and ſays, ſee 10 H. 7. 16.

6. Account *as receiver*, and *counted that* he bailed to him 2 tuns of wine to ſell for him, he ſhall not plead that the wines were the plaintiff's and another's; for if two are jointly poſſeſſed, and the one bails goods to merchandize, and to render account, he alone ſhall have account; quod nota. Br. Account, pl. 14. cites 43 E. 3. 21.

7. Where a *man takes upon him of his own head* to be my bailiff, action of account lies. Br. Account, pl. 8. cites 33 H. 6. 2. S. P. per Dyer. Dal. 99. pl. 30.

——3 Le. 24. pl. 50. S. P. by Dyer.——*But* if he *enters to his own uſe*, there it ſeems that account does not lie; for there never his receiver to render account is a good plea. And ſo ſaid Moile, and the law is with him. Br. Account, pl. 8. cites 33 H. 6. 2. and 2 M. 1. accordingly.

8. *Leſſee for years deviſed his term to B. for his own life*, remainder over *to C.* and *made B. his executor*, and died; *B. entered*, and made his will, and died; *B.'s executors entered*, and took the profits for a year, and *C. brought* an action of *account* againſt B.'s executor, as bailiff, &c. But all the juſtices held, that it did not lie for want of privity, and becauſe he never was in poſſeſſion of the land, nor had taken any profit thereof. D. 277. b. pl. 59. Trin. 10 Eliz.

[141]

9. To maintain an action of account, there muſt be either *a privity in deed by the conſent of the party*; for againſt a *diſſeiſor*, or other wrongdoer, no account does lie, *or a privity in law* ex proviſione legis made by the law, as againſt a guardian, &c. Co. Litt. 172. a. (g) For the diſſeiſin is merely a tort; per Manwood. Dal. 99. pl. 30.—And ibid. per Dyer, an abator or diſſeiſor cannot be charged in account, becauſe they pretend to be owners.—Ow. 36. S. P. by Dyer.——And it was agreed, that if a diſſeiſor appoints another to receive the rents, the diſſeiſee cannot have account againſt ſuch a receiver. 3 Le. 24. pl. 50. in caſe of Tottenham v. Bedingfield.——Dal. 99. pl. 30. S. C. and S. P. agreed.

So if there be *leſſee for years of a rectory*, and a ſtranger not having any intereſt, nor claiming any title in them, carries away *tithes ſevered*, and ſells them, the leſſee ſhall not have account againſt him; for

for torts are always done without privity, and here the tithes, as ſoon as ſevered, *were immediately in the leſſee*, and conſequently the taker was a wrong-doer, and account lies not againſt him; per Manwood and Dyer againſt Harper. 3 Le. 24. pl. 5. Mich. 15 Eliz. Tottenham v. Bedingfield.—Dal. 99. pl. 30. S. C. Per Manwood and Dyer accordingly, but Harper e contra.—Ow. 35. and 83. S. C. accordingly.

10. It was holden clear upon the evidence, that if 2 *men buy corn jointly*, barley or the like, the one ſhall not have account againſt his fellow for the diſpoſal thereof. Clayt. 50. pl. 87. Summer Aſſiſe 13 Car. coram Berkley J. Dent's caſe.

11. By 4 & 5 *Ann. cap.* 16. *ſ.* 27. *Actions of account are maintainable by one jointenant and tenant in common, his executors, and adminiſtrators, againſt the other as bailiff, for receiving more than his ſhare, and againſt the executor and adminiſtrator of ſuch.*

(D) *Againſt whom* it lies.

There be but 3 *kinds* of writs of accompt,

[1. NO *man is bound* to account, *unleſs by act of the law*, as guardian in ſocage, *or by his own act*, *as of his own will*, where he is bailiff or receiver. 2 H. 4. 12. b.]

viz. againſt one as *guardian*; the 2d againſt one *as bailiff*; and the 3d *as receiver*; for a man ſhall not be charged in an accompt as **ſurveyor, comptroller, apprentice, reve*, or *heyward*. Co. Litt. 172. a. (g)—S. P. by Dyer, Ow. 36. 14. Mich. 15 Eliz.——And Dal. 99. pl. 30.——S. P. and ſo of a meſſenger, unleſs they are as bailiffs or receivers. 2 Inſt. 379, 380.

* F. N. B. B. 119. (c) S. P.

F. N. B. 117. (C) S. P.—But

[2. It lies *not againſt executors* upon a *receipt by their teſtator*. 48 E. 3. 2.]

if the *bailiff's executors* do *account* with J. S. *of their own free will*, J. S. ſhall have *debt* on the arrears or balance of ſuch account. F. N. B. 117. (C) in the new notes there (b) ſays, ſee account againſt them as executors. 2 H. 4. 13.

An act on of debt was brought *againſt an adminiſtrator for* 20*l. received by his inteſtate, to lay out on the plaintiff's adventure* for French prunes at Roan, by the plaintiff. And it was adjudged that the action did well lie, and not in account. Trin. 28 H. 8. D. 20. Core v. Woodye.——*But adminiſtrator of an apprentice*, who was ſent by his maſter as a *factor in the Weſt Indies*, was decreed to account. Fin. R. 125. Mich. 26 Car. 2. Lee v. Bowler.

That it lies for the king, ſee prerogative (P)——Though the king has prerogative to charge the executors of an accountant, yet he ought to charge them only where the teſtator was chargeable in law, in one of the 3 caſes, viz. as guardian in ſocage, bailiff, or receiver. 11 Rep. 89. b. in caſe of the earl of Devonſhire.

[3. If *the king grants the land of a ward* to another, and a *ſtranger enters* upon his poſſeſſion, and levies the profits of the land, the grantee may have account againſt him. 11 H. 4. 65.]

*[142]

† Br. Account, pl. 80. cites S. C.—

[4. If a man *ſeiſes* land *as guardian in chivalry, where the heir holds of him in ſocage*, he ſhall have a writ of account againſt him for the profits. 49 E. 10. † 10 H. 6, 7.]

S. P. For he that ſeizes in ſuch manner ſhall be only bailiff to the infant. F. N. B. 118. (B) in the new notes *there (a) cites 28 Aſſ. 13. and 24 Aſſ. 10. and that the heir ſhall have account againſt him as guardian in ſocage, cites 10 H. 6. 7. Per Cott. 41 E. 3. Account 35. 32 E. 3. Account 59.—So if a man *ſeiſes an infant as guardian in ſocage*, and *is not prochein amy*, yet action of account lies againſt him. Br. Account, pl. 8. cites 33 H. 6. 2.

In account againſt a bailiff and receiver, it is a good plea to the writ to ſay that he was guardian in ſocage of the tenements, &c. Thel. Dig. 173. lib. 11. cap. 53. ſ. 13. cites Paſch. 32 E. 3. Account 60.

Account was brought *againſt a lord by the tenant, as occupier* of the land which the tenant, now plaintiff, held of the defendant *in ſocage*; and the *defendant ſaid that the anceſtor held of him in chivalry*, by which he took it for ward, judgment, &c. And ſo ſee that *account is admitted to lie againſt occupier of the land without privity*; therefore *quære if the defendant might have ſaid here that never his bailiff or receiver to render account*; and if account lies againſt pernor of a rent by diſſeiſin. Br. Account, pl. 22. cites 49 E. 3. 10.

[5. If

[5. If *A. ſeiſes B. for his ward* in chivalry, and *C. by the command of A. receives the rents* from the tenants of B. *to the uſe of the plaintiff*, * though he was not of right in ward to A. yet he ſhall not have any account againſt C. for the rents received by him, becauſe there is not any privity between them, inaſmuch as he received them as ſervant to A. Dubitatur. Paſch. 11 Jac. B. R. Morley's caſe.] * Fol. 118.

[6. If I *deliver money to B. to deliver to C. to my uſe*, if B. gives it to C. no account lies againſt C. for he is not privy to the uſe, but it lies againſt B. 2 H. 4. 12. b.] S. P. Per Hank. quod non contradicitur; for

he does not receive for me nor to my uſe. Br. Account, pl. 24. cites S. C. Brooke ſays, That from hence it ſeems, that a diſſeiſor or pernor by tort, who receives to his own uſe, ſhall never be charged to account; for the general iſſue ne unques ſon receiver is true.

7. If a *feme guardian in ſocage takes huſband*, account lies againſt both. F. N. B. 118. (B) in the new notes there (a) cites 18 E. 3. 55. But ibid. ſays, account lies againſt the

baron alone for the profit taken after the coverture; but for thoſe taken before it, lies againſt both, cites 8 E. 2. Brief 847.

8. Though the *power of guardian in ſocage is gone by the infant's taking a huſband*, yet they ſhall have account againſt the guardian, if he continues after. F. N. B. 118. (B) in the new notes there (a) cites 10 R. 2. Account 132. but that Litt. 27. is contra. 4 E. 3. Account 107. 12 H. 7. 26. 6 E. 2. Account 20. 29 E. 3. 5. contra.

9. In *debt upon recovery of damages*, it is a good *plea that the ſheriff has levied the money by fieri facias* ſued thereof by the plaintiff within the year, by the beſt opinion; and if he *has not delivered them to the court nor the party*, the plaintiff may have action of account againſt the ſheriff, as it ſeems there. Br. Dette, pl. 63. cites 11 H. 4. 58.

10. Account lies not againſt a *diſſeiſor*. F. N. B. 118. (B) in the new notes there (a) cites 33 H. 6. 2. 2 H. 4. 12. S. P. For then the diſſeiſee

ſhall avoid deſcents for his pleaſure, and alſo the defendant *was never his receiver to render account*; for this cannot be without privity in law or in deed, as by aſſignment, or as guardian, &c. or by pretence of the defendant to the uſe of the plaintiff, and *not where the defendant claims to his own uſe*; for there the plea is true, Never his receiver or bailiff to account, &c. Br. Accompt, pl. 89. cites 2 M. 1.

11. *He who takes the profits de ſon tort demeſne*, ſhall account thereof; per Pigot. Quære. Br. Accompt, pl. 76. cites 22 E. 4. 5. One that *entered without a title* into

houſes, was decreed to account for the *rent*. Fin. Rep. 285. Hill. 29 Car. 2. Liſter v. Liſter.

12. *Guardian who cannot ſell* ſhall account. Br. Account, pl. 94. cites 10 H. 7. 6.

13. If a man claims *to be guardian of an infant, and is not guardian*, and enters and occupies, action of *waſte lies, and therefore action of account*, as it ſeems; and *contra where he enters as treſpaſſor*. Note a difference. Br. Account, pl. 93.

14. If a man *holds* certain *lands* of me, *by the ſervice of being my bailiff of my manor*, I ſhall have account againſt him, though he never took the profits, becauſe he is my bailiff by his tenure; [143]

per Fitzh. F. N. B. 116. (Q) in the new notes there (c) cites 18 H. 8. 5.

One entered by colour of a deviſe, and occupied for the ſpace of 20 years; after which it was adjudged that the will was void, whereupon the perſon whoſe right it was brought account, and adjudged that the action lay not. Dal. 99. pl. 30. cited per Manwood, as the caſe of Moneux. ——S. C. cited Ow. 84. ——S. C. cited by Manwood J. 3 Le. 24.

15. If one *enters into lands claiming by deviſe*, where, in truth, *the land deviſed is entailed*, he ſhall not be charged in account, &c. Adjudged Le. 266. pl. 357. 20 Eliz. C. B. Anon.

16. If I *retain one to go about my buſineſs*, he is not accountable; per Anderſon. But per Windham, if I *deliver to him money to diſburſe in ſuch buſineſs*, he is accountable, which Anderſon granted; but ſaid that this is not in reſpect of the retainer, but as he was receiver; and if he expends more than he hath received, he does it without warrant, and no allowance ſhall be made him. Le. 219. pl. 301. Mich. 32 & 33 Eliz. C. B. in caſe of Gawton v. Ld. Dacres.

17. *Rents* taken *by colour of a title that is avoided*, the receiver ſhall be accountable as *bailiff*. Chan. Caſes 126. Paſch. 21 Car. 2. Hele v. Stowell.

18. If *money* be *delivered* to A. by B. *to be kept without any conſideration* or reward for ſo doing, if A. be *robbed*, he is diſcharged, and B. ſhall bear the loſs, contrary to Co. Litt. 123. 88. b. per Pemberton Ch. J. 2 Show. 172. Mich. 33 Car. 2. B. R. King v. Sheriff of Hertford.

* See Tit. Ley-Gager (H) pl. 17. Page v. Barns.

19. 4 & 5 *Ann. cap.* 16. *ſ.* 27. *Actions of account may be maintained againſt the executors and adminiſtrators of every guardian, * bailiff, and receiver; and the auditors appointed by the court ſhall adminiſter an oath, and examine the parties, and for their pains have ſuch allowance as the court ſhall adjudge reaſonable, to be paid by the party on whoſe ſide the balance ſhall be.*

(E) *Againſt whom* it lies, *and by whom.*

See (C.) pl. 4.

[1. IF *one executor* receives a debt of the teſtator, the other cannot have account againſt him. 11 H. 4. 79.]

If 2 joint merchants occupy their ſtock, goods, or merchandizes in common, to their common profit, one of them *naming himſelf a merchant ſhall have an account againſt the other, naming him a merchant*, and ſhall charge him as receptor denariorium ipſius B. ex quacunque cauſa & contractu ad communem utilitatem ipſorum A. & B. provenien' ſicut per legem mercatoriam rationabiliter monſtrare poterit. Co. Litt. 172. a. — F. N. B. 117. (D) S. P. accordingly. And ibid (E) ſays that the executor of one merchant ſhall have ſuch writ againſt the other merchant, but not againſt his executors.

[2. If *two merchants* have goods *in common*, the one ſhall not have account againſt the other. 11 H. 4. 79.]

Where 2 *tenants in common of goods* are, and the *one* of them *bails the goods to the other to merchandize ad communem utilitatem* eorundem, he who bails ſhall have writ of account againſt the other. Thel. Dig. 27. lib. 2. cap. 3. ſ. 13. cites Hill. 10 H. 7. 16.

See (C) pl. 1. If *10l. be paid to W. N. to my uſe*, I may have action of account againſt W. N. of it; per Wang. & Billing. Quod non negatur.

[3. If one *receives money to the common profit of himſelf and J. S.* J. S. ſhall not have a writ of account againſt him. See 14 E. 3. Account 70. Contra 20 E. 1. Itinere Cornubiæ, Account 27.]

negatur. Br. Accompt, pl. 61. cites 36 H. 6. 10. and Lib. Ent. 53. that he may have action of debt; *but Brooke makes a quære thereof.——Godb. 210. in CLARK's caſe, it is held that he may have debt or account at his election.

[4. If a *general receiver* of J. S. throughout England, *makes J. D. his deputy* receiver in one county, and *the deputy receives ſeveral* things by force thereof, and the *general receiver makes up his account thereof* with J. S. he may after have a writ of account againſt his deputy for the ſaid things, though before the account was made by the general receiver the deputy was in a manner receiver to J. S. 11 R. 2. Account 48.]

[5. *So* a *ſheriff* may have an account *againſt his deputy*; for he himſelf is accountable over to the king. 11 R. 2. Account 48.]

6. If a *receiver or bailiff makes a deputy*, yet the action of *account ſhall be brought againſt the receiver or bailiff themſelves*, and *not againſt their deputies*; for the deputies receive the ſame to their maſter's uſes. F. N. B. 119. (B) And the immediate bailiff ſhall have account againſt his deputy. Note, he ſurmiſed that he had accounted. F. N. B. 119. (B) in the new notes there (b) cites 4 E. 3. 17. & 8. 11 R. 2. Account.—Though in the caſe of the *king* he may have an account againſt a *clerk of a ſurveyor of the ordnance*, for money delivered by the ſurveyor to the clerk, notwithſtanding a want of privity; yet it is otherwiſe in the caſe of a *common perſon*; for if any receiver makes one his deputy, the principal ſhall not have account againſt ſuch deputy. 4 Le. 32. pl. 89. 33 Eliz. in the exchequer. The Queen v. Painter.

7. *Two purchaſed a manor for life*, and *one of them took upon him to be bailiff to the other*. No account lies. F. N. B. 117. (D) marg. cites 8 E. 2. Account 115. and 21 E. 3. Account 66. 30 E. 1. Account 127.

8. Account lies againſt an *abbot*, notwithſtanding the *receipt was by his predeceſſor*. F. N. B. 117. (F) marg. cites 20 E. 3. Account 78.

9. *Succeſſor*, prior or abbot, or maſter of an hoſpital, ſhall have account againſt the predeceſſor's bailiff or receiver. F. N. B. 117. (F) S. P. Thel. Dig. lib. 1. cap. 17. pl. 9. cites Hill. 31 E. 3. Accompt 57.——F. N. B. 117. (C) in the new notes there (a) cites S. C. and Accompt 124. But that it is contra of an *heir*, and cites 19 E. 3. Account 56.

10. A *bailiff* ſhall *not* have an account *againſt his maſter for a ſurplus on account*. F. N. B. 116. (Q) in the new notes there (c) cites 41 E. 3. Account 33. Quære.

12. Account as *receiver of money of D. and S.* The *defendant ſaid as to the receipt in D. that the plaintiff's father had land there, and infeoffed the defendant of it till the plaintiff came to full age, and the receipts were during the nonage*; judgment ſi actio, &c. And *as to the receipt in S. of* 18*l. by the hands of B.* he *ſaid that B. gave the* 18*l. to him, abſque hoc that he received it to his uſe*; and it was held no plea, but ſhall plead the uſual iſſue, that he was not receiver, &c. by the hands of the ſaid B. and ſo he did. Quod nota. Br. Account, pl. 24. cites 2 H. 4. 12.

13. Action of account does not lie againſt *executor*. Br. Account, pl. 25. cites 2 H. 4. 13. But if he will account where he need not, he ſhall be charged of the goods of the deceaſed. Br. Dette, pl. 52. cites S. C.——S. P. by a common perſon. Br. Accompt, pl. 85. cites Littleton, Tit. Socage. But the *king* may have account againſt executors.

F. N. B. 118. (H) S. P. If 2 *are jointly poſſeſſed of goods*, and *one* of them *delivers the goods for merchandize*, he only ſhall bring the action. Brown. 25. Anon. ——See Cro. J. 410. pl. 10. Mich. 14 Jac. B. R. Hackwell v. Euſtman.

14. In detinue, if 2 *have goods in common*, and *the one bails the goods to N. to render account*, he alone ſhall have the action; per Tremaile. Quod non negatur. But where 2 bail, both ſhall have the action. Br. Accompt, pl. 32. cites 12 H. 4. 18.

So where a man occupies my manor of his own head, I ſhall have action of account againſt him; contra per Moyle. Ibid.

*15. Note in treſpaſs, per Priſot, that the *king* may bring action of account *againſt one*, as bailiff, *who occupied of his own head*. Br. Accompt, pl. 8. cites 33 H. 6. 2.

Church-wardens ſhall have action of account againſt their predeceſſors.

16. The *pariſhioners* ſhall *not* have action of account *againſt the church-wardens*, *but* they may make other wardens, and the *new wardens* ſhall have account againſt the firſt wardens; per Needham; quod non negatur. Br. Accompt, pl. 71. cites 8 E. 4. 6. Thel. Dig. lib. 2. cap. 23. pl. 3.

17. The *pariſh-prieſt* ſhall not be *charged for the offerings* offered by a writ of account, if it be not otherwiſe agreed betwixt them, &c. For the clerk holds the veſſel in which they are put. F. N. B. 119. (E) cites 6 E. 6. pl. 7.

18. If a man have cauſe to have an account *againſt one as bailiff or receiver*, if he dies his *executors* ſhall have the action. F. N. B. 117. (C)

[*But*] F. N. B. 119. (A) in the new notes there (a) ſays, ſee 11 R. 2. Account 49. that for rent iſſuing out of a freehold *by* one [*a ſtranger*] during the coverture, the *feme ſhall have account, and not the huſband's executors*. Contra of other receipts.

19. If the *huſband* has *received the profits of the wife's lands, and dies*, the wife ſhall not have a writ of account of the profits, nor of the rents, during the coverture, againſt the huſband's executors. F. N. B. 119. (A)

20. Two are *parceners of merchandizes in one ſhip*, and *one* of them *appoints a factor of all* the merchandizes. It was moved, and not denied by the juſtices, that both of them *may have ſeveral writs* of account againſt him, *or* they may *join in one writ of account*, if they pleaſe. But the reporter ſays, quære of that. Godb. 90. pl. 101. Mich. 28 & 29 Eliz. B. R. Anon.

(E. 2) Where ſeveral muſt join.

But it is *otherwiſe* where two *tenants in common* are of a manor, and the *one makes bailiff for himſelf alone*, who adminiſters for him alone. Thel. Dig. 26. lib. 2. cap. 2. ſ. 18. cites 30 E. 1. Itin. Cornub. Accompt 127. and ſays, ſee Trin. 39 E. 3. fol. 19. where, in account againſt a *common bailiff*, he *ſaid, that the manor was leaſed to the plaintiff, and another who is dead, and made 2 his executors not named*, judgment, &c.

1. WHERE there are 2 *jointenants of a manor*, they ought to join in account *againſt the bailiff* of the manor, notwithſtanding the bailiff was *made by one* of them. Thel. Dig. 26. lib. 2. cap. 2. ſ. 18. cites Mich. 13 E. 2. and Hill. 15 E. 2. Accompt 118, 119.

2. It was awarded, that where 2 *have wines in common*, and the *one* of them *bails the wines to a ſtranger to ſell*, the bailor alone ſhall have action of account againſt the bailee. Thel. Dig. 26. lib. 2. cap. 2. ſ. 20. cites Trin. 43 E. 3. 21. and ſays, ſee Trin. 31 E. 1. Accompt 126. and 12 H. 4. 18.

*3. Where one was *receiver to a feme ſole*, and after *ſhe took baron*, and *they aſſigned auditors*, it was the clear opinion of the court, that they might join in writ of debt of arrearages of account. Thel. Dig. 30. lib. 2. cap. 5. ſ. 24. cites Mich. 16 E. 4. 8.

(F) How it ſhall be brought. *By what Name*, as Bailiff.

[1. NONE ſhall be charged in account *but as guardian* in ſocage, *bailiff, or receiver*. Co. 11. *Earl of Devon* 89. b.]

[2. If a man *delivers goods to another to ſell*, and he ſells them accordingly, and receives the money, the bailor ought to charge him *as bailiff*, and not as receiver. 46 E. 3. b. 9. For he ought to be allowed for his coſts. 43 E. 3. 21. b. 13 R. 2. Account 50. Quære 4 H. 6. 27.]

Br. Accompt, pl. 17. cites S. C. per Finch.—— Br. Accompt, pl. 18. cites S. C.——F. N. B. 116. (Q) in the new notes there (c) S. P. [but ſeems to be miſprinted] cites 41 E. 3. 21. 46 E. 3. 9. 4 H. 6. 27.——Account as *receiver*, and *counted that he bailed to him* 2 tuns of wine to ſell for him, and *he received of J.* 10s. *and of W.* 10s. *and of another the riſt, and did not ſhew by whoſe hands*, &c. And per cur. he ought to ſhew by whoſe hands in account as receiver, and *if he cannot put it in certain, he may bring writ of account againſt him as his bailiff*, and count of the bailment of the ſtuff to merchandize. Quod nota. And per cur. if the ſum of the receipt be 13s. or other ſum under 40s. yet the *action does not lie before the ſheriff*; quod nota; and the reaſon ſeems to be, *becauſe a ſheriff cannot aſſign auditors*. Br. Account, pl. 14. cites 43 E. 3. 21.

Account as *againſt receiver, and counted of receipt by diverſe hands of diverſe ſums*. Rolfe demanded judgment of the writ; for the *plaintiff was poſſeſſed of* 12 *truels of wood, and bailed them to the defendant to ſell, and to render account* of the money ariſing therefrom, *ſaving to the defendant reaſonable coſts for his labour, and coſts* of it; *by which he ſold to the perſons compriſed in the count, and for the ſums in the count*, in which caſe he ought to have action of account againſt him as bailiff, and not as againſt receiver; & adjornatur. But Brooke ſays, it ſeems that the law is with Rolfe; for it *does not lie as againſt receiver, but where the ſums are aſcertained at the time of the conſtituting of him to be receiver.*—— Br. Accompt, pl. 53. cites 4 H. 6. 27. ——*But* where *ſtuff is bailed to ſell, and to render account*, there it is not certain till they are ſold, and that he has received; and alſo in *account as bailiff*, he ſhall have certain *allowances* for his labour, *which is not allowable in account againſt receiver*. Ibid.

[3. If a man hath a *taverner to ſell his goods*, he ought to charge him *as bailiff*. 46 E. 3. 3. b.]

Br. Accompt, pl. 17. cites S. C. per Finch.

[4. If a man makes another *bailiff of his manor*, he ought to be charged *as bailiff*, and not as receiver, becauſe he ought to approve. 9 E. 4. 40. b.]

Br. Accompt, pl. 56. cites S. C. but S. P. does not appear.——F. N. B. 116. (P) S. P.

[5. If a man makes another *receiver of all the rents* of his tenants, the writ ſhall be againſt him *as receiver*, and not as bailiff; for he cannot approve. 9 E. 4. 40. b.]

S. P. Br. Accompt, pl. 56. cites S. C.—— F. N. B. 116. (P) S. P.

S. P. Br. Accompt, pl. 56. cites S. C. —— The plaintiff counted that the defendant was *bailiff of his borough in* R. from Mich. ſuch a year, for one whole year, &c. *and had power of leaſing the tenements parcel of the ſaid borough, and collecting the rents*, &c. *due to the plaintiff, ratione burgi illius*, &c. The defendant *pleaded, that* at the time, &c. *he was receiver*, &c. *abſque hoc that he was bailiff.* At the niſi prius was given in evidence a *cuſtom time out of mind*, within the borough, *to chooſe* one of the tenants at the borough court to be *portreve*, to collect the rents ratione tenuræ ſuæ, when his turn ſhould come, who uſed to account before the auditors of the plaintiff and his predeceſſor, to have allowance, &c. and that the *defendant was elected* ſuch a day at ſuch a court to be portreve ratione tenuræ, viz. to collect the rents, &c. for that year, &c. The whole court held, that the evidence did not maintain the action as bailiff, the *count being general as bailiff of the plaintiff*, whereas the *evidence charges him ſpecially ratione tenuræ*, ſo that the *count ſhould have been ſpecial* according to the matter; whereupon the plaintiff purchaſed a new writ againſt the defendant as bailiff, and counted ſpecially. Kelw. 75 b. 76. a. pl. 23. Mich. 21 H. 7. the Abbot of Bukefaſt v. Horſwill.

[6. If a man alleges a *ſpecial preſcription that a bailiff ought to be found for him, as that there is a borough within his manor*, within which he hath part of the *market, and a court of piepowders*, &c. *and that the defendant is bailiff thereof, and received the profits*, &c. though it appears that he ought to do nothing but collect the fee-farms, iſſues, fines, and amerciaments, the which are certain, * yet becauſe he is named *bailiff*, he ought to be named according to the name that he had by preſcription. 9 E. 4. 40. b.]

S. P. Br. Accompt, pl. 56. cites S. C. per Littleton.

[7. If a man makes another *bailiff of his hundred*, he ſhall be charged by the name of bailiff, becauſe he hath the name, and may approve, as to ſee that all things are preſented, &c. 9 E. 4. 40. b.]

[8. If a man *leaſes his manor rendering rent*, and after *makes a bailiff* of the ſaid manor, *and he receives the rent*, yet he ſhall not be charged as bailiff, but *as receiver*. Mich. 3 Jac. B. R. between *Cage and Peacock*. Agreed.]

See (H) pl. 3. the ſame caſes. —— In account by merchant againſt factor, as receptor bonorum & merchandizorum ad compotum inde reddendum, and ſo *declared of diverſe goods in particular*, but *ſays not by whoſe hands*; and judgment for the plaintiff by default, quod computet. Then the defendant pleaded an inſufficient plea before the auditors, whereupon the plaintiff demurred, and had judgment, and writ to inquire of damages. It was moved in arreſt of judgment, that the declaration was ill, becauſe he charges him as receiver, and ſays not by whoſe hands; and that in this caſe he ought not to be charged as receiver, but as bailiff, he being to merchandize with the goods, and ſo to have his expences, allowances, and factorage, and judgment in account as receiver is no bar in account as factor. But adjudged for the plaintiff; though Hale ſaid he ought to be charged as bailiff; but this ought to be by demurrer upon the declaration, which is now paſſed by the judgment quod computet. 2 Lev. 126. Hill. 26 & 27 Car. 2. B. R. Burdet v. Thrule. ——— 3 Keb. 387. pl. 78. S. C. ſays, the defendant ſhould have demurred to the declaration, and judgment for the plaintiff. ——— Ibid. 435. pl. 41. S. C. ſays, that the being charged as receiver, and not as bailiff, ſhould have been excepted to before the auditors, or on plea of ne unques receptor, or have demurred ſpecially; and this being after 2d judgment, and error depending, the exception comes too late; and judgment for the plaintiff. ——— Mr. Danvers, in a note on this plea, ſays, that this muſt be ſpecially pleaded; and ſo he ſuppoſes this caſe in 2 Lev. 126. muſt be intended, though ſaid the advantage muſt be taken by demurrer to the declaration.

[9. A *receiver that never takes upon him to be a bailiff*, cannot be charged as bailiff, becauſe then he may be twice charged. 21 E. 3. 60. 41 E. 3. Account 34. Admitted by iſſue, and alſo in account as bailiff he ſhall have allowance of his coſts and expences, which he ſhall not be allowed where he is charged *as receiver*. Co. Litt. 172.]

Br. Accompt, pl. 15. cites S. C. but S. P. does not appear.

[10. A man may be charged *as bailiff and receiver of ſeveral things in one action*. 43 E. 3. 1. b. 27 E. 3. 79. 44 E. 3. Account 31. 44 E. 3. 1. 41 E. 3. Account 34. 32 E. 3. Account 6.]

If

If a man *makes one his bailiff, &c. and alſo his receiver*, then he ſhall have account againſt him as bailiff, and alſo as receiver. F. N. B. 116. (P)

Account of receipts of a manor in Rye, which is one of the *cinque ports*, and the receipt *as bailiff* was *in the caſtle of Rye*, where *every caſtle is of the county and of the guildable*, though it be in the franchiſe; and *for this part he counted againſt him as bailiff, and of the reſt as receiver of the money*; and therefore for this part the court was ouſted of the juriſdiction, and had juriſdiction of the reſt. Br. Juriſdiction, pl. 94. cites 49 E. 3. 24.

Account was brought againſt S. as bailiff and receiver *of the manor of D.* but ſhewed only that he was bailiff thereof, and found for the plaintiff. It was moved that the declaration was not good, becauſe he *ſhews no charge againſt him as receiver*. Sed non allocatur, it being more for the defendant's benefit, and therefore adjudged for the plaintiff. Cro. C. 240. pl. 25. Mich. 7 Car. B. R. Wells v. Some.

11. If a man *enters into my land to my uſe, and receives the profits* thereof, I ſhall have an account againſt him as bailiff. F. N. B. 117. (A)

12. If the *father occupies the land of an infant, which the infant has purchaſed, or hath by purchaſe*, the infant ſhall have an account againſt him as bailiff of his lands, and this writ of account may be ſued as well in the county as in the common pleas. F. N. B. 117. (B) [148]

13. If the defendant is charged as *bailiff of goods ad merchandizandum*, he *ſhall anſwer for the increaſe, and be puniſhed for negligence; but if* he is charged *as receiver ad computandum*, he ſhall *anſwer* for the increaſe, and be puniſhed for negligence; but if he is charged as receiver ad computandum, he ſhall anſwer *only for the money or thing delivered*. Godb. 55. pl. 69. Mich. 28 & 29 Eliz. B. R. by Egerton ſolicitor-general, in caſe of Gomerſall v. Gomerſall.

(G) By what Name.

[1. *A Surveyor of a manor* cannot be charged as bailiff *where there is another that is above him, and hath the care* and adminiſtration of the whole. 12 E. 3. Account 75.]

[2. If a man makes another bailiff *of his woods to expoſe them to ſale*, he may be charged *as bailiff*, though he does not ſell them. 34 E. 3. Account 131.] F.N.B.116. (P) in the new notes there (b) cites S. C. and ſays, ſee 9 E. 4. 40. 9 E. 3. 37.

[3. *An apprentice* by the name of apprentice is not chargeable in account. Co. 11. *Earl of Devon* 89. b.] Ibid. cites 8 E. 3. 46. F. N. B. 119.

(D) 7 H. 4. 14. b. —— S. P. per Fenner J. Goldſb. 161. pl. 94. Hill. 43 Eliz. Anon. —— S. P. F. N. B. 119. (D) in marg. cites 6 E. 3. 3. Account 102. and 8 E. 3. Account 94. Account as receiver, the defendant ſaid that he was his apprentice; and no plea, but he was forced to anſwer to the receipt.

4. *Ballivus domus* ſhall be charged for goods delivered to him as bailiff in account. F. N. B. 116. (P) in the new notes there (b) cites 2 R. 2. Account 46.

5. Account is maintainable againſt a *ſervant*. Per Fenner J. Goldſb. 161. pl. 94. Hill. 43 Eliz. Anon. The maſter ſhall have a writ of account *againſt a ſervant* who is ſent to receive * money, &c. *if he be receiver*. F. N. B. 119. (D)

* If they are not in a bag ſealed. Ibid. in the new notes there (d) cites 29 E. 3. 20. 8 E. 3. 261.

But, per Powel J. a church-warden muſt be charged as receiver. 11 Mod. 187. S. C.

6. *Church-wardens* are more than bare receivers, and are in all reſpects bailiffs, and therefore ſhall be allowed their expences and ſurpluſage in caſe their expences out-balanced, &c. Per cur. clearly. 10 Mod. 23. Paſch. 10 Ann. B. R. Biſhop and Eagle.

(H) How it ſhall be brought. By what Name he ſhall be charged as Receiver.

[1. IF *J. S.* is *obliged to me with condition for the payment* of a ſmall ſum, and *I deliver this to another to receive* what he can of J. S. if the *bailee delivers the obligation to J. S. without receipt of any money from him*, I cannot charge the bailee as receiver, for he did not receive any money, and alſo I cannot ſet forth a [149] certain ſum as I ought in ſuch action, and therefore I am put to my writ of *detinue*. 2 R. 2. Account 46.]

[2. If a man *receives the rent due from my leſſee* for life, or my tenants, an account lies againſt him *as receiver*. 11 R. 2. Account 49. 6 R. 2. Account 47. per Brough, and Belknap is not contrary thereto.]

See (F) pl. 9. S. C. and the notes there.—— A man ſhall not have writ of account againſt one as receiver, where he ought to ſue the writ againſt him as bailiff or guardian in focage. Thel. Dig. 51. lib. 6. cap. 4. ſ. 6. cites Paſch. 18 E. 4. 2. 4. and ſays, ſee Trin. 4 H. 6. 26.

[3. A *bailiff cannot be charged as receiver*, becauſe, if he be charged as bailiff, he ſhall upon his account have allowance of his charges and expences, of which he ſhall not have allowance where he is charged as receiver, and alſo becauſe there is ſo *material a difference between a bailiff and a receiver*, that he cannot plead when he is charged as bailiff that at another time he was charged as receiver; and therefore if this writ to charge a bailiff as receiver ſhould be allowed, he ſhould be twice charged for the ſame thing. 21 E. 3. 60. 41 E. 3. Account 34. admitted per iſſue.]

Mo. 862. pl. 1184. Hill. * Fol. 120. 12 Jac. S. C. adjudged accordingly. — Brownl. 26. S. C. adjudged for the plaintiff. —Hob. 36. pl. 40. S. C. and ſays, that though the books of 1 E. 5. and other books, are, that if A. deliver money over to B. to deliver and pay over to C. that in this caſe B. is anſwerable to 2 actions of account conditionally, as the books are, yet as this caſe is, B. could never have had an action of account againſt C. for his money, becauſe he had put himſelf out of the property of it by appointing

[4. If *B.* is *indebted to A.* in 200 l. and *A. appoints C. to* enquire and *receive of B. the* 200 *l.* and *B. alſo appoints C. to borrow it, and to pay it* * *to A.* and after *C. borrows it* of a ſtranger *for B. to pay to A.* and he appoints his wife to pay it to A. and after *B. gives bond for the money to the ſtranger*; in this caſe A. may have a writ of *account* againſt C. *as his receiver by the hands of B.* for C. was a ſervant as well to A. as to B. and he received it as the money of B. to pay over to A. though it does not appear that the ſtranger paid it to C. to the intent to pay it over to A. Hob. Rep. between *Harrington and Deane*, adjudged upon a ſpecial verdict, 10 Jac. b. For inaſmuch as C. was appointed by A. to receive the money of B. and he received it by the appointment for A. it was the money of A. and the property in him, and B. cannot charge him in an account for it.]

pointing C. to pay it over unto A. for his debt, and A. had accepted it and made it his ſatisfaction by appointing C. to receive it by the hands of B. and C. had received it to that intent, and in execution of all parts of that agreement, and ſo all parties were bound by it.

5. The account of *guardian in ſocage* is only for the iſſues of the land; for if he receives other monies, he ſhall be charged as receiver. F. N. B. 118. (B) in the new notes there (a) cites 32 E. 3. Account 60.

6. Account *againſt a feme ſole ut receptrix*, and the writ awarded good. So, *ut balliva*; quod nota; and if it be not good form, yet when it paſſes the Chancery it is good. Br. Faux Latin, pl. 32. cites 19 H. 4. 5.

7. A man ſhall have a writ of account againſt one as bailiff or receiver, where he was not his bailiff or receiver; for if a man *receives money for my uſe*, I ſhall have an account againſt him as receiver; for if a man *delivers money unto another to deliver over unto me*, I ſhall have an account againſt him as my receiver. F. N. B. 116. (Q)

8. An account againſt a *receiver*, *is* when one receives money to the uſe of another to render an account, but upon his account he *ſhall not be allowed his expences* and charges; and therefore a man *cannot charge a bailiff as a receiver*, becauſe then the bailiff ſhould loſe his expences and charges. Co. Litt. 172. a. (c)

9. After judgment quod computet, a 2d judgment was given againſt the defendant; and it was moved in arreſt, that the *action* was brought *againſt the defendant as receiver of goods ad merchandizandum*, and that it ſhould be as bailiff of goods, and a receiver of money; and that ſo are all the precedents, and material; for a bailiff ſhall have his charges allowed, but not a receiver. But it was anſwered, that it is well enough; and cited Fitzh. Account 47. and Roll. Abr. 125. 575. and that this is out of the reaſon of the difference, becauſe a receiver ad merchandizandum ſhall have his charges; and ſo is Co. Ent. 42. and ſo it is but matter of form; ad quod curia inclinavit. Sed adjornatur. Freem. Rep. 378. pl. 493. Mich. 1672. Bradenend v. Greene. [150]

10. In account by one tenant in common againſt another, as bailiff, and alſo as receiver of ſo much profits of the lands held in common, and for ſo much money by the defendant received to the plaintiff's uſe. The defendant demurred, it not being alledged by whoſe hands he received it. But it was urged, that this exception was taken away by 4 & 5 Ann. cap. 16. which gives account to one tenant in common againſt another; ſo that it appearing by the declaration that they are tenants in common, it is ſufficient, without ſaying by whoſe hands the profits were received. Sed non allocatur; for by the ſtatute the one cannot charge the other but as bailiff; for by the common law account lay not for the one againſt his companion, but where expreſs authority was given to take his part, and then he was chargeable as bailiff; but now by this ſtatute he may be charged. If he receives his companion's ſhare, though without his privity, yet he ought to be charged as bailiff by the expreſs words of the ſtatute, and cannot be charged as receiver; and therefore as the declaration

charges

charges him as bailiff, and alſo as receiver, it ought to be ſhewn by whoſe hands, as at common law; and judgment for the defendant. Comyns's Rep. 272. pl. 150. Mich. 4 Geo. 1. C. B. Walker v. Holyday.

(I) How it ſhall be brought. By other Hands. What ſhall be ſaid *other Hands*.

[1. IF the *defendant* received by the hands of his *wife*, this is by another's hand. 43 E. 3. 33.]

S. P. Br. Baron and Feme, pl. 51. cites 15 E. 4. 16. Nor this ſhall not ouſt the defendant of his law.

[2. *But* if the defendant received by the hands of the *wife of the plaintiff*, this is not by another's hand, but by the plaintiff himſelf. 43 E. 3. 33.]

See (K) pl. 2. S. C. and the note.

[3. *So* if he received by the hand of the *commoigne* of the plaintiff. 47 E. 3. 16.]

D. 183. b. pl. 60. Paſch. 2 Eliz. S. P. Anon.

[4. If executor brings account of a receipt by the *hands of his teſtator*, this is by another's hand. 43 E. 3. 33.]

[5. A man may count of a receipt by the hands of the *wife of the defendant*. 15 E. 4. 16.]

If the receipt be alleged by the hands of a feme, and does not name her the feme of the plaintiff, this is good. Br. Accompt, pl. 19. cites S. C.——The baron cannot ſuppoſe the receipt to be by the hands of his own feme; for they are one perſon in law; and therefore there the defendant may have his law. Br. Accompt, pl. 49. cites 15 E. 4. 15.

[6. A man may count of a receipt by the hands of the wife *of the plaintiff*. * 47 E. 3. 16. 13 H. 4. 8.]

* See (K) pl. 1. S. C.

[151]

Br. Account, pl. 19. cites S. C. —— S. P. Br. Account, pl. 49. cites 15 E. 4. 15.

[7. So he may count of a receipt by the hands of the *commoigne of the plaintiff*. 47 E. 3. 16. 13 H. 4. 8.]

If the receipt be alleged by the feme of another man, and does not name her the feme of her baron, it is ill, per cur. Br. Account, pl. 19. cites S. C. but Brooke ſays the caſe is ill reported.

[8. So he may count of a receipt by the hands of the *wife or commoigne of a ſtranger*. 47 E. 3. 16.]

[9. In account, a man may count of a receipt by the hands *of 2 ſtrangers*. 43 E. 3. 33.]

[10. *But* he cannot count of a receipt by the hands of the *plaintiff himſelf, and a ſtranger*; for this requires two iſſues. 43 E. 3. 33.]

[11. So for the ſame reaſon he cannot count of a receipt *by the defendant himſelf and a ſtranger*. 43 E. 3. 33.]

3 Le. 149. pl. 199. Cocket v. Robſton, S. C. and judgment to account, but S. P. as to the ſpecial manner

12. A. *delivered* 100 *l. to B. to deliver to C. for the relief of D. and E.* In account brought by D. and E. againſt C. to whom B. delivered the 100 l. the *writ and count was of a delivery by the hands of B.* After judgment for the plaintiff, it was *aſſigned for error, that the delivery ought to have been alleged to be by the hands of A.* for that B. delivered it as his ſervant, and it may be ſaid the delivery of the maſter, and the receipt, ought to be ſuppoſed by the

the hands of the maſter. But it was anſwered by Coke, that this differs from a contract made by a ſervant, which ſhall be ſaid the contract of the maſter, and he only charged for it; for here the *plaintiffs convey only a poſſeſſion, and not any intereſt by the hands of B. and ſo may count of a receipt by his hands.* Cro. Eliz. 82, 83. pl. 1. Hill. 30 Eliz. B. R. Robſert v. Andrews.

of declaring nothing appears. —— 2 Le. 118. pl. 160. S. C. and it was aſſigned for error, that the writ ought to be more ſpecial; but judgment was affirmed. —— 3 Le. 230. pl. 311. S. C. in almoſt the very ſame words.

13. In account as receptor denariorum the defendant *demurred* ſpecially, becauſe it is *not ſaid by whoſe hands.* And per curiam, it is ill. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Fripp.

(K) By what *Name.* [*Count. How.*]

[1. IF he counts of a receipt by the hands of *A. S.* if ſhe be *the wife of a ſtranger* he ought to *allege* that ſhe is the wife of him. *Otherwiſe* it is if ſhe be wife *to the plaintiff.* 47 E. 3. 16.]

Br. Account, pl. 19. cites S. C. —— A receipt made by the huſband by the hands of his wife is his own receipt, and the writ and the count ſhall ſuppoſe that he himſelf did receive, &c. without ſaying by the hands of the wife. F. N. B. 118. (F) —— And ibid. in the new notes (c) it is ſaid that the count ſhall not abate but when it ſuppoſes a receipt by the hands of the commoigne, or feme of the plaintiff or defendant, but it ſhall *not ouſt the defendant of his law.* But it ſeems the count is good, ſuppoſing the receipt immediate in ſuch caſe, cites 13 H. 4. 8. 2 H. 5. 2. 10 E. 4. 6. 15 E. 4. 16. 4 E. 3. pl. 45. 5 E. 3. pl. 6. contra.

[2. The ſame law if he declares of one who is *commoigne to a ſtranger*, and where to the plaintiff. 47 E. 3. 16. But vide Brook Account 19. where he ſays, that this is ill reported; and that it ſeems it ought to be alleged *in both caſes.*]

Br. Account, pl. 19. cites S. C. —— A man ſhall have an account *againſt a prior upon a receipt* had *by his commoigne, but* there the *writ ſuppoſes that he himſelf did receive* the money, &c. and ſhall not ſay by the hands of his commoigne. F. N. B. 118. (F)

3. If a *prior or huſband receives money of a ſtranger*, then the *count ſhall be that he received by the hands of the ſtranger*, &c. but the *writ ſhall be general*, tempore quo fuit receptor denar', without ſaying by whoſe hands; but he ſhall ſhew that in the count or declaration. F. N. B. 118. (F)

[152]

(K. 2) Joint-Bailiffs. Charged or Diſcharged. How. And Pleadings.

1. IF two are joint-bailiffs, the receipt of one is the receipt of the other; and if *one dies the other ſhall be charged of all*, and *a diſcharge to one is* a diſcharge *to both*; and if *one accounts after the proceſs determined againſt the other, and is charged* upon the account, *this ſhall charge the other* when he comes. Br. Charge, pl. 49. cites 41 E. 3. 3.

S. P. Br. Account, pl. 10. cites S. C. *And* per Thorpe, *if one be awarded to account, and will not* account, he ſhall be condemned in all the receipts. —— And where one is outlawed, and the other accounts, and the one *ſues charter of pardon*, and comes *and prays allowance, becauſe the plaintiff had*

had his account of the other, and to go quit. Quære thereof without execution; for it is not admitted in that point. But *it seems that he shall go quit*; for the plaintiff demanded only an account, and he has the account of the one; for *plene computavit* is a good plea in account; therefore it seems that where the plaintiff had had account, he shall never have account of it again. And in debt by 2, if the plaintiff has execution or payment by the one, he shall not have action against the other. And see 2 H. 4. 16. where 2 were warned in detinue, and the one made default, the default of him shall not prejudice the other by way of defence, contra ex parte querent', for there the default of the one is the nonsuit of both. But per Thorp and Finch. because they were awarded to account in common, therefore the *charge shall fall upon them in common*. Quære ibid. cites 41 E. 3. 3. 9.——S. C. cited Arg. 2 Le. 76. pl. 100. And see there the same point debated in the exchequer chamber.

Lee 2 Le. 75. pl. 100. 13 Eliz. in error, in the Exchequer, S. C. and the argument.

2. Where 2 are accountable, an *account made by the one* is not good; for both the accountants shall make but one account; and therefore the account of the one cannot be good; cited by Coke as the case of Gore v. Dawbeney, in the exchequer chamber, upon a writ of error. Le. 234. in pl. 316.

3. In account against 2 as receivers, it was moved that one of them could not *plead ne unques son receiver*, but ought to say ne unques son receiver, absque hoc that he and his companion were receivers; but Clench and Shute J. held, that it was *well without traverse*. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. Anon.

4. In account against 2, *one confessed the action*, and *the other pleaded ne unques receiver*, &c. Judgment was presently given against him that confessed the action, and issue joined upon the other was *found against the defendant*. It was moved that *one of the defendants was dead*, and so the whole bill should abate, though it was after judgment; but Gawdy conceived it should abate only against him that was dead. Adjornatur. Cro. E. 701. pl. 17. Mich. 41 & 42 Eliz. B. R. Hogobert v. Hokely and Spike.

Ibid. The reporter adds a quære as to this opinion of the court, since the declaration charges them jointly; so that when the other comes in, if it be found that he ought not to account, it seems that both shall be discharged; and so he says it seems to him, if the other had a release. Quære.

5. Account was brought against 2 jointly *by bill in B. R.* (and not by original) *one pleaded ne unques son baily*, and *found against him*; the *other made default*, and *judgment against him by default*, The *first is found by auditors so much in arrears*; and the court being moved for final judgment against him for so much as found, they were in doubt what to do; for no auditors ought to be assigned to him that appeared, the suit being joint against both, and *no outlawry can be against the other who did not appear (the suit being by bill*, and not by original) but only an alias capias in infinitum; and the book of 43 [41] E. 3. [3] is of * suit original. But afterwards the court was satisfied that *he who appeared being condemned in a sum certain before auditors, comes too late now to be relieved*. Sid. 159. pl. 12. Mich. 15 Car. 2. B. R. Davis v. Isaac and Martin.

*[153]

(L) What Pleas shall be in Bar of the Account.

So in account the defendant pleaded that he was not *receiver of the predecessor*; and admitted good. F. N. B. 117. (F) marg. cites 4 E. 3. 8. 14 H. 4. Account 124. 4 E. 2. 17. Account 97. 31 E. 3. Account 57. 25 E. 3. 45.

[1. IN account *against one as bailiff* it is a good plea in bar that he *was never his bailiff*. 21 E. 3. 60.]

[2. In

[2. In account againſt a bailiff *of his houſe*, and counts that he had *the care of certain goods*, it is not any plea in bar that the *plaintiff ſold to him the goods, without ſaying that he was not his bailiff*, for if he was his bailiff, he ought to account for the houſe, and the count had been good without alleging theſe particulars. 49 E. 3. 7.]

Br. Account, pl. 21. cites S. C.—— Godb. 57. Arg. cites S. C. and 14 H. 4. and ſays theſe caſes were not ruled; that in the one caſe the plea was of a gift of the goods, and in the other of a ſale, and demanded judgment of the action, and ſaid that it is no good anſwer; for they are pleas only before the auditors, and not in action of account.—2 Bulſt. 195. accordingly.

[3. *But* it is a good plea in bar of all, to ſay that he *never was the bailiff of his houſe*. 14 H. 4. 21.]

Br. Account, pl. 34. cites S. C. but S. P. does not fully appear.

[4. *So* in account againſt a bailiff *of a manor*, and that he had *the adminiſtration of certain oxen* there, never his bailiff of the manor is a good plea in bar of all. 14 H. 4. 21.]

Br. Account, pl. 34. cites S. C. but S. P. does not fully appear.

[5. In account againſt a bailiff, it is a good plea that he was *ſervant to the plaintiff to drive his plough*, and had his cattle for the drawing of his plough, abſque hoc that he was his bailiff in other manner, becauſe he is not accountable for this occupation. 7 H. 4. 14. b.]

Br. Account, pl. 29. cites S. C. accordingly; but if the beaſts periſh by his default, action on the caſe lies, as of goods impaired for default of good keeping.—Br. Action ſur Caſe, pl. 34. cites S. C. accordingly, as of goods carried away for default of well keeping.

[6. In account againſt a bailiff, it is a good plea in bar *that plaintiff leaſed to him for life*, &c. the thing of which he is ſuppoſed bailiff. 29 E. 3. 47.]

S. P. with a traverſe that he was his bailiff. Br. Account, pl. 21. cites 49 E. 3. 7.

[7. It is no plea in bar of an account that the *plaintiff was indebted to the defendant in the ſame ſum, and* that the plaintiff *granted that the defendant ſhould retain it* in ſatisfaction of his debt, for he confeſſes the receipt, and ſo once accountable. * 12 H. 4. 18. 14 H. 4. 20. b.]

* Br. Accompt, pl. 31. cites S. C.

[8. So it is no plea *that he delivered the money to a ſtranger by the command* of the plaintiff. † 12 H. 4. 18. ‡ 19 H. 6. 5. b.]

† Br. Accompt, pl. 31. cites S. C.——‡ S. P. for there he was once accountable. Br. Accompt, pl. 43. cites S. C.—— It ſeems § it is no plea in bar of the account, but it ſhall be allowed him on his account before auditors. See 1 E. 5. 1. cited by Coke Ch. J. and agreed to per tot. cur. as to money diſburſed by command of the plaintiff. 2 Bulſtr. 277. Arg. in caſe of the earl of Suffolk v. Floyd. §

[154]

[9. In an account *by the churchwardens* of a pariſh *againſt their predeceſſors*, wardens, to render an account of a bell received, and of certain ſtones, it is not any plea in bar *that they took the bell (being ruinous) by the conſent of the pariſhioners, and carried it to a bell-founder's, and* that it was agreed *that he ſhould have 4 l. for the caſting thereof, and ſhould retain the bell till ſatisfaction* of the 4 l. whereof he is not yet ſatisfied, and that they took the ſtones, and with part of them repaired a ruinous window of the church, and the reſidue they retained to themſelves by *agreement between them and the pariſhioners*, in ſatisfaction

See tit. Churchwardens (A. 2) S. C.—— Vent. 88. Trin. 22 Car. 2. B. R. TABLOUR AND RONS v. PARNER S. P. as to a bell delivered to the

bell-founder, who kept it until he ſhould be paid. The plaintiff demurred, for

ſatisfaction of their expences, in the reparation of the ſaid windows; for they were once accountable, though it was before theſe wardens were made, and then this plea is only in diſcharge before auditors. Mich. 37, 38 Eliz. B. R. between *Method and Winn* adjudged.]

that this plea is no bar of the account, but a good diſcharge before auditors. It was anſwered on the other ſide, that the matter pleaded ſhewed that the defendant never was accountable, and therefore it might be in bar. But the caſe here of METHOLD AND WYNNE being cited as adjudged to the contrary, the court now was of the ſame opinion.——Mod. 65. pl. 11. TAYLOR v. ROUSE S. C. and it was inſiſted, that *wherever the* matter or *cauſe of the account is taken off, the plea is good in bar*, but the *action was brought for taking away bona eccleſiæ and not bona parochianorum* as it ought to have been, and therefore the court *ordered* to amend all and *to plead de novo*.——Keb. 675. 704.

Br. Account, pl. 31. cites S. C. but S. P. does not appear.

[10. *But if the defendant does not by his plea confeſs himſelf ever accountable*, this will be a good plea in bar. 12 H. 4. 18.]

* Br. Account, pl. 31. cites S. C. and P. for there

[11. It is a good plea *that the plaintiff gave him the money, and ſo he received it as his own proper money.* 30 H. 6. 6. * 12 H. 4. 18.]

he was never accountable.——A gift after the receipt is a good plea per Brian, which Vaviſor denied; for the contrary thereof was adjudged 27 H. 6. and affirmed in writ of error, quod nota. Br. Accompt, pl. 75. cites 21 E. 4. 66.——See (N) pl. 13.

Br. Account, pl. 34. cites S. C. but S. P. does not appear.

[12. *So* in account for goods it is a good plea *that he aſſigned to him the goods in ſatisfaction of a debt due to him by the plaintiff*, for the aſſignment was made upon the firſt delivery, and ſo he was never accountable for them. 14 H. 4. 20. b.]

[13. *So in account as receiver by the hands of A.* it is a good plea *that A. owed the money to the plaintiff, and the plaintiff was indebted in ſo much to him*, and the plaintiff *aſſigned to him* the ſaid ſum *in payment of his debt, and ſo he received it* of A. and *not to render account.* 16 E. 3. Account 53.]

14. In account *againſt a feme* as receptor' denar', &c. She *ſaid that by all this time ſhe was covert* with ſuch a one, &c. And held a good plea to the action. Thel. Dig. 119. lib. 11. cap. 2. ſ. 2. cites Hill. 6 E. 3. 244. but ſays ſee 18 H. 6. 3. where it was *replied that ſhe was executrix to another at this time.*

15. Account as receiver by another hand. Paſton, you have a *deed witneſſed of the receipt*; judgment ſi actio without ſhewing the deed. And per Rolf, this matter *and a gift goes in diſcharge of the account.* Per Babb. if the defendant ſhall not have this plea he ſhall be doubly charged; for at another time he ſhall have other action upon the deed, as in debt upon ſimple contract, it is a good plea that he has thereof an obligation; for the one determines the other, and becauſe Paſton had accepted the count good before, he was compelled to anſwer over, by which he pleaded the ſame matter in bar, and demanded judgment ſi actio; quære cauſam. Br. Accompt, pl. 60. cites 1 H. 6. 7.

[155]

16. *Debt upon arrearages of account*; the *defendant ſaid, that ſuch a day, a month after the account, the auditors committed him to priſon, and ſo he was in execution.* And no plea unleſs he had *ſaid, that the auditors committed him* to priſon *immediately*; for after, viz.

viz. if it be the ſame inſtant, their power is determined; and from hence it ſeems that if he had been committed immediately, it had been good execution, and ſo good bar of account. Br. Execution, pl. 135. cites 27 H. 6. 8.

17. In *account* the *defendant ſaid that the plaintiff aſſigned to him two auditors before whom he accounted at D. in another county*, and the *plaintiff ſaid that after the aſſignment, and before the account, he diſcharged the auditors at S. in this county where the action is brought*, and a good replication. Br. Replication, pl. 53. cites 18 E. 4. 26. Br. Confeſſ. and Avoid. pl. 51. cites S.C. accordingly.

18. In *account*, the *defendant ſaid that they were bailed to him to deliver over to J. S. which he had done*; judgment, &c. The plaintiff *ſaid, that after the delivery to the defendant, and before the delivery over, he commanded him to bail it to him*; and a good replication, by the beſt opinion; for by the delivery to the defendant J. S. has no property in it, and therefore the plaintiff may countermand it, and yet by this delivery to defendant J. S. may have action of account, if it be not countermanded. Br. Replication, pl. 65. cites 1 E. 5. 2.

19. In account brought *by a feme, it was pleaded that ſhe was covert* with ſuch a one *at the time of the receipt*, &c. and ſhe *replied, that then ſhe was executrix of the teſtament of ſuch a one*, and that the money belonged to her teſtator. And the opinion of Brian was againſt the plaintiff. Thel. Dig. 120. lib. 11. cap. 2. ſ. 15. cites Hill. 2 H. 7. 15.

20. In account *againſt defendant as bailiff of his manor, and that he had adminiſtration of goods*, &c. Though it be *found that he was not bailiff* of the manor, *but that he had the adminiſtration of the goods*; yet the opinion of the court was that ſhe ſhall account for the goods; for he can have no other writ, and *ſuppoſing in the writ that the defendant is his baily, are only words of form*; for he cannot have a writ de tempore quo fuit receptor bonorum, and therefore in this caſe, though it be found that he is not his bailiff, yet he ſhall account of the goods. And though the contrary of this was adjudged Hill. 49 E. 3. 14. and Mich. 14 H. 4. 14. yet 20 R. 3. [E. 4] pl. the opinion of Cateſby is with this book, and ſo the opinion is at this day that the firſt plea does not go to the whole; for if he had the care of my goods, as wine to ſell and the like, I cannot have other writ. And the like matter is 6 H. 7. 7. and 2 R. 3. 3. Kelw. 114. a. b. pl. 51. Caſus incerti temporis, Anon.

21. *Judgment in account as receiver* is no bar in *account as bailiff*. Arg. 2 Lev. 126. cites Co. Litt. 172. a. Roll. Abr. Account (F) pl. 9. (B) pl. 2. 4 H. 6. 27. a. 43 E. 3. 4. b. 46 E. 3.

22. In accompt the defendant pleaded in bar, *that upon receipt of the money he gave the plaintiff a bill under his hand for it*, and no good plea, becauſe it is only evidence of the account. D. 20. b. pl. 122. cites it as adjudged 1 H. 6. 7.

23. If an *infant ſues his guardian for money*, and recovers, and the *guardian brings the money into court*, and depoſites it there, this is a good diſcharge againſt the infant, and he ſhall not anſwer

the ſuit again in an account. Agreed per cur. Godb. 214. pl. 306. Mich. 11 Jac. C. B.

2 Mod. 43. S. C.—— Freem. Rep. 195. pl. 200. S. C. and North Ch. J. ſaid that he always took the law to be that a promiſe might be diſcharged by parol before it was broke, but not afterwards, becauſe

24. Quantum meruit for 40 s. and indebitatus aſſumpſit for 40 s. likewiſe, the defendant acknowledged the promiſes; but ſays, that the plaintiff and he accounted together for ſeveral ſums of money, and that thereon defendant was indebted to plaintiff in 30 s. and that plaintiff in conſideration that defendant promiſed to pay him the 30 s. *diſcharged* him of all demands. Upon demurrer the court held, that if two men, being mutually indebted, do account together, and one is found in arrear ſo much, and there be *an expreſs agreement to pay the ſum found to be in* * *arrear, and each to ſtand diſcharged of all other demands*, that this is a good diſcharge in law, and the parties cannot reſort to the original contracts. But per North Ch. J. if there be *but one debt between them*, entering into account for that will not determine the contract. Mod. 205. Trin. 27 Car. 2. C. B. Milward v. Ingram.

then the plaintiff is intitled to an action. But the reporter ſays that Mr. Townſend told him that judgment was afterwards given for the defendant, by reaſon of the account.——S. C. cited 12 Mod. 534. and ibid. 538. Holt Ch. J. ſaid that if there be 2 *dealers*, and *without coming to an account* they *agree to be clear againſt each other*, it would not be well without coming to an account; and that as to the caſe cited out of the Mod. Rep. that it was the firſt of this kind, and by his conſent it ſhould be the laſt.

(M) What Pleas bar an Account. And what not.

* The caſe of Speaks v. Hungerford. —So he cannot give a releaſe in evidence upon ſuch iſſue.

[1. IF *A. delivers money to B. to deliver* over *to C. ex dono, or ex commodato*, and after A. *brings account againſt B.* if he *pleads never his receiver*, &c. he cannot *give in evidence* the delivery over; for he ought to *plead it ſpecially*. Mich. 13 Jac. B. * D. 3 Eliz. 196. 43]

Brownl. 24. Willoughby v. Small.

S. P. by Roll Ch. J. Sty. 355. Mich. 1652. in caſe of Baynton v. Cheek. Arg. * Br. Accompt, pl. 47. cites

[2. It is a good plea, *that it was delivered to deliver over, to whom he hath delivered it accordingly*, becauſe he was never accountable for it but conditionally, ſcilicet, if he did not deliver it over. D. 3 Eliz. 196. 43. * 22 H. 6. 49. per curiam. 1 E. 5. 2. b. 21 H. 7. 34. 21 E. 4. 55. b. † 41 E. 3. 31. ‡ 21 E. 4. 67. ‖ 19 H. 6. 5. b. Adjudged. ** 9 E. 4. 15. b. per curiam. H. 7 Jac. B. per curiam. Contra 14 E. 3. Account 68.]

S. C.——Br. Traverſe per, &c. pl. 296. cites S. C.

† Br. Accompt, pl. 12. cites S. C. that it was held a good plea in diſcharge upon the action, but not in bar, by the beſt opinion.

‡ Br. Accompt, pl. 75. cites S. C. per Brian, that it is a good plea without traverſing; for he has confeſſed himſelf accountable conditionally, which Choke, Nele, and Vaviſor denied; for the contrary has oftentimes been adjudged.

‖ Br. Accompt, pl. 43. cites S. C. and he ſhall not be compelled to account, and to plead it in diſcharge of the account, becauſe he was never accountable as here; but where he delivers it to one to render account, and after commands him to deliver it, or part thereof, to J. N. which he does, there it is no plea in bar; for there he was once accountable. Contra above.

** Br. Accompt, pl. 54. cites S. C. Br. Traverſe per Sans, &c. pl. 125. cites S. C.

[3. So

[3. So it is a good plea in bar *that it was delivered to him to get the king's patent* for the plaintiff, of the cuſtom of certain goods, which he had done before the writ purchaſed; for he was not *accountable but conditionally.* 30 H. 6. 5. b.]

[4. In an account againſt another as *receiver by the hands of J. S.* it is no good plea in bar *that he was the plaintiff's ſervant, and received the money of J. S. to deliver to the plaintiff, the which he did accordingly.* 29 E. 3. 20.]

[5. If a man *delivers money* to another *to deliver to him again,* and after *he commands the bailee to deliver it to a ſtranger, and he does it accordingly,* yet this matter ſhall not be any bar in an account. 1 E. 5. 2. b. becauſe he was *accountable at firſt.* H. 7 Jac. B.] S.P. 2 Bulſt. 31. pl. 36. Arg. accordingly; but ſaid that it is a good plea in diſcharge of account before auditors for that matter after the bailment, and not upon the bailment.—See (L) pl. 8. and the note there.

[157]

[6. In a writ of account *as receiver by the hands of J. S.* it is not any plea in bar *that he received it of J. S. to deliver to the plaintiff, to whom he had delivered it* accordingly; for this is but a *payment.* * 9 E. 4. 16. b. per Choke. Contra 2 R. 2. Account 45.] * Br. Accompt, pl. 54. cites S. C. but S. P. does not appear.

[7. In account *as receiver* it is a good plea in bar *that it was delivered to him to carry* to London *to a banker to make exchange, and to receive bills of exchange, and to ſend them to the plaintiff, which he had done accordingly, &c.* For this is tantamount that he never was his receiver to render an account; for this was delivered to him to exchange, and not to render account. 5 H. 5. 5. Curia.]

[8. [*So*] In account as receiver, it is a good plea *that he accounted before auditors aſſigned by the plaintiff.* 30 E. 3. 1. b. Iſſue thereupon 5. b. Adjudged 29 E. 3. 28. 26 E. 3. 76.] F.N.B. 117. (D) in the new notes there (d) S. P. For the action of account is gone. Cites 7 H. 4. 14. and 34 H. 6. 43.

[9. *So* it is in account *as bailiff.* 30 E. 3. 1. b.]

[10. In account *as receiver,* it is a good bar *that he hath accounted before to the plaintiff himſelf;* for thereupon he may have an action of debt. * 45 E. 3. 14. b. 7 H. 4. 14. b. 30 E. 3. 5. b. Adjudged 39 E. 3. 5. b. 34 H. 6. 44. Curia. † 21 E. 4. 66. b. 16 E. 3. Account 52. contra. 22 E. 3. 13. b. adjudged.] * Br. Accompt, pl. 16. S. C.—† Br. Accompt, pl. 75. cites S. C.—

S. P. per cur. and yet a man cannot be his own judge. Br. Accompt, pl. 9. cites 34 H. 6. 43.

It was awarded a good plea; for by the account before any auditors, or before the plaintiff himſelf, the action is altered into another nature; for he may have debt upon the arrearages, and the account is determined for ever. Br. Accompt, pl. 28. cites 7 H. 4. 14.—S. C. cited, and other of the caſes here mentioned; and alſo 4 E. 4. 6. Arg. Saund. 49. That if the defendant of his own gree *accounts before the plaintiff himſelf,* the account ſhall be good; and Ibid. 50. the ſame was agreed to by the court.

The plea to the account was, *that he had accounted before the plaintiff in Cumberland,* &c. which was objected to be a foreign plea, and therefore was refuſed, and judgment was marked; quod computet. It was moved that the plea was good, and cited the caſes of 45 E. 3. 24. and 34 H. 6. 23. and thereupon praying an allowance. Doderidge ſaid, that here is no miſchief, becauſe it is a good plea before auditors that he accounted at another time before the plaintiff himſelf; whereupon by Crew, Doderidge, and Jones, the judgment was ruled to ſtand. Lat. 59. Paſch. 1 Car. Hopton v. Offal.

In account it is a good *plea that the defendant fully accounted before the plaintiff himſelf at B.* ſo to ſay that he fully accounted to the plaintiff, or before the plaintiff, by the opinion there. Br. Accompt, pl. 67. cites 4 E. 4. 6.

[11. In an *account againſt a huſband*, it is a good plea in bar for him to ſay *that his wife was a common taverner, and that the plaintiff delivered* the tuns of wine (for which the account is now brought) *to his wife to ſell for him, without the aſſent* and agreement *of the huſband, and ſhe ſold them accordingly, and delivered the money to the plaintiff*; it ſeems it is intended that ſhe was not a taverner by the aſſent of her huſband. 13 R. 2. Account 50.]

[12. In account againſt a man *as receiver*, it is a good plea *that he was within age* at the time of the receipt. 21 E. 3. 8. admitted by iſſue. 16 E. 3. Account 52.]

Br. Account, pl. 59. cites 21 H. 4. 36. S. C.

[13. In an account againſt another, *as bailiff of his manor*, it is a good bar of the account, *that the plaintiff was a diſſeiſor, and the diſſeiſee hath re-entered.* 21 H. 7. 34. per Brudnel.]

14. *Account in N. and B.* Clayn ſaid *B. is a franchiſe*, judgment of the writ; for the bailiffs may demand conuſance of plea; but if they do not demand it, the defendant cannot plead it. Br. Brief, pl. 477. cites 39 E. 3. 17.

15. In *account for malt*, the defendant *pleaded that the plaintiff had formerly brought trover and converſion for this and other malt* againſt him, and that he was *found guilty as to part, and not guilty as to other part, and damages aſſeſſed.* Adjudged that this was no bar; for it might well be, that he did not convert the malt as
[158] the firſt action ſuppoſed, and yet he ought to account as this action ſuppoſes. Mo. 463. pl. 653. Hill. 36 Eliz. Mortimer v. Wingate.

(N.) What ſhall be a good Plea in Bar.

See (M) pl. 1. and the notes there.

[1. IN an account it is a good plea in bar of the account, that the plaintiff hath *releaſed* to him *all actions*. 22 H. 6. 55. b. agreed 14 E. 3. Account 73. 33 E. 3. Account 130.]

[2. *So* it is a good plea in bar, that the plaintiff hath *releaſed to him all the advantage and profit that he might have by the account.* 9 E. 4. 46. ſaid by Moyle to have been adjudged.]

——If a man is my *receiver* by other hands, and *I releaſe to him all manner of my receipts*, it is a good bar; for the receipt by other hands is my own proper receipt. Br. Account, pl. 77. cites 10 E. 3. 7.

But if A. be accountable to B. and B. releaſes to him all his duties, this is no bar in an action of account; for duties extend to things certain, and what ſhall fall out upon the account is uncertain; and albeit the Latin word is debita, yet duties do extend to all things due that are certain, and therefore diſcharges judgments in perſonal actions and executions alſo. Co. Litt. 291. a.

But it is not a good plea before auditors.—— See (O) pl. 29. Taylor v. Page.

[3. So it is a good plea in bar, *that they have ſubmitted to the award of J. S.* who awarded that the defendant ſhould be acquitted againſt the plaintiff. 22 H. 6. 55. b. for this is as ſtrong as a releaſe.]

——*Debt upon account*, the plaintiff *counted before auditors*, the *defendant pleaded arbitrement*; and becauſe in this caſe before auditors wager of law does not lie [the plea was held not good.] Contra upon other account, for the action is now in manner of record; and yet the ſtat. of Weſt. 2. 11. does not give; but that if they be found in arrears they ſhall be committed to ward irrepleviable; therefore for inſufficiency of the plea the plaintiff recovered his debt. Quod nota. Br. Account, pl. 52. cites 4 H. 6. 17.

In

In account of a receipt by other hands, *arbitrement that the defendant ſhall pay ſuch a ſum in ſatisfaction of all receipts, by which he had paid at ſuch a place*, is a good plea by the beſt opinion; and yet the defendant in receipt by other hands cannot wage his law. Quod nota. Br. Account, pl. 46. cites 22 H. 6. 39.

[4. So it is a good plea in bar, *that after the receipt* of the ſum of which the account is demanded by the mediation of their friends, it was agreed between them *that the defendant ſhould make an obligation of* 100 *l. for the* 100 *l. received, and the profit to ariſe from the ſaid* 100 *l. which* obligation of 100 *l. he made and delivered accordingly* to the plaintiff; for the acceptance of the obligation deſtroys the duty, and ſo the ſum in demand is as ſtrongly thereby releaſed, as by a releaſe of all actions. 22 H. 6. 55. q. Curia.]

Br. Account, pl. 48. cites S. C. that it is a good bar, and not only in diſcharge of account per cur.

[5. *But* it is no good plea, that it was agreed *that he ſhould make an obligation of* 100 *l. for the* 100 *l. received, which he did accordingly*, becauſe the accord is not that the obligation ſhall be made for the 100 l. and the profit to ariſe from it; for the accepting the obligation is not a diſcharge of the profit ariſing as well as of the principal, but he is accountable for the profit. 22 H. 6. 55. b. per Newton.]

[6. So it is no good plea in bar of an account, *that the plaintiff accepted a ſtatute merchant from him of the ſame ſum* in demand, in ſatisfaction of the ſaid ſum, and a tun of wine in ſatisfaction of the damages; for here it is expreſſed that the ſtatute ſhall not be a diſcharge of all. 39 E. 3. 4. b. 23. admitted; for there it is pleaded before auditors.]

[7. It is a good plea in bar, *that the plaintiff granted by indenture, that if the defendant did ſuch a day acknowledge a ſtatute merchant to the plaintiff*, that the writ of account ſhould be taken as null, &c. and that he acknowledged the ſtatute to him, &c. accordingly; for thereby the account is releaſed. 20 E. 3. Account 79. agreed.] [159]

[8. *But* if he ſays *he did acknowledge the ſtatute, the plaintiff being abſent, and that he did deliver it to the clerk of the recognizances, and after carried it away with him*, this is no good plea; for the plaintiff is not ſure of the ſtatute till delivery thereof to him. 20 E. 3. Account 79. adjudged.]

[9. If the defendant pleads *the plaintiff's acquittance* of the ſum demanded, this is not any plea in bar of the account; for by this plea he *acknowledges that there was a duty once, and a diſcharge ſubſequent by payment.* 22 H. 6. 55. b. 21 H. 7. 34. 14 E. 3. Account 74. admitted, for this is pleaded before auditors. Contra 21 E. 3. 47. 27 E. 3. 79. b.]

In account the defendant pleaded acquittance in bar. Per Fineux, if one be once charged to account, and has a matter in diſcharge of later times, this goes in diſcharge of the account; but if a man bails goods to bail over, which he does, this is in bar, &c. Br. Account, pl. 59. cites 21 H. 7. 36.

[10. So in an account of 100l. it is no good bar *that he delivered to the plaintiff* 20 *woollen cloaths, in full ſatisfaction of the* 100l. *and* 2 *tun of wine, in ſatisfaction of the profit of the ſaid* 100l. which things the plaintiff accepted in ſatisfaction of the 100l. and the profits thereof; for this is but a *payment.* 22 H. 6. 55. b.

This plea is in diſcharge of the account upon the account, and not in bar; for the judges are judges of the action, and not of the account, but the auditors are judges of the account. Br. Account, pl. 48. cites S. C. per Newt. and Aſhton.

[11. So in an account for 100l. it is no good plea in bar *that such a day &c. he put the money into a bag tied up, and offered it to the plaintiff, and he agreeing* to the offer, did will and *grant that he should retain the said money as his own proper money, in satisfaction of such a sum, in* which he was indebted* to the defendant; and therefore he took the bag with the money, in satisfaction as before, &c. for this is but a *payment*. †28 H. 6. 7. adjudged per curiam, but a writ of error was brought. ‡12 H. 4. 18.]

* Br. Account, pl. 7. cites S.C.— † Br. Account, pl. 31. cites S. C. ‡ Fol. 124.

[12. So in account for certain tin received, it is no plea in bar *that he sold the tin to J. S. and took an obligation for it in the name of the plaintiff;* for it is only in discharge. D. 28 H. 8. 29. 193.]

S. C. cited by Williams J. Bulst. 103.— In account the plaintiff declared that he *delivered* the defendant *so much cloth to sell at B. in Spain.* The defendant *pleaded that he sold the same* at B. in Spain, in November, *for* 40l. English, *to be paid in May next; and alledged the custom of merchants, that if any merchant had goods in that kingdom to be sold to another merchant, and he sells them to be paid at a day to come, and this done before a public notary, and thereby a bill signed to him, and in his name who sold the goods; and if such seller delivers to the owner of the goods such bill, this shall be a discharge to him* of the goods; and averred that he sold to a Spanish merchant, and took a bill accordingly, and at London offered that bill to the plaintiff, who refused it. The plaintiff demurred, and adjudged for him by Hobart and Winch, being only present. Win. 52. Mich. 20 Jac. C. B. Dodderidge v. Anthony.——And ibid. Hobart Ch. J. said, that the custom as alledged is too large; but *if he had alledged that such bill taken by the factor shall be as good and effectual to the master as if it had been taken in his own name,* this had been good.

See (L) pl. 11.— In account the defendant pleaded that after his receipt of the goods, for which the action

[13. So it is not any plea in bar of the account *that after the receipt* of the money *the plaintiff gave him the money;* for he acknowledges himself once accountable. (It seems if this gift had been *by deed*, it would amount to a release of the duty, and then it should be a good plea, but without deed it cannot be any release, and therefore it is no good bar.) 21 E. 4. 67. Adjudged.]

of account is brought, and which receipt made him liable to render an account,* the plaintiff made a gift of the said goods to the defendant. This was adjudged no bar; but a good plea before auditors. Adjudged and affirmed in error, Jenk. 136. pl. 79.——A. bails goods to B. to bail to C. who does so. This is a good bar in account brought by A. against B. For here originally was no account to be rendered; but in the principal case, before the gift, the defendant was accountable. Jenk. 136. pl. 79.

In account *against the defendant as receiver of his money by the hands of a stranger*, the defendant *pleaded in bar a gift of the money to him afterwards by the plaintiff.* It was admitted to be a good plea before auditors; but the question was if it was so in bar of the account. And Walburton J. being only present, held it good in bar; for by the gift it is his own money, and therefore may plead it in bar. Win. 9 Pasch. 19 Jac. Harrington v. Harrington.

* [160]

See (M) pl. 7.

[14. So it is no plea in bar, *that after the receipt the plaintiff commanded him to carry the money to London to a banker, to make exchange* thereof, *and to receive bills of exchange to send them to the plaintiff, the which he had done accordingly*, &c. For this is only in *discharge* of the account. 5 H. 5. 5.]

Br. Accompt, pl. 55. cites S. C.— Account from the time that

[15. It is no good plea in bar of the account *that he was robbed* of the money by certain felons; for if this should excuse him, it ought to be pleaded before the auditors. 9 E. 4. 40. b. Curia.]

[16. So it is no plea *that he received it to carry, and was robbed of that and other his goods.* Contra 22 E. 3. Account 111.]

he was receiver of money &c. Per Cat. the *receipt was upon condition that if the defendant came safe with the money to the camp at Northampton, that then he shall account, and otherwise not*; and *said that he was robbed* of the money *before he came to the camp*, &c. *absque hoc that he was his receiver in any other manner.* Per Littleton, this is in discharge, and not in bar; but it was held a good plea in bar.

Quod

Quod nota, quære if he ſhall take the abſque hoc. It ſeems that he ſhall. Br. Accompt, pl. 69. cites 5 E. 4. 4.

Debt upon *bond to account* for money. Defendant *pleaded that he did account.* The plaintiff *replied that ſuch a day the defendant received* 26l. *for which he has not accounted.* The defendant *rejoined that he accounted* thus, *viz. that certain thieves broke open his compting-houſe, and ſtole the money, whereof he gave the plaintiff notice.* And the court held this an account, and no departure. 2 Lev. 5 Paſch. 23 Car. 2. B. R. Vere v. Smith.——Vent. 121. S. C. adjudged for the plaintiff.——2 Keb. 761. pl. 30. S. C. and held accordingly per cur.——Ibid. 779. pl. 8. ſays that judgment was for the plaintiff, niſi the robbery be tried. But Ibid. 380. pl. 52. ſays that the rule for trial of the matter being diſobeyed, the court gave the plaintiff leave to diſcontinue, the robbery being a good bar.——S. C. cited, and allowed for law. 6 Mod. 139. Paſch. 3 Ann. B. R.

17. *Plene computavit* is a good plea in account, therefore it ſeems that where the plaintiff had had account, he ſhall never have account of it again. Br. Accompt, pl. 10. cites 41 E. 3. 9.

18. *Payment to the plaintiff or a ſtranger* is a plea in diſcharge, and yet may be pleaded in bar. Raym. 57. Arg. cites Raſt. Ent. 16. 19 H. 6. 5.

19. Account *of the receipt of* 100 *marks, to render account at P. in London*; he *ſhall not plead that the plaintiff delivered to him the* 100 *marks at S. in the county of E. to deliver to J. S. which he has done, without traverſing the receipt in London*; but it is a good plea that he received the 100 marks in London to deliver to J. S. which he has done without traverſe. Note a difference per tot. cur. For if he has not delivered it over, he is accountable. Br. Accompt, pl. 47. cites 22 H. 6. 49.

20. The defendant in account as *receiver ſaid that at another time, in* writ of *account of the ſame receipt, he was adjudged to account at the ſuit of the ſame plaintiff*, &c. And per Danby and Moyle, it is no plea; for if he *has not taken execution*, he may have a new action. Contra per Litt. and Choke; for the nature of the action is changed by the judgment from matter in fact to matter of record. Quære. Br. Accompt, pl. 57. cites 9 E. 4. 50.

(O) What ſhall be a good Diſcharge [or Plea] *before Auditors.* [161]

[1. IT is a good diſcharge before auditors *for a factor* to ſay *that in a tempeſt*, becauſe the ſhip was ſurcharged, *the goods were flung into the ſea.* Dubitatur 41 E. 3. 4.] Br. Accompt, pl. 10. cites S. C.

[2. It is no good diſcharge before auditors *that he was robbed* of the goods by certain felons. Dubitatur 9 E. 4. 40. b.] Br. Accompt, pl. 55. cites

S. C.——S. P. held by Popham to be a good plea; but Gawdy e contra. Mo. 462. pl. 650. Hill. 39 Eliz. Woodliff's caſe.——Ow. 57. Hill. 38 Eliz. Anon. S. C. Gawdy held it no plea in bar, becauſe he has confeſſed himſelf accountable by the receipt; nor any plea before auditors. But Popham held it a good plea before auditors.

[3. It is a good diſcharge before auditors that he was robbed of the goods, *without his default or negligence.* Co. Litt. 89.] 4 Rep. 84. a. it was ſaid by the

court, arg. in Southcot's caſe, that in account it is a good plea before auditors that he was robbed, as appears by 12 E. 3. Account 111. 41 E. 3. 3. & 9 E. 4. 40. and if the factor did his beſt to ſave them, he ſhall be diſcharged.——See (N) pl. 15, 16.

Br. Accompt, pl. 66. cites S. C.

[4. It is a good discharge before auditors in account, *as receiver of* 10l. if he *tenders the* 10l. *and swears* upon a book, that after the time that the money was delivered to him, *that he found nothing that he durst to buy for fear of loss*; for he is not bound to buy so as to lose, for he himself shall bear the loss, and not the plaintiff, 46 E. 3. Account 40.]

[5. (It seems a receiver is not bound to buy and sell, and therefore it seems it is intended *that he was a receiver to merchandize.*)]

Br. Accompt, pl. 66. cites S. C.

[6. And in this case the plaintiff shall not be received to *aver contrary to his oath.* 46 E. 3. Account 40.]

[7. If goods and *merchandizes are shipped* in a ship *to be sold in Barbary*, and delivered into the custody of a bailiff, ad merchandizandum & vendendum *according to his discretion*, and thereupon he goes with the ship and merchandizes to Algiers in Barbary, and there desires leave to trade; but before he can obtain it, the said town *surprizes them with ships of war*, upon pretence of damages received by them, and the English before; *upon which, for the redemption* of the ship and merchandizes in the same ship, *by composition* between the merchants of the said ship and the said town, *he and all the other merchants were compelled to pay so much*, &c. And so the average upon all the goods in the said ship did amount unto * 67l. per cent. *for their redemption*, and according to this rate the *average for the said goods amounted to so much, &c. for which he prays allowance*, this is a good discharge before auditors, because this was done for the preservation of the residue. Mich. 9. Car. B. R. between *Brown and Robinson*, per curiam. But judgment was given against the defendant for another matter. Intratur. Mich. 8 Rot. 186.]

* Fol. 125.

F.N.B. 116. (Q) in the new notes there (c) S. P. accordingly.

[8. If a *bailiff of a manor pays the relief of his master to the lord to whom it is due*, he shall be allowed this upon his account, though he had no warrant from his master so to do, because this is a *casual thing of common course.* 41 Edw. 3. Account 33. Curia.]

[9. *But* if a bailiff *pays a thing that is not casual of common course* without warrant from his lord, he shall not have allowance thereof upon his account. 41 Edw. 3. Account 33. Curia.]

[162]

Brownl. 25. in a nota there accordingly. See pl. 20.

[10. If a *factor buys* certain things *for* 20l. *which are not worth* 12d. though he did as well as he could, yet he shall not be allowed for so much upon his account. 41 Edw. 3. 9 b. † 46 Edw. 3. Account 40.]

† So of a bailiff. Br. Accompt, pl. 10. cites S. C. per Finch. —— Ibid. pl. 66. cites S. C. that if a bailiff merchandizes and loses, if he does as well as he can he shall not bear the loss but the lord, as it is said by some, but contra of receiver.

[11. It is a good discharge before auditors *that he acknowledged a statute merchant to the plaintiff*, in which he was bound to the plaintiff in a certain sum, which is as much as the plaintiff demands, and that he *gave another thing in satisfaction of the profit thereof.* 30 Edw. 3. 4. b. 23. adjudged.]

[12. If a man *receives money* of J. S. to deliver to J. D. *as a messenger*, in an account against the bailee, he shall be discharged before

before auditors by *tender in court* of the principal ſum; for he *is not to account for the profit thereof* in the mean time, though he hath detained it for a long time, for he did not receive the money to merchandize, but only to deliver over. 2 Rich. 2. Account 45. for he had no warrant to merchandize with it to gain or loſe.]

[13. *So* if my *bailiff* of my manor *receives the rents* of my tenants, *and retains them for* 2 *or* 3 *years*, yet in a writ of account he is not to account for the profit coming therefrom in the mean time, for he had not any warrant to merchandize with them, or to gain or loſe. 2 Rich. 2. Account 45.]

[14. *So* in an account *as receiver where he is not to merchandize*, he is not to account before auditors for the profit after the receipt.]

In ſome caſes in an action of accompt againſt one as receptor denariorum he ſhall have *allowance of* his *expences and charges*, and alſo ſhall *accompt for the profit he received or might reaſonably receive*; and this was provided by law in favour of merchants, and for advancement of trade and traffic. Co. Litt. 172. a.

15. *But* otherwiſe where the receipt *was to merchandize*, for there he hath a warrant to gain or loſe. 2 Rich. 2. Account 45. 6 Rich. 2. Account 47.]

[16. *So* though the receiver *retains the money* in his hands without any employment, *if he might have employed it for profit*. 2 Rich. 2. Account 45.]

Account lies againſt him for what he has or might have gained by the occupation. Per Luke J. D. 21. b. pl. 130.

[17. *But he ſhall be diſcharged* of the profit in this caſe *by his oath* that he could not find any thing to buy by which he might gain. 2 Rich. 2. Account 45.* 46 Edw. 3. Account 40.]

* Br. Accompt, pl. 66 cites S. C.

[18. And the *plaintiff ſhall not* be received to *aver contrary to his oath*. 46 Edw. 3. Account 40.]

Br. Accompt, pl. 66. cites S. C.

[19. In account *as bailiff curam habens & adminiſtrationem de* quibuſdam bonis & merchandiſis, ſcilicet cloves *ad merchandizandum & proficuum inde faciendum & compotum inde reddendum*, he ought to tender an account before auditors of the *profits made* thereof. Mic. 9 Car. B. R. between *Brown and Robinſon*, adjudged upon a demurrer, where it appeared by the plea of the defendant that he had made profit thereof by ſale, and yet he had accounted but according to the *value at the receipt thereof*. Intratur. Mich. 8 Car. B. R. Rot. 186.]

[20. In account for merchandize the defendant ſhall be charged if he *might have gained more in ſuch or ſuch a thing*, &c. 6 Rich. 2. Account 47.]

If I deliver goods to one of the value of 10l. to traffic with for my uſe, and he ſells them for 10l. I have no remedy; but if my bailiff buys a thing for 10l. which is not worth it, he ſhall not be allowed. Brownl. 25. in a nota.

[21. So my bailiff ſhall be charged, *if he ſells* a quarter of corn *for* 40 *d. when he might have ſold it for half a mark*. 6 Rich. 2. Account 47.]

[163]

[22. If a man delivers *money to another to deliver over to J. S. and he does it* accordingly, and *after bailor brings* a writ of *account* againſt him, and he *pleads never his receiver*, &c. and this is

The caſe of Speake v. Hungerford. --In account

against D. *for receipt of* 18*l. by the hands of A. to the plaintiff's uſe*, iſſue was joined upon

found againſt him, becauſe he cannot give this ſpecial matter in evidence, inaſmuch as he was once accountable conditionally if he did not deliver it over, he ſhall not after be received to plead this matter in diſcharge before auditors, becauſe this plea proves him not to be accountable, which is found and adjudged againſt him. D. 3 Eliz. 196. b. 43. agreed by ſeveral.]

ne unques receivor per *manus*, &c. and *found for the plaintiff*; and the defendant *pleaded* before auditors, *that by the appointment of A. he had paid the money to J. M. for the debt of the plaintiff.* Adjudged an ill plea, and *contrary to the firſt iſſue*; wherein it was ſaid that he never was receiver, &c. Hutt. 133. Hughes v. Drinkwater.

[23. In an account, if the plaintiff *declares of a receipt of* 1000 *dollars monetæ venetiæ, the value of each dollar being* 4*s. monetæ Angliæ quæ in toto ſe attingunt ad valorem* to *ſo much*, &c. to which the defendant *pleads never his receiver to render account*, upon which they are at iſſue, and it is found for the plaintiff, by which the defendant is judged to account, the *defendant* is not bound to render an account of the dollars as they are valued in the declaration according to the value there ſhewn, but he *may ſhew before the auditors of what value they were at the time of the receipt*, and according to this he ſhall account. Trin. 36 Eliz. B. R. between *Beecher and Smith*, per curiam.]

As in account defendant *ſaid*

[24. He cannot alledge a diſcharge by *matter done beyond ſea, which is not triable here.* 41 E. 3. 4.]

that he bought jewels in Breteigne for 400*l. and* in Breteigne *ſhewed them to the plaintiff, and put them into a box, and delivered the plaintiff the key* of the box locked *in Breteigne, and after delivered to the plaintiff in A. in England the box*; and the *plaintiff ſaid that theſe which he bailed to him at A. was worth but* 40*l.* and after the plaintiff recovered 400l. except 40l. The reaſon ſeems to be, becauſe the *buying and delivery at B. beyond ſea, is not triable here.* Br. Account, pl. 10. cites 41 E. 3. 3. 9.

Fitzh. Tit. Account, pl. 21. cites S. C. and § P. by Hull, quod curia conceſſit.

[25. It is no plea in bar, *that he bailed the money to J. N. by the plaintiff's command, but* a good plea *in diſcharge* before auditors. B. R. Account, pl. 31. cites 12 H. 4. 18.]

26. Account againſt a receiver of 20l. he *ſaid that after the receipt he married the ſiſter of the plaintiff, for which he ſhould have* 20l. *and the plaintiff granted to him that he ſhould retain this in full payment*, judgment ſi actio, and no plea in bar of the account, but it is a good plea in diſcharge of the account before auditors. Br. Account, pl. 31. cites 12 H. 4. 18.

27. The *defendant acknowledged the receipt, and auditors were aſſigned, and the plaintiff did not come*, and the *auditors certified it* to the court; wherefore they awarded that the defendant ſhould go quit, for as to this account he is diſcharged; but firſt the *juſtices demanded him, and he came not*; and further they awarded that the warden of the Fleet ſhould permit him to go at large. Br. Account, pl. 45. cites 21 H. 6. 26.

28. Account againſt W. as bailiff, who *pleaded never his bailiff.* After verdict, and *judgment quod computet* upon the account, the *defendant ſhewed a diſcharge*, and ſo to iſſue again, and a *verdict for the plaintiff*; and there being a *demurrer to part*, the *defendant*

fendant ſhewed that his feme had title of dower, and entered firſt, and enjoyed as guardian in ſocage; and ſo prayed allowances of the third part. It was inſiſted, that though bailiff on account ſhall have action for ſurpluſage, yet the receiver or guardian in ſocage ſhall not; and that here the defendant is charged as bailiff. And per cur. accordingly, and that this matter *ſhould have been pleaded*, and it ſhall not be allowed upon account; for he has *paſſed the advantage* of it. Palm. 512. Hill. 3 Car. B. R. Briggs v. Wilſon.

29. In account, the defendant *pleaded ne unques receiver*, and found againſt him. Afterwards *before the auditors he pleaded an arbitrement for all accounts, actions*, &c. *and that he was awarded to pay* 10l. only, in diſcharge of all accounts, debts, &c. which he paid accordingly. But adjudged for the plaintiff; for *this* arbitrement before the action *ſhould have been pleaded in bar of the action*, which is *now too late* to do before the auditors. Cro. Car. 116. pl. 10. Trin. 4 Car. C. B. Taylor v. Page.

Het. 114. Page v. Taylor, S. C. accordingly. And by Richardſon, *though the arbitrement was made after the action* brought, it cannot be pleaded before the auditors, but he ought to have his audita quærela.

30. An *accord with ſatisfaction* may be pleaded in bar of account, but not in diſcharge before auditors; per Crooke J. to which the court ſeemed to agree. Het. 114.

31. *B. depoſited* 200l. *betted on a horſe-race in the hands of C. to be delivered to the winner*, as by articles between the parties. C. delivered the 200l. to the other party, ſuppoſing he had *won* the wager; whereupon B. brings account againſt C. as his receiver. C. as to 100l. pleaded ne unques receiver; whereupon he was adjudged to account before auditors, where he *pleaded* in diſcharge, *that he had delivered the money to the other that won the wager*. The plaintiff *replied that there was foul play*, &c. *and ſo he ought not to have delivered the money*. Roll. Ch. J. held the plea not good; for he *being adjudged to account, implies that the money was fairly won by the plaintiff*; and Jerman and Nicholas J. agreed that judgment ought to be for the plaintiff. Sty. 353. Mich. 1652. Boynton v. Cheek.

S. C. cited Sty. 410, 411.

32. After judgment quod computet the defendant *pleaded* before the auditors, *that he had delivered over part of the money*; upon demurrer it was inſiſted that this plea is contrary to the verdict on the firſt judgment. And per Roll. Ch. J. The books generally are, that this plea is in bar of the account; but here the plea of delivery over has made it a plea in bar, and it would be miſchievous to plead it now; for then the ſame iſſue would be *tried twice*, and ſo there may be contrary verdicts. Judgment for the plaintiff. Styl. 410. Hill. 1654. Pendarvis v. St. Aubin.

But after account againſt the defendant as receiver, and judgment quod computet, he *pleaded* before the auditors, *that he received the money* of the plaintiff *to deliver over, which he had accordingly done*; per Roll. Ch. J. if he had pleaded that he had paid it over *by the conſent of the plaintiff*, it had been good before the auditors, and it is a good plea in bar if the money be paid accordingly. Styl. 430. Hill. 1654. Kirk v. Lucas.

33. In account, as receiver of 20l. the defendant *pleaded that plaintiff delivered it to him to pay over to ſuch perſons as Sir G. M. ſhould*

ſhould think fit, who awarded it to be delivered over to one H. &c. *abſque hoc that he was their receiver*, aliter vel alio modo. It was found for the plaintiff, and *judgment quod computet*. Before the auditors he *pleaded the act of oblivion*; upon which the plaintiff demurred, and the court ſeemed to think that the plea was good enough. Raym. 57. Mich. 14 Car. 2. B. R. Southcot v. Rider.

34. In account againſt a bailiff for a *pearl necklace*, defendant pleaded ne unques bailiff, and before auditors pleaded in diſcharge that he *delivered it over by appointment to a goldſmith, on agreement to ſell or deliver*. Plaintiff replied non deliberavit. Defendant demurred, and well, if the delivery over had not been
[165] alleged to be by agreement; but as it is, the demurrer was held frivolous. The plaintiff alſo *traverſed the delivery by appointment*; but the court held the appointment not traverſable, the bailiff having original power to agree; but the court ordered an amendment by conſent. Keb. 491. pl. 39. Paſch. 15 Car. 2. B. R. Vanganhell v. Brownwick.

35. In account *judgment* was given *quod computet*, then the defendant *pleaded before auditors, that the goods* for which he was to account *were bona peritura; and* though he took care in keeping them, yet they were much worſe, and that they *remained in his hands for want of buyers, and being likely to be ſtill worſe, he ſold them upon credit to a perſon beyond ſea*. Upon demurrer the plaintiff had judgment; for where a merchant delivers goods to his factor ad merchandizandum, he cannot ſell them upon credit, unleſs he hath a particular commiſſion ſo to do. 2 Mod. 100. Trin. 28 Car. 2. C. B. Anon.

36. No plea which would have been a *good plea in bar of the action*, ſhall be pleaded before auditors. Agreed. Arg. 10 Mod. 22. Paſch. 10 Ann. B. R. in caſe of Biſhop v. Eagle.

(P) What will be a good Diſcharge *without Deed.*

Br. Account, pl. 26. cites S. C.

[1. IF a *bailiff does a thing that belongs to him as bailiff*, as to *pay rents*, or ſuch things, which are due of right, from the manor, he *ſhall aver* this without writing. 42 Edw. 3. 6. b. 25.]

Br. Accompt, pl. 26. cites S. C. and ſays that of a thing

2. *So* it ſeems he may aver *a payment by command, which of right does not belong to him as bailiff*, as that he by command paid 6 l. for the maintenance of the plaintiff's brother. 42 E. 3. 6. b. 25.]

which does not touch his bailywick, it is not reaſonable that he ſhould have the averment without warranty, by which, &c. & adjornatur.——Fitzh. Tit. Account, pl. 27. cites S. C. and S. P. by Finch.

Fitzh. tit. Account, pl. 27. cites S. C. and S. P. by Finch.

[3. So if a man *appoints a ſtranger or his ſervant to receive money in his name*, and he receives and *pays it over by his command*, he may aver this without deed; for the ſtranger is his ſervant for the time. 42 Edw. 3. 24.]

[4. It

[4. It is a good diſcharge that *the plaintiff was indebted to him in the ſame ſum*, and *granted that the defendant ſhould retain it* in ſatisfaction of his debt, without deed. 12 H. 4. 18.] Fitzh. tit. Account, pl. 21. cites S. C. and that after the defendant was awarded to account, &c.——Br. Account, pl. 31. cites S. C. [but in neither of theſe caſes is any mention of a deed.]

[5. So it is a good diſcharge that he *delivered the money to a ſtranger by the plaintiff's command.* 12 H. 4. 18.] Br. Accompt, pl. 31, cites S. C.

[6. The accountant being *charged as bailiff* of a manor may aver without ſhewing a deed of acquittance, *that as to a certain ſum* of money *he paid it by the plaintiff's command to T. the plaintiff's receiver of the ſame manor*; for he cannot oblige him to give a tally or acquittance. 13 Rich. 2. Account 51. adjudged.]

[7. *So* ſuch bailiff may, without ſhewing a letter, tally, &c. aver *that he paid* a certain ſum *to the plaintiff himſelf*; for he cannot conſtrain his lord to give acquittance. 13 R. 2. Account 51. adjudged.] S. P. Br. Accompt, pl. 13. cites 41 E. 3. 25.—Payment to *the plaintiff himſelf* was averred without ſhewing deed, and good. Br. Monſtrans, pl. 148. cites 42 E. 3. 25.

[8. *But* in account againſt a bailiff the defendant can *not* aver a *delivery over to another, &c. without writing or tally.* 6 Rich. 2. Account 47. per Belknap. It ſeems as if this is intended of a voluntary delivery upon a bargain between them, *without the command of the plaintiff.*] [166]

9. Account as receiver of 40 l. by other hands. The defendant *ſaid that the plaintiff had a deed of the ſame receipt; judgment if without ſhewing the deed*, &c. as in debt upon contract. The defendant ſaid that he had ſpecialty. Judgment, &c. But the principal caſe was not * admitted, therefore quære. Br. Accompt, pl. 2. cites 2 H. 6. 9. S. P. Br. Count, pl. 2. cites S. C. but it was not adjudged. * It ſeems miſprinted for (adjudged.)

(Q.) Diſcharge *before Auditors. Who* ought to plead † it.

See (K. 2.)—Theſe Pleas ſeem not to anſwer the diviſion. † This word (it) ſeems to be put in by miſtake, and makes the title not to agree with the matter of the pleas, which might be, viz. *Several accountants, where one ſhall account alone. And where the account by one ſhall affect the other.*

[1. IF 2 in a writ of account are *adjudged to account*, and *one is afterwards outlawed* in the ſuit, and the other appears, he ſhall account alone. ‡ 41 Edw. 3. 3.]

‡ Fitzh. tit. Account, pl. 23. cites S. caſe.——Br. Accompt, pl. 10. cites S. C.——Br. Reſponder, pl. 5. cites S. C. becauſe the proceſs is determined againſt the other.——S. P. Thel. Dig. lib. 12. cap. 2. ſ. 19. cites Paſch. 13 E. 3. Brief 263. and ſays that ſo it is by way of plea, and cites Mich. 31 E. 3. Brief 344.——Brownl. 25. in a nota, S. P. and ſame reaſon, as in Br. Reſponder.

[2. *So if* he who is *outlawed be dead.* 41 Edw. 3. 3. *So if* after 2 are adjudged to account *one dies*, the other ſhall account alone. 41 Edw. 3. 3. Br. Accompt, pl. 10. cites S. C.——Br. Reſponder, pl. 5. cites S. C. For the receipt of the one is the receipt of the other.—Brownl. 25. S. P. in a nota.

[3. When

Br. Accompt, pl. 10. cites 41 E. 3. 3. & 9.—— Fitzh. Accompt, pl. 23. cites Hill. 41 E. 3. 3.

[3. When 2 are adjudged to account, and one is outlawed, and [the other] accounts, if he *diſcharges himſelf* upon the account, *this ſhall be a diſcharge to the other* when he ſues a ſcire facias upon a charter of pardon, and *if he be charged* by the account, *this ſhall be a charge upon the other*, becauſe they *were adjudged to account jointly*. 41 Edw. 3. 13. b.]

(R) Account. Inforced. How.

The *miſchief before* this ſtatute was, as it appears by the letter thereof, that the laſt proceſs in an action of accompt was diſtreſs infinite, and the accomptants ſeeking ſubterfuges did withdraw themſelves and become vagrant, flying to ſecret places, ſometimes in foreign counties, and had no lands or tenements whereby they might be diſtrained, ſo as the lords were in a manner remedileſs.

1. *Statute of Marlb.* 52 *H.* 3. *cap.* 23. ENACTS, That *if* * *bailiffs withdraw themſelves,*

But this act gives to the lord a writ of accompt, founded upon this ſtatute, which [from] the words of the writ is called a *monſtravit de compoto*, and begins thus, Monſtravit nobis A. quod cum B. balivus ſuus, &c. and is mentioned in the Regiſter, Fleta, and other ancient books and records, and *lies in any county where the accomptant may be found*. 2 Inſt. 143.——But this writ ought not to be granted but upon oath to be made in chancery. 2 Inſt. 144.

* This ſtatute *extends* not only to bailiffs according to the letter, but *to gardeins in ſocage, receivers and other accomptants*; but the ſtatute of Weſt. 2. cap. 11. extends only to bailiffs and receivers, and not to a gardein in ſocage; for a capias lies againſt him by this ſtatute, but no exigent by the ſtat. of Weſtm. 2. 2 Inſt. 143.

And where ſome have ſuppoſed that the ſtatute of Weſt. 2. which gives proceſs of utlagary in an action of accompt, hath taken away either the effect or the uſe of this act, the contrary appears in ſeveral caſes in our books. 2 Inſt. 144.

* [167]

If the accomptants have *any lands* or tenements whereby they might be diſtrained, *though* it be *not to the value of the account*, yet it ſuffices to exempt them out of this ſtatute, *but* they muſt have lands and tenements *for term of life at the leaſt*, and ſo is this act to be underſtood.

And have no lands, &c. whereby they may be diſtrained, they ſhall be attached by their bodies, ſo that the ſheriff ſhall make them come to make their accompt.

For where after this ſtatute, and after the ſaid ſtatute of W. 2. cap. 11. viz. in 4 E. 2. one brought a writ of monſtravit de compoto upon this ſtatute, and counted that he was his receiver of 100 l. &c. in which action 4 points were reſolved, 1ſt, That our ſtatute extends to a receiver as well as to a bailiff. 2dly, That if the accountant has any lands or tenements, though they be not ſufficient to render the account, yet he is exempted out of the ſtatute. 3dly, By theſe words (lands and tenements) is intended an eſtate of freehold; and therefore, where it was there found that the accountant had a houſe of the yearly value of 6 s. in the right of his wife, who had the inheritance thereof, but for that it was the *freehold of his wife*, and not his freehold, *it was adjudged no ſufficiency within the ſtatute*. 4thly, It was reſolved that if the huſband had *iſſue by his wife*, ſo as ſhe had a frankte-nement for his life, he had been exempted out of the ſtatute. And the like caſe was in 6 E. 2. in caſe of a receiver, and many other authorities and records there be to that effect, whereby it appears that both this act hath ſtill its effect, and that it was in uſe after the ſtat. of W. 2. cap. 11. and herewith agrees Fleta, who wrote ſoon after the ſtat. of Weſt. 2. and that ſtat. does confirm this act, & ſi diffugerit, & gratis compotum reddere noluerit, ſicut in aliis ſtatutis alibi continetur; by which words this ſtat. is meant. 2 Inſt. 144.——Thel. Dig. lib. 12. cap. 60. cites Paſch. 4 E. 2. Briefe 791.—— And Ibid. cites 6 E. 2. Briefe 806. That if he has no tenements in the county where the writ is brought, yet the writ is good, notwithſtanding that he has tenements in another county.

But if any ſue out this writ of monſtravit de compoto, and *attaches the accountant's body, where he has lands and tenements*, contrary to this act, in deceptionem curiæ contra formam ſtatuti, &c. the party grieved ſhall have a writ for his relief, which appears in the Regiſter. 2 Inſt. 144.

* Receivers were anciently called chamberlains, becauſe they were wont to keep the money received in chambers ſpecially provided for that purpoſe, yet cannot be charged *as chamberlain* in an account, but as bailiff or receiver. 2 Inſt. 380.

Weſt. 2. 13 *Ed.* 1. *cap.* 11. *Concerning ſervants, bailiffs, chamberlains, and all* * *receivers, which are accountable:*

When

When the maſters of ſuch ſervants do aſſign them auditors to take their accounts, An *account taken before one auditor* is not within the purview of this ſtatute; for it is in nature of a commiſſion, and a commiſſion being made to two or more cannot be executed by one alone. 2 Inſt. 380.

In *debt* the plaintiff *counted that the defendant aſſigned auditors* to him *A. B. and C. B. and that the plaintiff accounted as bailiff of his manor, by which he accounted before them; and it was found that the plaintiff was not in arrears, and that the defendant was in ſurpluſage* 10 *l.* Newton ſaid that nothing was owing to him, and that he was ready to make by his law; and by the opinion of the court the defendant may have his law, though it be before *auditors*; for they *are judges of the bailiff, and not of the lord*; for the *ſtatute is that if the accountant be in arrears*, he ſhall not have his law; ſo that the ſtatute is all upon the accountant, and nothing upon the lord. Br. Ley Gager, pl. 62. cites 14 H. 6. 24.

Debt againſt the lord by receiver of the ſurpluſage, where he has paid more than he received, upon account before auditors, the defendant tendered his law. Per Danvers J. the law lies; for the ſtatute of W. 2. which ouſts the law, is only for the lord, and not for the accountant; and yet by him the defendant cannot wage his law, becauſe the *plaintiff was compelled to account*; but Priſot was clear that the law lies, but the defendant dared not demur. Br. Ley Gager, pl. 65. cites 38 H. 6. 6.

By this act the *auditors are judges of record*, and therefore by conſequence *in an action of debt for the arrearages* of an account before 2 or more auditors, the *defendant ſhall not wage his law*. 2 Inſt. 380.

And by the ſame conſequence of reaſon, if the *lord* be *found in ſurpluſage* upon the account determined by the auditors as an incident to their authority in an action of debt brought by the bailiff for this ſurpluſage, the lord *ſhall not wage his law*, becauſe by force of this act (they being judges of record) no wager of law can be allowed againſt their record. And ſo was it adjudged in the exchequer chamber. as it is reported in 20 H. 6. 8. but if the account be made before one auditor, this is out of the ſtatute. 2 Inſt. 380.

It has been ſeveral times ruled in B. R. and alſo in C. B. that a common bailiff cannot wage his law, but that it is *otherwiſe of a receiver*; per Walmſley J. to which the other juſtices aſſented. D. 183. b. marg. pl. 60. cites Mich. 42 & 43 Eliz. Sheffield v. Barnsfield. [168]

And though in debt upon arrears of account before auditors, they may *commit the bailiff to gaol*, if he be in arrears, *but not the lord for his ſurpluſage*; for the ſtatute does not ſo extend. Br. Ley Gager, pl. 7. cites 20 H. 6. 16.——S. P. As to the lord. 2 Inſt. 380.

In an action of account againſt a receiver for 13s. 4d. or any other *ſum under* 40*l.* the *ſheriff* in his county-court *ſhall not hold plea* of it; becauſe he cannot aſſign auditors, who (as has been ſaid) are judges of record, and the county-court is no court of record. 2 Inſt. 380.

And they be found in arrearages upon the account, all things [*being*] *allowed which ought to be allowed,* By theſe words, if the *lord* be *found in ſurpluſage*, it is within their authority, and therefore parcel of their record; and ſo in that caſe no wager of law lies. 2 Inſt. 380.

But albeit the *auditors* do *diſallow a juſt demand*, yet ſhall he take no averment or advantage upon theſe words againſt the record of the judgment of the auditors; for judicium pro veritate accipitur, & nemo poteſt contra recordum verificare per patriam; but *he has remedy* after by this act, *by* a writ of *ex parte talis* for his relief. 2 Inſt. 380.

Their bodies ſhall be arreſted, Note, at the common law the proceſs in account was ſummons, attachment, and diſtreſs infinite, by the ſtatute of Marlbridge a writ of monſtravit de compoto was given; and here by this branch the body may be arreſted; and after by this act proceſs of outlawry is given in account, ſo as after the account determined the body of the defendant may be arreſted, &c. 2 Inſt. 380, 381.

The power of the auditors is to commit him to the next gaol upon the account ended, and the party found in arrears is to be committed to the next gaol *immediately*, and not by any mean ſpace. Br. Account, pl. 6. cites 27 H. 6. 8.——S. P. For note the words in effect be ſuper compotum ſuum, &c. arreſtentur & liberentur. 2 Inſt. 381.

The lord cannot commit the defendant to ward, as the auditors may by the ſtatute; for they have this power only by the ſtatute; but upon account at common law before himſelf, the lord might have debt of the arrears. Br. Account, pl. 16, cites 45 E. 3. 14 & 28.

And by the teſtimony of the auditors they ſhall be ſent unto the next gaol of the king in thoſe parts, and ſhall be received of the ſheriff or gaoler, This is intended of the *next gaol, though* it be *not in the ſame county*, for the ſtatute is in nature of a commiſſion; and therefore this word (next) muſt be purſued. 2 Inſt. 381.

The

The auditors must make a *warrant in writing under their ſeals* to the ſheriff, upon the ſpecial matter; and thereupon the ſheriff ought to receive the accountant in execution. 2 Inſt. 381.

If need require; but this the gaoler could not have done by the common law, as by all our ancient authors it appears. 2 Inſt. 381.

And impriſoned in iron under ſafe cuſtody, and ſhall remain in the ſame priſon at their own coſt, till they have ſatisfied their maſter fully of the arrearages.

By this clauſe it appears, that he, that is ſo impriſoned, *muſt live of his own*. 2 Inſt. 381.

A *guardian in ſocage* cannot be committed to priſon by force of this act; for he is in loco parentis, and this act begins with the word (ſervants) which is to be applied to bailiffs, chamberlains, and receivers, and extends to all of them; and therefore guardian in ſocage being no ſervant, nor the heir lord or maſter, he is not by this act to be impriſoned. 2 Inſt. 380.

By this clauſe is the writ of *ex parte talis* given to the accountant,

Nevertheleſs, if any perſon ſo committed complain that the auditors have grieved him unjuſtly, charging him with more than he received, or not allowing him expences or reaſonable diſburſements,

if the auditors aſſigned by the lord either *charge him de receptis quæ non recepit, vel non allocando ei expenſas* aut liberationes rationabiles, and *this writ is in nature of a commiſſion to the barons of the exchequer* for that they are the *ſovereign auditors of England* to hear and audit the account, & quod fiat juſtitia partibus. 2 Inſt. 381.

But this writ *lies not but where the account is taken before auditors aſſigned by the lord*; for if there be a writ of account brought, and the court aſſigns auditors, there lies no writ of ex parte talis; for in that caſe he ought to ſhew his grief to the juſtices, and they ought to do him juſtice, and the writ of ex parte talis is grounded upon this act, where the lord aſſigns auditors. 2 Inſt. 381.

[169]

The writ in the Regiſter, and F. N. B. 129. (F) is *coram theſaurario & baronibus*, noſtris de ſcaccario; but it ought to be *coram baronibus* de ſcaccario, according to this act; and that the rather becauſe the barons are the ſovereign auditors of England; and herewith agrees Fleta. 2 Inſt. 381.

And find friends that will take him to mainprize, to bring him before the barons of the exchequer, he ſhall be delivered. And the ſheriff ſhall give knowledge unto his maſter, that he be before the barons at a certain day, with the rolls and tallies, by which he made his account, and in the preſence of the barons, or ſuch auditors as they ſhall aſſign, the account ſhall be rehearſed, and juſtice done to the parties, ſo that if he be found in arrearages he ſhall be committed to the Fleet.

Upon *ſureties found* he ſhall be at large to follow his writ of ex parte talis before the barons; but if it be found that he was in arrearages, he ſhall be in execution again. 2 Inſt. 381.

See Marlbridge, whereby the writ de monſtravit de compoto is given. 2 Inſt. 381.

*And if he flie he ſhall be diſtrained to come before the juſtices to make his account, if he have whereof to be diſtrained; and when he comes to the court auditors ſhall be aſſigned, before whom, if he be found in arrearages, and cannot pay the arrearages forthwith, he ſhall be committed. And if it be * teſtified by the ſheriff that he is not found, he ſhall be called from county to county until he be outlawed; and ſuch a priſoner ſhall not be repleviſable.*

* Here is *proceſs of outlawry* given in account. 2 Inſt. 381.

For further explanation of this ſtatute ſee the ſeveral diviſions of this head.

(S) Auditors aſſigned by the Party. How. And their Power.

1. IF I make J. S. my *auditor generally to take accounts of all my bailiffs and receivers*, he is not a ſufficient auditor *without a patent*; for when a man is made an auditor generally,

he is an officer, and an officer cannot be without a deed; per Periam J. and not denied by any. Le. 219. pl. 301. Mich. 32 & 33 Eliz. in C. B. in case of Gawton v. Lord Dacres.

2. *But* if a *bailiff or receiver* be *accountable to me*, it is as clear on the other side, that *I may appoint* one to be my *auditor to* take the account of him *pro hac vice by word*; per Periam J. which Anderson granted, and not denied by any. Le. 219. pl. 301. in case of Gawton v. Lord Dacres.

3. *But if he afterwards takes an account of any by* force or *colour of the said warrant without my commandment*, he is not a sufficient auditor to such intent, either to take the account, or to assess the arrearages, if the accountant be found in arrear, or to make allowance if he be found in surplusage; per Periam J. and not denied by any. Le. 219. pl. 301. in case of Gawton v. Lord Dacres.

(T) Allowance by Auditors. Of what.

1. *IN receipt of money* there is no *costs* to be allowed, &c. Br. Account, pl. 18. cites * 46 E. 3. 9. * S. C. cited, and adjudged that no allowance shall be made a receiver for surplusage. 2 Bulst. 278. Mich. 12 Jac. B. R. Earl of Suffolk v. Floyd.—And Roll. Rep. 87. in S. C.—S. P. Br. Account, pl. 53. cites 4 H. 6. 27. *But in account as bailiff* he shall have certain *allowances* for his labour.

[170]

2. If an *executrix* will account of the receipts of the testator, she *shall be charged* by action of debt *upon the arrears of account of the goods of the deceased*; and yet action of account does not lie against executrix; and the reason seems to be because she took upon her notice of account. Br. Account, pl. 25. cites 2 H. 4. 13. Br. Dette, pl. 52. cites S. C.—Br. Executors, pl. 40. cites S. C.

3. In debt, *executor assigned auditors, who found an over-payment in the testator by* 12*l.* by which the *bailiff brought debt against the executor*, and recovered by award; for though the statute of Westminster 2. does not give them power to commit the lord to prison as well as the bailiff, yet by the statute the auditors are made judges of record; and therefore the executor charged per judicium. Quod nota, and the writ was detinet only. Br. Dette, pl. 182. cites 10 H. 6. 24. Br. Executor, pl. 159. cites S. C.

4. If a *bailiff pays rent issuing out of the manor, &c. which touch the manor* of which he is bailiff, he shall have thereof allowance; & e contra if he pays the *debts of the lord*. Br. Account, pl. 88. cites 4 H. 7. 14. per Keble. Br. Bailiff, pl. 26. cites S. C.

5. *Bailiff of land* shall have allowance on his account, but not bailiff *of goods*. D. 183. b. marg. pl. 60. Mich. 42 & 43 Eliz. Sheffield v. Barnsfield.

6. If one *becomes my bailiff of his own wrong* without my appointment, he is accountable to me, but I am not compellable to make him any allowance for his expences about my business; and if I assign him an auditor he cannot make allowance of such expences.

expences. Per Periam J. Le. 219. pl. 301. Mich. 32 & 33 Eliz. C. B. in caſe of Gawton v. Ld. Dacres.

7. The plaintiff declared that he was *bailiff* to the defendant *of certain manors, receiver of certain monies*, and ſo retained, *ad diverſa negotia procurandum*: and upon account the allowance was made unto him for his *board-wages, and other expences in riding circa negotia*. And by Anderſon theſe allowances ſhall not bind the defendant; for as bailiff of a manor, no expences ſhall be allowed unto him, but thoſe which the bailiff has expended within the manor. Le. 219. pl. 301. in caſe of Gawton v. Lord Dacres.

8. If I *retain one* to follow my buſineſs and *give him money* to diſburſe in ſuch buſineſs, if he *expends more than he received* he does it without warrant, and no allowance ſhall be made him. Per Anderſon and Windham J. Le. 219. in caſe of Gawton v. Lord Dacres.

Ibid. The reporter adds a nota, that by the iſſue it was *found that 30l. of the ſaid 204l. was not paid by his command*, and the defendant prayed that he might be ſatisfied out of the 600l. ſurpluſage; but adjudged that it ſhould not, but that the plaintiff ſhould recover 30l. more, and that the ſurpluſage is nothing to the purpoſe.——2 Bulſt. 277. S. C. adjudged accordingly. And Coke Ch. J. cited 1 E. 5. 1. That if one be charged in an action of account as receiver, and he pleads that he received it, and afterwards by his command diſburſed the ſame for him, he ſhall not plead this in bar of the account, but it ſhall be allowed him on his account before auditors, and ſaid that this is very clear; and the whole court agreed with him herein, and that the defendant in the principal caſe can have no allowance for what he had *diſburſed of his own head*, more than he received.

9. In account, the plaintiff charged the defendant as *receiver of 204l. pur account render*. Before auditors the defendant *ſhewed that he had diſburſed the 204l. to divers perſons in particular, by the command of the plaintiff himſelf, and likewiſe 600l. more*, and ſo prays allowance of this ſurpluſage. But per cur. he ſhall not be allowed the ſurpluſage becauſe he is charged as receiver and not as bailiff. And Coke Ch. J. cited 46 E. 3. that a receiver ſhall not have any recompence *for his travel*, but a bailiff ſhall. Roll. Rep. 87. pl. 38. Mich. 12 Jac. B. R. Suffolk (Earl of) v. Floyd.

Ibid. 387. pl. 78. BURDET v. THREELE S. C. ſays that the defendant ſhould have confeſſed what was allowed and pleaded to the reſt, and not plead a general iſſue.

10. In account the *defendant confeſſed the charge, but alleged an allowance of a halfpenny expended*. The plaintiff demurred; it was objected that the demurrer was ill, and the defendant *ſhould have prayed judgment de reſiduo*; to which the court inclined. 3 Keb. 362. pl. 40. Mich. 26 Car. 2. B. R. Hemſell v. Thrale.

[171]

11. The *rule* generally taken, *that a bailiff ſhall be allowed expences and ſurpluſage* in an action of account, *but not a receiver*, holds true only of a *bare receiver*, and as to him the reaſon is evident; but *where the nature of the thing ſhews that the receiver muſt be put to trouble and expence*, the rule is falſe. 10 Mod. 23. in caſe of Biſhop v. Eagle.

(U) Proceſs and Pleadings before or after Judgment to Account.

1. THE defendant was awarded to account and *capias ad computandum awarded*, and the *defendant was taken by another ſuit*, by which the *plaintiff in writ of account prayed that he remain for his execution*, and the *defendant ſaid that the plaintiff after the award was nonſuited in the writ of account*; and it was held that he * cannot be nonſuited after judgment, for *the award to account is a judgment*; but becauſe it was after the year and day, he was awarded to ſue *ſcire facias*, and not to have him in execution immediately. Quod nota. Br. Accompt, pl. 37. cites 21 E. 3. 7.

* See pl. 13.

2. In account, the defendant pleaded *acquittance*, which was *found falſe by verdict*, by which the defendant was adjudged to account, and *capias ad computandum* iſſued, and the *plaintiff died*, his *executor brought ſcire facias* againſt the defendant to account. Per Hill, the writ does not lie if he has not accounted, for otherwiſe by the death of the plaintiff *the original ſhall abate*; for in writ of account there is not other execution, but that the defendant ſhall pay the arrears, and therefore the writ was abated. Br. Accompt, pl. 40. cites 27 E. 3. 32.

And ſo Brooke ſays, it ſeems by this book, that where judgment is given to account, there *if the defendant does not account* in fact by force of the judgment *in the life of the plaintiff*, the executor ſhall not have execution. Ibid.——But Br. Exigent, pl. 21. cites 14 H. 4. 1. that in account it appeared, that upon *judgment of account* the *plaintiff died before account made*, the *executors* had ſcire facias and capias ad computandum thereupon, and exigent upon that; for *upon capias after judgment, exigent ſhall iſſue upon the firſt capias*.——Br. Accompt, pl. 33. cites S. C. Brooke ſays, and ſo ſee that this nature of judgment ſhall ſerve, though the defendant had not accounted in fact in the life-time of the plaintiff, and notwithſtanding that two judgments are in account, and he died before the laſt judgment. Quod nota.

3. The defendant in account of receipt by other hands found *mainpriſe to be at the next day*, and the clerks ſaid that they ſhould be mainpriſed *from day to day till the inqueſt was paſſed*, and this was their courſe, and no other courſe had been ſeen. And yet Wilby commanded to enter it as above notwithſtanding their courſe, and ſo it was. Br. Accompt, pl. 50. cites 24 E. 3. 32. & 67.

4. Where a man is *awarded to account*, this *is not peremptory to recover immediately*, but then he ſhall plead in diſcharge of the account before auditors, be the plea in bar of the account tried by verdict or demurrer. Br. Peremptory, pl. 81. cites 29 E. 3. and Fitzh. Accompt 128.

5. Account *againſt a bailiff* ſhall be brought *in the county where he was bailiff*, but *againſt a receiver* it may be *in any county*. F. N. B. 117. (C) in the new notes there (c) cites 30 E. 3. 20.

6. No capias or *exigent* lies in account *againſt a guardian*. F. N. B. 118. (A) in the new notes there (a) cites 17 E. 3. 50. but if the defendant comes in by capias, he ſhall be put to anſwer, for it is only a miſcontinuance. Cites 29 E. 3. 5.

If the defendant pleads in bar, and it is found againſt him, he ſhall be awarded to the Fleet inſtanter.

7. A writ appears in the Regiſter, that if a man be *found in arrearages* upon his account, and the party *plaintiff arreſts him in London* for theſe arrearages, then he *may ſue a writ* in chancery directed unto the ſheriff, rehearſing the whole matter, *commanding the ſheriff to detain* and keep * in priſon him who is ſo arreſted, until he has ſatisfied and paid the arrearages.

F. N. B. 118. (c) in the new notes there (b) cites 39 E. 3. 36. but ſays, that if the plaintiff there leaves him without accounting, he may have a *ſcire facias againſt the plaintiff*, and *if the plaintiff does not come* at the day, the *defendant ſhall be diſmiſſed*, and thereby the plaintiff has loſt the advantage of the judgment; and per Anſham, of the writ alſo. 18 E. 2. Account 123. See 1 H. 7. 1. But if he will not account, the plaintiff may pray judgment according to the account. Cites 14 E. 3. Account 109.

8. And it ſeems by the ſame reaſon, that if a man brings *debt upon arrearages of account* before auditors, and has the party arreſted, that *he ſhall have a writ* out of the Chancery *unto the ſheriff, to keep him in priſon* until he has paid thoſe arrearages; *but* I conceive this writ does *not* ſtand in law, that he ſhall be kept in priſon *without anſwering unto the ſuit commenced* againſt him. F. N. B. 118. (C)

9. *He who is awarded to account, ſwears that he will account well and lawfully.* Br. Accompt, pl. 10. cites 41 E. 3. 3. 9. per Belk.

10. In account the plaintiff *counted as againſt receiver*, &c. The *defendant pleaded fully accounted before*, &c. and the other e contra. And *it was found that he had not accounted*, by which *capias ad computandum* was awarded, and *exigent upon it*, and the *ſheriff returned reddidit ſe*, and the *defendant pleaded acquittance after the judgment*; and the *plaintiff ſaid that not his deed*; and upon this it was agreed, that the *defendant ſhould find mainpriſe* in 40 l. And yet it may be that this is greater than the ſum of account. And per Bryteine clerk, if he fails he ſhall loſe the ſum, which ſeveral denied. Br. Accompt, pl. 23. cites 50 E. 3. 11.

If the *plaintiff* in account *does not appear at the niſi prius*, he cannot be nonſuited, for judgment to account was given before, but he *ſhall be barred by his default*.

11. In account the *defendant came by capias ad computandum*, and was awarded to account, and *auditors were aſſigned* to him, *and an hour, at which place and hour the plaintiff made default*, and the *auditors recorded it*; and Horton prayed the juſtices that *nonſuit* might be awarded. Per Markham, this *cannot be*; for if he had appeared, he could not vary from his declaration made before; but Horton ſaid, that if the defendant alleges any payment or tally, or aſſignment made by the plaintiff, there the plaintiff ſhall anſwer to it, which cannot be without his preſence; and after they *agreed to account at another day*. Br. Accompt, pl. 27. cites 3 H. 4. 7.

Quære; for by him where the defendant is taken by capias ad computandum, and the plaintiff makes default, he ſhall be barred. Br. Account, pl. 45. cites 21 H. 6. 26. per Brown.——See pl. 3.

In account the defendant was *adjudged to account, and were at iſſue before auditors, and the jury ready to paſs*, and the *plaintiff made default*, this is a nonſuit to all the action; for though he be adjudged to account, it is *not ſuch judgment as determines the action*. Br. Accompt, pl. 87. cites 1 H. 7. 8.——Br. Accompt, pl. 63. cites S. C. by ſome for law; but per Townſend, if a man be awarded to account, and *capias ad computandum iſſues*, and at the day *he comes*, and the *plaintiff makes default*, he ſhall be nonſuited, and yet after he ſhall have ſcire facias ad computandum, which will give day to the parties again. Br. Accompt, pl. 63. cites 1 H. 7. 8.——S. P. And he ſhall have the ſcire facias upon the firſt judgment. Br. Scire Facias, pl. 237. cites 1 H. 6. [7] 1.——The defendant

defendant was adjudged to account, and *a capias* iſſued againſt him *ad computandum* before auditors, at a day certain; *he appeared and entered into account*, and the *auditors aſſigned them to appear at another day*, at which day the *plaintiff did not proceed*. It was the opinion of the prothonotaries, there can be *nonſuit* in this caſe, becauſe it is after judgment, but a *diſcontinuance* only ſhall be entered, and his ſureties put fine die; and if the plaintiff will afterwards proceed upon the account, he ſhall have a ſcire facias upon this record ad computandum. And the juſtices awarded accordingly. Cro. E. 19. pl. 6. Paſch. 25 Eliz. C. B. Anon.

In account the plaintiff may be nonſuited before the 2d judgment. Reſolved. Cro. J. pl. 14. Mich. 12 Jac. B. R.——S. P. Roll. Rep. 85. pl. 33. per Coke and Doderidge.——S. P. Arg. Cro. E. 636. Mich. 40 & 41 Eliz. B. R. cites 1 H. 7. 2.

12. And the defendant prayed to be *by attorney*, and could not, but ſhall *find mainpriſe*. Br. Accompt, pl. 27. cites 3 H. 4. 7.

13. In account the defendant *pleaded never his receiver to render account*, and *found againſt him*, and capias ad computandum, and this continued till he was *outlawed*, and taken and *impriſoned for it in the Fleet*, and auditors aſſigned to him, *and they were at iſſue*, and the *auditors certified the record* before the juſtices, by which [173] diverſe *venire facias's* were awarded; and the *defendant found ſurety in 200 l. to appear in priſon every day of the plea; and that if the iſſue ſhall be found againſt him, to render his body to priſon;* and proceſs continued to the niſi prius, and there the iſſue *found for the plaintiff*, who prayed his judgment, and further an increaſe, becauſe he was his receiver 27 years paſt. And Markham caſt writ of error in arreſt of judgment. Per Browne, he ought to be demanded upon a pain, and ſo he was, and appeared, by which he was *awarded to the Fleet till he made gree of 18 l. found by the jury, and 20 l. over for increaſe*. Br. Accompt, pl. 45. cites 21 H. 6. 26.

14. In account the defendant pleaded in bar, which was found againſt him, by which he was awarded to account, and was *committed* to ward *to the Fleet;* and after 2 filazers of C. B. were aſſigned him to the auditors to hear his account, and the defendant *prayed to be by mainpriſe*, and could not, *becauſe a judgment is given againſt him, and his body in execution*. Br. Accompt, pl. 3. cites 9 H. 6. 29.

15. In writ of account the *defendant was outlawed*, and ſued charter of *pardon*, and had *ſcire facias againſt the plaintiff, in which they were at iſſue*, and had niſi prius, and the *defendant found bail to attend the inqueſt*, and at the day the *defendant appeared by attorney*, and the jury remained for default of jurors; and at the day in bank Thorp prayed the inqueſt by default, and writ to take the defendant and his mainpernors, becauſe he did not appear in proper perſon, and becauſe the *record of niſi prius made no mention of the ſureties*, nor of the mainpernors, ſo that for default of full record they can record nothing of it; therefore the court held it for null; and becauſe the *defendant appeared in bank in perſon, and the inqueſt did not come*, he had *day over by the firſt mainpriſe*. Br. Accompt, pl. 45. cites 21 H. 6. 26.

16. If certain perſons ought *to account unto a corporation*, as if the king grant to the honeſt men of the town of N. a certain ſum out of things which come to the ſame town to be ſold, and there are collectors to gather the ſame who do ſo, *the king may grant a commiſſion to certain perſons to inquire what perſons have received ſuch* See F. N. B. 119. (F) S. P.

ſums, and to hear and determine the matter, and to hear their accounts thereupon, and *do in that caſe as auditors ſhall do, and* he ſhall *ſend a writ unto the ſheriff to return a jury* before the ſame juſtices at the day, &c. which they appoint, &c. to inquire thereof. F. N. B. 114. (C)

S. P. Br. Exigent, pl. 1. cites 19 H. 8. 1.— Br. Proceſs, pl. 2. cites S. C. but adds, that by the prothonotaries this is covin.

17. In account, after judgment the plaintiff ſued *ſcire facias ad computandum, and the ſheriff returned nihil*, by which *capias ad computandum was awarded*, becauſe it was after judgment; and ſo ſee capias lies upon ſcire facias after judgment, where capias was the proceſs in the original. Br. Account, pl. 1. cites 19 H. 8. 6.

18. After judgment quod computet, if the defendant be *taken upon a capias ad computandum, and bailed* pending the action before the auditors, *and makes default* before them, capias ad computandum de novo ſhall iſſue; per tot. cur. and affirmed by the prothonotaries. Le. 87. pl. 189. Mich. 29 & 30 Eliz. C. B. Anon.

19. If the bailiff be found in ſurpluſage in the concluſion of the account, the auditor ought to enter *allocatur ſuper determinationem computi in ſurpluſagiis, ſo much for ſuch and ſuch expences allocatis allocandis upon the next account.* But in this caſe it appeared upon the evidence, that the *entry upon the foot of the account was, viz. And ſo he is in ſurpluſage upon the determination of this account* 26 *l.* But the *auditor being examined, ſaid*, that *it was not his meaning to allow* unto him *ſo much, but only to find and expreſs the certainty of the whole account, and ſo refer the allowance of it to the defendant to whom he was auditor.* And upon that the court ſaid
[174] to the jury, if they believed the auditor, that they ſhould find againſt the plaintiff, for upon the matter here is not any account, and ſo no allowance; for the allowance, if it had been according to law, ought to be entered before the allocatur, &c. and ſuch allowance is as a judgment; but here is not any allowance, for the auditor did refer the ſame to the defendant. Le. 219, 220. pl. 301. Mich. 32 & 33 Eliz. C. B. in caſe of Gawton v. Lord Dacres.

Win. 5. WHITE v. WILLIAMS, Paſch. 19 Jac. ſays, it was holden by Gawdy and Fenner only preſent, that the judgment ought to be given which the plaintiff had counted of; but Baron Altham e contra; for the court may in diſcretion give a leſs ſum.

20. Account againſt J. S. *as bailiff for* 100 *l.* the defendant *pleads never his bailiff*, which was *found againſt him*, and thereupon he was adjudged to account before *auditors*, who having *aſſigned a day* ad computandum, the *defendant made default*; whereupon it was adjudged quod querens recuperet valorem bonorum præd' (viz.) 92 l. 10 s. And this was aſſigned for error, there being *no writ awarded to inquire of the value.* Sed per curiam, where the defendant makes default, the court may order that the plaintiff recover the value as he had counted, but then the judgment ought to be ſo, whereas here the 92 l. 10 s. is not as he counted. And here day being given him to account, he not being preſent to take conuſance thereof, and ſo is condemned by default without notice, and therefore the 2d judgment was reverſed. Cro. E. 806. pl. 7. Hill. 43 Eliz. B. R. Williams v. White.

21. In

21. In account the 2*d judgment was reverſed*, and *the firſt, being without error, was affirmed*; it was ſaid, that a *capias ad computandum* ſhould iſſue out of this court to bring the defendant to account. Cro. E. 806. pl. 7. Hill. 43 Eliz. B. R. Williams v. White.

22. A *writ of error* will not lie *after the firſt and before the ſecond judgment*, becauſe the firſt judgment is but an award, and no final judgment till he has accounted before the auditors; and the *firſt judgment does not determine the original.* Cro. J. 356. pl. 14. Mich. 12 Jac. B. R.

S. C. Godb. 258. pl. 356. S. C. by name of Fox v. MEDCALFE, and S. P. accordingly; for the firſt judgment is only a conveyance, and the plaintiff has no benefit till he be ſatisfied by the award of the auditors, becauſe upon the award the final judgment ſhall be given. ——— Cro. E. 636. pl. 32. S. P. Arg. cites 21 E. 3. ——Roll. Rep. 84. pl. 33. WOOD v. MEDCALFE, S. C. accordingly; but, per Coke and Doderidge, if in writ of account the defendant pleads in bar, and the bar is adjudged good, the plaintiff in ſuch caſe may have a writ of error immediately; for this judgment is final till reverſed. And if in the principal caſe both judgments had been given, and error brought, and the firſt is reverſed, the laſt is conſequently reverſed alſo; and ſo if the laſt judgment be reverſed, the firſt judgment alſo ſhall not ſtand by itſelf, but ſhall be reverſed alſo. Quod nota.

23. In an action of account the defendant was adjudged to account, and auditors were aſſigned. The *court was moved that they would order to join ſome merchants to the attornies on either ſide*, to help them to manage the account, becauſe the attornies were not ſkilful in ſuch buſineſſes. Roll Ch. J. ſaid, we can make no rule for this, but you *may by conſent adviſe with merchants to aſſiſt* you in drawing up the accounts. Styl. 388. Mich. 1653. Franklin's caſe.

24. In action of account there was a *demurrer*, and exception taken *becauſe he had not ſhewn the particulars* of what was diſpoſed of by the ſale; for it is not good for a factor to ſay, I have received ſo much for your goods, but he ought to ſhew the particulars; but Glyn Ch. J. ſaid, the court ought not to intermeddle with their accounts, becauſe the *auditors are officers appointed by ſtatute, who ought to refuſe or confirm* them; and he knew not by what advice they had demurred in account. Hern ſaid, that 2 clerks of this court are the auditors; but if there be a demurrer upon the pleadings, it ought to be tried by the court. And it was agreed to wave the demurrer by conſent, and leave the matter to the auditors. 2 Sid. 89. Trin. 1658, in B. R. Leger v. Amory.

[175]

25. If one *comes in by habeas corpus only to account*, he ſhall not put in *ſpecial bail*, and if he does, it is erroneous. Keb. 230. pl. 46. Hill. 13 Car. 2. B. R. Towes v. Lewis.

And though ſpecial bail be in the inferior court, yet in B. R. he put in bail only to be in cuſtodia; but after judgment quod computet, a capias iſſues, and when taken he muſt put in ſpecial bail, viz. 2 mainpernors to anſwer the condemnation; but ſhall not, on the firſt appearance, put in ſpecial bail to anſwer the condemnation; per Twiſden & cur. Keb. 255. pl. 26. Paſch. 14 Car. 2. B. R. Towes v. Lewis.

26. After judgment quod computet, the *defendant came in on a capias*, and was committed to the marſhal, *and bailed.* The bail are anſwerable for the account, the *firſt bail* being only for appearance; but yet *ſhall not be diſcharged till the party renders him-*

ſelf on the firſt judgment, though a capias had not iſſued before the bail can be charged, and yet the court would only order the bail to be filed, and leave the party to his remedy according to the condition of the bail-bond. Keb. 89. pl. 96. Trin. 13 Car. 2. B. R. Towes v. Lewis.

27. The *bail entered into recognizance, that if judgment be quod computet, the defendant ſhall appear;* and if he makes default, the plaintiff ſhall have execution againſt body, lands, and goods of the bail. The *court aſſigned a day for his appearance after judgment quod computet*, but *he made default*, and they not rendering his body to priſon, the plaintiff had judgment niſi. Keb. 176. pl. 140. Mich. 13 Car. 2. B. R. Towes v. Lewis.

S. P. and held that the auditors are judges by the ſtatute, and the *court refuſed to intermeddle.* Sty. 464. Mich. 1655. Le Gay's caſe.

28. In account the defendant moved for a farther day to give his account, the matter being referred to auditors. Per Twiſden, the *auditors muſt give farther day.* And per Keeling, *they are judges whether the delay is wilful or not;* and if they find the parties negligent, they muſt certify to the court that they will not account. Mod. 42. pl. 94. Hill. 21 & 22 Car. 2. B. R. Williams v. Lee.

29. By 4 *Annæ, cap.* 16. *ſ.* 27. which gives actions of account againſt executors and adminiſtrators of guardians, &c. and joint-tenants, &c. enacts, that the *auditors appointed by the court ſhall adminiſter an oath, and examine the parties, and for their pains ſhall have ſuch allowance as the court ſhall adjudge reaſonable, to be paid by the party on whoſe ſide the balance ſhall be.*

(W) Declaration.

1. WRIT of account was maintained by one, *ſuppoſing that the defendant was receiver of the money of the plaintiff and the defendant of every manner of contract to their common profit* ariſing, &c. Thel. Dig. 27. lib. 2. cap. 3. ſ. 12. cites 30 E. 1. Itin. Cornub.

In account *as receiver of* 10*l. by the hands of J. and K. and* 18*l. by the hands of perſons unknown*, and of the firſt matter the writ ſtood, and of the reſt the defendant was diſcharged, becauſe it was uncertain.

2. Account as *receiver*, and *counted that* he bailed to him 2 tuns of wine to ſell for him, and *he received of J.* 10*s. and of W.* 10*s. and of another the reſt, and did not ſhew by whoſe hands*, &c. and per cur. he ought to ſhew by whoſe hands in account as receiver, and *if he cannot put it in certain, he may bring writ of account againſt him as his bailiff*, and count of the bailment of the ſtuff to merchandize; quod nota. And per cur. if the ſum of the receipt be 13 s. or other ſum under 40 s. yet the account does not lie before the ſheriff; quod nota. And the reaſon ſeems to be, *becauſe a ſheriff cannot aſſign auditors.* Br. Accompt, pl. 14. cites 43 E. 3. 21.

Br. Brief, pl. 472. cites 46 E. 3. 3.

* In an account *againſt the receiver*, the plaintiff muſt *declare by whoſe hands* the defendant received the money, which he ſhall *not* do in the caſe *of a bailiff.* Co. Litt. 172. a.

The writ ſhall be *general, de tempore quo fuit receptor denariorum, without ſaying by whoſe hands*; but that muſt be ſhewn in the count; but it is not ſo if againſt a *bailiff.* F. N. B. 118. (F)

3. In account he counted *that he bailed to him* certain pots and pails of ſilver *to ſell*, &c. and he ſold them in fairs and markets, and *received of J. ſo much*, &c. *and by the hands of another unknown a great ſum*, &c. and of that which was put in certain the defendant was compelled to anſwer, and of the reſt, which is uncertain, not. Quod nota. And ſo the count good in part, and in part not. Br. Accompt, pl. 17. cites 46 E. 3. 3.

4. In account the plaintiff counted that the defendant was his bailiff of his manor of D. in M. and *had care and adminiſtration of certain goods* and chattels, *viz. oxen, beaſts, and other things;* and it was pleaded to the *count*, becauſe he *did not ſhew of how many oxen*, &c. & non allocatur, but the count awarded *good*. Br. Accompt, pl. 5. cites 27 H. 6. 1.

5. Account by an *abbot* of receipt of 100 l. of the predeceſſor, &c. by the hands of D. to render account, and did *not ſay of the goods of the houſe and church;* for an abbot cannot otherwiſe have property but to the uſe of the houſe, and therefore this is implied, and D. by whoſe hands, &c. was a monk of the ſame houſe, and yet good. Br. Accompt, pl. 49. cites 15 E. 4. 15. S. P. Thel. Dig. lib. 1. cap. 17. pl. 9. cites Hill. 31 E. 3. Accompt 57.

6. In account the plaintiff *declared of damages*, and well; and yet he ſhall not recover any damages. Br. Accompt, pl. 64. cites 2 H. 7. 13.

7. In account *by executor of A. againſt the defendant as bailiff of A. ex quacunque cauſa & contractu ad communem utilitatem of the ſaid A. and one W. P. of certain merchandizes of the ſaid A.* &c. Though the demand was againſt the defendant as general bailiff of one, when by the plaintiff's own ſhewing he was bailiff ex quacunque cauſa ad communem utilitatem of 2, and that he ſhould have joined the other in the action, yet it was held good. Cro. J. 410. pl. 10. Mich. 14 Jac. B. R. Hackwell v. Euſtman. And the court ſaid, it would be very miſchievous if one tenant in common might not have account, without the other's joining, which perhaps the other would not do, and here is *no repugnancy* in the count; and judgment for the plaintiff. Roll. Rep. 411. pl. 10. S. C.

8. In account againſt defendant as *receiver of money, as money of the plaintiff*, it was objected that it was only recital; and the court held it ill. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Frip.

9. The declaration was *as receiver between* 1658 *and* 1673, *without any certain time;* but, per cur. this is well enough, and to ſay, viz. ſuch a day, would be immaterial, and not traverſable. 3 Keb. 425. pl. 26. Hill. 26 Car. 2. B. R. Jaggard v. Frip.

10. Account was brought againſt defendant *as receiver, and ſays not by whoſe hands;* beſides he ſhould have charged him as *bailiff*. This would have been ill upon demurrer upon the declaration, but is cured by judgment *quod computet* by default. 2 Lev. 126. Hill. 26 & 27 Car. 2. B. R. Burdet v. Thrule.

11. Account was brought by a preſent church-warden againſt a former, *as receiver per manus parochianorum*. This was held imperfect and uncertain, and they ſhould have ſet forth the particular

ticular receipts of the particular perſons. See 11 Mod. 187. Biſhop v. Eagle.

12. Where the condition of a bond is to give a true account upon requeſt, and the *party* who is to give the account makes up his account, and *makes a right charge upon himſelf, but puts more in his * diſcharge than he ought*, the plaintiff *cannot aſſign the non-payment* of the charge as a breach, becauſe, until the account is agreed upon on both ſides, it is no account. *But* the breach muſt be aſſigned *on the not giving a true account*, and then all the other matters will follow in evidence. L. P. R. 32. Anon.

(X) Pleadings. In Abatement of the Writ.

Note the writ and count *a tempore quo fuit ballivus manerii de S. & habuit adminiſtrationem bonorum*, &c. if it be *found quod habuit adminiſtrationem bonorum, although he be not ballivus manerii*, the plaintiff ſhall recover becauſe there is no other writ. F. N. B. 116. (P) in the new notes there (b) cites Kelw. 114.

1. IN account the writ was *de tempore quo fuit ballivus ſuus manerii de N.* and by his *count demanded account but of 6 beaſts only*, yet adjudged a good writ and count. Thel. Dig. 83. lib. 9. cap. 5. ſ. 10. cites Mich. 4 E. 2. Accompt 113.

2. In account againſt a receiver, the writ was *receptor denariorum*, and the *count was that he received 100 florins, price each 4s.* &c. and adjudged good. Thel. Dig. 83. lib. 9. cap. 5. ſ. 14. cites Mich. 6 E. 3. 281.

3. In account againſt a bailiff, if the defendant *pleads as to parcel that he was leſſee for years, and not bailiff*, &c. it ſhall not abate the writ but only for this parcel. Thel. Dig. 237. lib. 16. cap. 10. ſ. 44. cites Paſch. 18 E. 3. 16.

4. In account, if the *count* be *of receipt, parcel by the hands of the plaintiff, and parcel by another hand*, and the plaintiff *confeſſes that the defendant has not received any thing by another hand*, all ſhall abate. Thel. Dig. 220. lib. 16. cap. 4. ſ. 12. cites Paſch. 28 E. 3. 91.

Account againſt *receiver*, who *ſaid that he was bailiff of his manor*, therefore ought to be impleaded as bailiff, and not as receiver, judgment of the writ. *And* per Litt. in account as receiver, it is a good *plea that he was his guardian in ſocage*, judgment of the writ; for *otherwiſe he ſhall be doubly charged*, and ſo it was held by all the juſtices. Br. Account, pl. 74. cites 18 E. 4. 3.

5. In account *againſt one as bailiff and receiver*, the defendant *pleaded as to that for which he is ſued as bailiff, that he was his guardian in ſocage, and not bailiff*; judgment of the writ; but it was held that all the writ ſhall not abate for this plea, but it ſhall ſtand for the receipt. Thel. Dig. 236. lib. 16. cap. 10. ſ. 2½. cites Paſch. 32 E. 3. Accompt 60. and ſays, ſee 46 E. 3. 3. accordingly.

6. In account *againſt a bailiff and receiver of 10s.* the *defendant confeſſed that he was bailiff and receiver of 8s.* and the *plaintiff confeſſed that he received only 8s.* yet the writ ſhall not abate; but auditors were aſſigned. Thel. Dig. 237. lib. 16. cap. 10. ſ. 27. cites Trin. 41 E. 3. Br. 543. Quære.

7. Account

7. Account *as bailiff and receiver in K.* The *defendant ſaid that there are* 2 *K.*'s in the ſame county, and none without addition, * & non allocatur. Contra in account as bailiff. 21 H. 6. 23. And the plaintiff counted in K. of Skirk, by which the defendant pleaded it to the count, not warranted by the writ, & non allocatur. Br. Account, pl. 15. cites 44 E. 3. 1.

* S. P. *contra* in account *againſt bailiff of his manor.* Br. Brief, pl. 66. cites S. C. —— Account *as bailiff of his manor of the vills of K. H. and B. and alſo* that he was his *receiver of his money in the county of E.* Port. demanded judgment of writ; for *there are in the ſame county* 2 *vills of K. viz. Over K. and Nether K. and no* vill of K. *without addition* only, priſt; and the other would not maintain the writ by which the *writ was abated in toto*, and not for the parcel in K. only; quod nota. Br. Accompt, pl. 44. cites 21 H. 6. 21. —— S. P. Br. Additions, pl. 33. cites S. C. Br. Brief, pl. 183. cites S. C.

8. Account againſt a feme as *receptrix denar'* of the plaintiff, [178] by the hands of J. N. who demanded judgment of the writ; for receptrix is not form; and upon good argument the writ was awarded good; and notwithſtanding that it was not the form, yet when it paſſes the chancery they ſhall hold plea in bank thereupon. Br. Accompt, pl. 43. cites 19 H. 6. 5.

9. In account *againſt defendant as bailiff*, he *pleaded that he is guardian in ſocage* to the plaintiff, he being under 14, *and ſhewed that the plaintiff's father was ſeiſed of Bl. acre in fee*, and ſo he as guardian, &c. and concluded *judgment ſi actio.* The plaintiff *replied that his father died ſeiſed of a copyhold in fee, which is the ſame land*, &c. but did *not ſhew that it was ſocage* land, *nor of whom it was held*, and therefore was moved not to be good, to which Coke Ch. J. agreed. Roll. Rep. 104. pl. 44. Mich. 12 Jac. B. R. Anon.

10. And it was inſiſted that the defendant being charged as bailiff, and he pleading that he is guardian in ſocage, and concluding judgment ſi actio, is not good; for *the plea being to the writ*, he *ſhould have concluded judgment of the writ*, and that ſo is 49 E. 3. 9. 10. Quod fuit conceſſum per Coke. Roll. Rep. 104. S. C.

11. In account the *death* of any of the parties *before the 2d judgment* ſhall abate the writ. Cro. J. 356. pl. 14. Mich. 12 Jac. B. R. reſolved.

(Y) Pleadings. Where one is charged as Bailiff or Receiver.

See (L) (M) (N).

1. IN a writ which ſuppoſes that *de tempore quo fuit receptor denariorum*, the defendant ſhall not ſay that he hath accounted from ſuch a time to ſuch a time, but ought to *ſhew for what things he hath accounted.* Contra where the writ is *a tempore quo fuit ballivus.* F. N. B. 117. (D) marg. in a note cites 3 E. 3. Account 61.

When the plaintiff charges the defendant as receiver from ſuch a time to ſuch a time, he muſt anſwer that preciſely, or otherwiſe judgment will be given for the plaintiff. Raym. 57. Mich. 15 Car. 2. B. R. Southcot v. Rider.

2. Account

S. P. Br. Accompt, pl. 72. cites 10 E. 4. 8. Per Chocke, which was agreed.

2. Account, and counted *of a receipt by the hands of J. N.* The *defendant ſaid* that *never his receiver by the ſame hand*, priſt, &c. and a good iſſue, though it may be intended that he received by the hands of W. S. but if it was by the hands of the plaintiff, then he ſhall wage his law, and contra here, and therefore he ſhall have *traverſe to the hands of J. N.* Nota, by award. Br. Accompt, pl. 50. cites 24 E. 3. 32. & 67.

3. Account of receipt by the hands of J. N. *Never his receiver by the hands of J. N.* priſt, is a good iſſue, and not pregnant. Br. Negative, pl. 27. cites 29 E. 3. 35, 36.

4. In action of account the *defendant ſaid quod plene computavit before A. and B.* and the others e contra; and *it was found that he accounted before B. only*, and yet the plaintiff was barred, for *the effect is if the defendant has accounted or not*, and it is not traverſable before what perſons he accounted. Br. Traverſe per, &c. pl. 371. cites 30 E. 3. 5. and Fitzh. Judgment 141.

5. Account *againſt J. S. one of the companions of Mayl-ball*, and *counts that he was his receiver*, it is no plea per Mombray,
[179] that he is not of the company of the Mayl-ball, becauſe it is of his own receipt, and not by the companion, and yet the ſurplus ſhall not abate the writ, as it ſeems there. Br. Nugation, pl. 12. cites 38 E. 3. 34.

6. Account againſt the defendant, *as receiver* for 7 years *to merchandize, and that in that time he received* 10*l. by the hands of A. B.* The *defendant ſaid that fully accounted before ſuch auditors ſuch a day, which was the 5th year of the 7 years*, and the *plaintiff traverſed it*, and *found with the plaintiff*, and he prayed judgment, and was compelled to replead, becauſe he could not fully account 2 years before the end of the 7 years, for he *ſhall account as well of the increaſe as of the ſum*, which cannot be within the 7 years. Quod nota. Br. Account, pl. 41. cites 7 H. 6. 5.

7. In account, the plaintiff *counted that he was his receiver of* 20*l. by the hands of J. C. from Eaſter till Michaelmas.* Rolfe demanded judgment of the count; for J. C. by whoſe hands, &c. *died at Whitſuntide, which is before Michaelmas.* Et non allocatur; for it may be that he received all the 20l. after Eaſter, and before Whitſuntide. Quod nota, the count awarded good. Br. Account, pl. 42. cites 8 H. 6. 32.

Account againſt A. as *receiver*, who *ſaid that he received it to deliver over to J. N.*

8. Account as receiver, the *defendant ſaid that he delivered it to him to deliver over to J. S. which he has done*, and a good plea *without traverſing the receipt*; for he confeſſes a receipt accountable, in caſe that he had not delivered it over. Br. Traverſe per, &c. pl. 296. cites 22 H. 6. 49.

which he had done, judgment, &c. The *plaintiff ſaid, that after the receipt and before the bailment he required him to re-bail to him.* And by the beſt opinion this is a good replication, and the bar is a good bar of account, as well as in diſcharge of the account before auditors, if he delivers it over; for then he is not accountable to the bailor; and ſo he was never accountable but conditionally. And J. N. may have account againſt the defendant by the firſt delivery to the defendant. Br. Accompt, pl. 83. cites 1 E. 5. 2.

9. In

9. In account, the plaintiff counted that the defendant was his bailiff of his manor of D. in M. and was his receiver of his monies, viz. ſo much by the hands of ſuch a one, and ſo much of another by 4 years; by which the *defendant ſaid, that as to ſo much of the money before ſuch a day he had fully accounted before the plaintiff himſelf*, and *as to the reſt never his receiver to render account*; and becauſe he did *not ſhew of how much of the money he accounted*, therefore ill; by which he *ſaid that he received ſo much before ſuch day, of which he has fully accounted, &c. and to the reſt never his receiver*, ut ante. Br. Account, pl. 5. cites 27 H. 6. 1.

10. Account as receiver, the *defendant ſaid that he accounted before the plaintiff himſelf for the ſame ſum the 1ſt day of April*, abſque hoc *that he was his receiver after*; and no plea per cur. for it does not go but for this time only, and not for the time before, or it may be that he received ſuch a ſum diverſe times before, and ſo he *ought to traverſe before and after*. Br. Traverſe per, &c. pl. 309. cites 21 E. 4. 66. Br. Account, pl. 75. cites S. C.

11. Account of *goods delivered to merchandize*, the *defendant ſaid that at another time the plaintiff brought writ of detinue of the ſame goods, and counted upon a bailment to re-bail; and the defendant waged his law, and made his law, by which the plaintiff was barred*; judgment ſi actio, and a good bar per Brian; for if it be bailed to re-bail, it cannot be to merchandize, therefore *the one is contrary to the other*. And contra Cateſby; for by him it is a good eſtoppel, but no bar. Quære inde. Br. Account, pl. 84. cites 2 R. 3. 14.

12. Debt by the dean of P. upon obligation, upon condition that whereas the *defendant was receiver* of all the rents of the dean and chapter of L. *if he render account* to the dean and chapter *annually during his office*, that then, &c. and *ſaid that the dean made A. receiver of two tenements in L. parcel*, &c. and ſo diſcharged him, judgment, &c. And per Townſend and Brian J. this is no plea, becauſe he *does not anſwer to the reſidue of the receipts*; for the condition is for the advantage of the obligor, and therefore a *diſcharge of parcel* is not a diſcharge of the whole. Contra where it is in advantage of the obligee, therefore he ought to perform the reſt. Br. Conditions, pl. 128. cites 4 H. 7. 6. [180]

13. If a defendant be *charged as receiver by indenture*, he ſhall not be admitted to *plead that he was not receiver*. Brownl. 25. in caſe of Willoughby v. Small.

(A. a) Pleadings. Suppoſal of the Writ traverſed.

1. ACCOUNT againſt *receiver*, who *ſaid that he received to deliver to W. N. which he has done, abſque hoc that he was his receiver to render account*; and per Jenny, Chocke, and Moyle, his traverſe is *repugnant*; for if he does not deliver it over, then he Br. Traverſe per, &c. pl. 125. cites S. C.

he is accountable, for the firſt matter is a good bar without the traverſe. Quod nota. *But* if he ſays *abſque hoc that he was his receiver in other manner*, it is a good traverſe; quod fuit conceſſum. Br. Account, pl. 54. cites 9 E. 4. 15.

2. In account *againſt guardian in ſocage*, it is no *plea that the anceſtor held of him in chivalry*, without ſaying *abſque hoc* that he held in ſocage. Br. Account, pl. 80. cites 10 H. 6. 7.

3. Where an account was brought *againſt one, ſuppoſing the receipt of* 200 *marks by the hands of J. P. and R. C. the* defendant *(as to* 100 *marks) pleaded that he received it by the hands of J. P. tantum, without that, that he received it by the hands of J. P. and R. C.* and *as to the other* 100 *marks, he received them from the hands of R. C. only, without that, that he received by the hands of J. P. and R. C.* and there it was doubted whether it be good or not. Godb. 43. pl. 50. Mich. 28, 29 Eliz. B. R. cites 10 E. 4. 8. Fitz. Account 14.

4. If an account be brought *againſt* 2, and *one pleads that he was his ſole receiver, and has accounted before ſuch an auditor*, if the plaintiff *replies unto his bar*, he ſhall abate his writ, becauſe the receipt is ſuppoſed to be a joint receipt; and it is not like a præcipe quod reddat againſt 2. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. cites Fitz. Account 14.

5. Account againſt *one as guardian in ſocage* to the plaintiff for ſuch a manor held of C. in ſocage, and that the defendant *received the profits till* 14 *years of age of the plaintiff.* The defendant *ſaid that the land was held of the ſaid C. in chivalry, and not in ſocage;* priſt. And after becauſe he did not juſtify the action he amended his plea, and *ſaid that the land was held of C. in chivalry, and he as ſervant, and by his command ſeiſed the ward* of the land and body, abſque hoc that it was held in ſocage, upon which they were at iſſue; but by ſeveral the firſt plea was ſufficient. Br. Account, pl. 76. cites 22 E. 4. 5.

6. *Two* were *charged in* accompt *as receivers, one of* them *pleaded that he never was receiver*, without traverſing that he and his companion were receivers; and Clench and Suit J. held it well without traverſe. Godb. 43. pl. 50. Mich. 28 & 29 Eliz. B. R. Anon.

2 Le. 194. pl. 245. S. C. in totidem verbis.

7. In account againſt the defendant *as bailiff of his ſhop, curam habens & adminiſtrationem bonorum;* the defendant *anſwered as to the goods, but ſaid nothing to the ſhop;* this being moved in arreſt of judgment, the better opinion was that he ought to have anſwered to all. Godb. 55. pl. 69. Mich. 28 & 29 Eliz. Gomerſall v. Gomerſall.

Yelv. 171. S. C. adjudged accordingly. Buſt. 16. TALBYE v. COOKE, S. C. and judgment accordingly per tot. cur.

8. Caſe for that upon an account between them, the defendant was found in arrear, and promiſed to pay, &c. The defendant pleaded and * *confeſſed the account, and that he was found in arrear accordingly, but that he gave bond to the plaintiff for the ſame, abſque hoc that they afterwards accounted, prout*, &c. The court held that the account which was the ground of the promiſe was well traverſable; and judgment for the defendant. Cro. J. 234. pl. 4. Hill. 7 Jac. B. R. Dalby v. Cooke.

*[181]

9. Debt

9. Debt upon *bond*, conditioned *that H. as receiver, ſhould account and pay to the plaintiff*, &c. *all rents which he ſhould collect*, &c. The defendant H. *pleaded performance generally*; the plaintiff *replied that he had received* 7000 *l. which he had not paid.* The defendant *rejoined, that* bene & verum eſt *he had received* 500 *l. and no more, whereof he had given a true account* to the plaintiff, *and paid* 30 *l.* the balance; and upon demurrer to the rejoinder, it was objected, that becauſe the condition was in *ſeveral parts of it in the disjunctive*, the plea of performance generally was not good; and that defendant *ſhould have poſitively alleged he had received* 500 *l. and given a true account thereof, abſque hoc, that he received* 7000 *l.* or *any more* than 500 l. And adjudged accordingly for the plaintiff. Lutw. 579. Hill. 9 W. 3. Duke of Bolton v. Clarke.

(B. a) Actions after Account made, and Pleadings.

1. IN debt upon arrears of account, the *defendant tendered his law, and prayed that the plaintiff be examined*, by which he was examined, and *it was found that it lies in account*, and the *defendant ſaid* that *he accounted for rent due upon arrears of a leaſe, abſque hoc that he made other account*, and a good plea. Br. Dette, pl. 181. cites 10 H. 6. 20.

2. In *debt upon arrears of account before auditors*, the *defendant pleaded payment in another county*; judgment ſi actio. And per Forteſcue and Paſton this is no plea without *concluding, and ſo nihil debet.* Br. Dette, pl. 11. cites 20 H. 6. 16.

3. In debt upon arrears of account, the *defendant ſaid that nihil debet modo & forma*, and *gave in evidence that no ſuch account was.* And Newton ſaid for law to the jury, that this is a good iſſue and good evidence. Br. Dette, pl. 14. cites 20 H. 6. 24.

4. Debt upon arrears of account, the *defendant ſaid that after he had accounted before auditors, they a month after committed him to ward for the ſame arrears, and ſo in execution*; judgment, &c. And per judicium no plea; for the power of the auditors is to commit him to the next gaol upon the account finiſhed, and the party found in arrears is to be committed to the next gaol immediately, and not by any mean ſpace; and ſo by judgment the plaintiff recovered his debt and his damages; quod nota. Br. Accompt, pl. 6. cites 27 H. 6. 8.

5. In debt, the plaintiff *counted that the defendant aſſigned to him auditors A. and B. before whom he accounted from the time that he was receiver* of the money, *viz. by the hands of T. and S. before which auditors the defendant was found in ſurpluſage* in the ſum in demand. Per Moyle J. for *bailiff of a manor* who is in ſurpluſage, ſuch action lies clearly; for he is to do things of expences, and to pay and receive, and to have allowances. And the ſame law where he is his *receiver to merchandize*, which is ſometimes in gain and ſometimes in loſs; *but* of a *receiver of a certain ſum to render account*, there he is not bound to do any labour, expences, nor

Br. Dette, pl. 130. cites S. C. but there it is, that debt lies for bailiff or receiver againſt the lord of a ſurpluſage upon account before

auditors, where he has paid more for the lord than he has received.

nor coſts, and therefore there he *ſhall not have ſuch action of ſurpluſage*; for this is his folly; which Priſot agreed. Br. Accompt, pl. 92. cites 38 H. 6. 5.

——But 2 Bulſt. 277, 278. it was adjudged contra to what is * above, and according to Br. Accompt, pl. 62. Mich. 12 Jac. B. R. Suffolk (Earl) v. Floyd.——Roll. R. 87. S. C.

6. *And* where a man is *receiver of* 100 *l. per ann. by diverſe hands*, and is in ſurpluſage, there he *ſhall have debt againſt the lord*. And *contra* where he is *receiver to receive a certain ſum, and not retained as a receiver in his ſervice*, note a difference by which the defendant paſſed over and pleaded nihil debet. Br. Accompt, pl. 62. cites 38 H. 6. 5.

7. In debt *by a mayor and commonalty againſt an executor* upon arrearages of account, he need not *ſhew* in the count *that he was mayor at the time of the auditors aſſigned*. Thel. Dig. 87. lib. 9. cap. 7. ſ. 20. cites 12 E. 4. 10.

8. If *debt* is brought *upon arrearages of accompt found before auditors*, it is not a good plea to ſay that he *gave a bond to the plaintiff for the ſame duty*, becauſe the debt was not changed by the obligation. D. 51. pl. 14. Mich. 33 H. 8.

9. In debt for arrears on accompt, the defendant pleaded *that before the accompt the plaintiff of his own wrong impriſoned him, and then aſſigned auditors to him in priſon*, and ſo the accompt was made *by dureſs*. It was holden a good plea by the juſtices of both benches. 4 Le. 91. pl. 188. Paſch. 25 Eliz. the Earl of Northumberland's caſe.

It lies of *rent and a legacy*. Cro. J. 602. Bard v. Bard.

10. An action upon an inſimul computaſſet doth not lie *for rent (alone)* due and in arrear, for the rent demandable is certain; but if the rent be behind, and there are (alſo) other things mixed with it, for which the action is brought, then an action upon an inſimul computaſſet may be brought for both of them together, becauſe it is uncertain upon the whole matter what is due to the plaintiff. L. P. R. 30. cites Trin. 1651. B. S.

11. Note, at this day the common *declaration* upon an inſimul comp. is to ſay that the plaintiff and defendant ſuch a day, year and place, *inſimul inter ſe computaverunt de diverſis denariorum ſummis per ipſum* the defendant *eidem* the plaintiff *præantea ibidem debit' & inſolut. exiſten. & ſuper compoto illo idem* the defendant *adtunc & ibidem inventus fuit in arreragiis erga eundem*, the plaintiff in ſo much *predicto que defendente ſic in arreragiis invent. exiſten. adtunc & ibidem conſideratione inde ſuper ſe aſſumpſit*, &c. L. P. R. 118.

12. The plaintiff muſt in his declaration lay *the very day of the account, and* ſum agreed *upon* by both parties to be due, otherwiſe the plaintiff will be nonſuited. L. P. R. 118.

(C. a) Account in Equity. In what Caſes, and againſt whom.

1. A *Creditor of a delinquent in the time of the great rebellion, purchaſed the delinquent's eſtate of the truſtees under the then government* for ſale thereof; and upon the ſaid purchaſe the debts due from the delinquent to the ſaid purchaſer were allowed him, and he paid the reſidue only. The delinquent, after the reſtoration, brought a bill againſt the purchaſer's executor for an account. The defendant offered to account, if plaintiff would pay the debt and the purchaſe-money. The lord keeper declared, that if defendant's counſel had not offered it, he would not have ordered an account, all *monies received by the profits* being *pardoned by the act of oblivion.* Chanc. Caſes 172. Trin. 22 Car. 2. Stowel v. Long.

[183]

2. Account by a *firſt mortgagee binds* the after-mortgagees, though neither of them are parties to it, unleſs there is fraud or colluſion. 2 Chanc. Caſes 32. Trin. 32 Car. 2. Anon.

S. P. accordingly, if the fraud and colluſion charged in the bill be anſwered, and the bill not ſpecifying any particulars as it ought, it ſhall be ſufficient if the fraud and colluſion be denied; per Ld. Chancellor. 2 Chanc. Caſes 299. Trin. 29 Car. 2. Needler v. Dibble.

3. If one in his anſwer ſwears that what he received he *received as a menial ſervant, and hath paid it over to his maſter*, he ſhall not be put to account again, but he ought to diſcloſe this matter in his anſwer. Vern. 136. pl. 127. Hill. 1682. Anon.

But where on a bill for an account and diſcovery of *money received by defendant on the behalf of one who became bankrupt*, he pleaded that he received it only as a menial ſervant to the bankrupt, and had accounted for it to him already, *and that the commiſſioners had already examined him on interrogatories*, the plea was over-ruled. Vern. 95. pl. 81. Mich. 1682. Wagſtaffe v. Bedford.——2 Vent. 338. Anon. S. P. accordingly, and S. C.——Abr. Equ. Caſes 6. pl. 5. cites S. C. but ſays quære whether there were not circumſtances of fraud in this caſe, or a combination between the bankrupt and ſervant.——And on exceptions to a maſter's report reporting the defendant's anſwer inſufficient, Lord K. North declared that it was ſufficient for a ſervant *or apprentice*, in anſwer to a bill for an account, to ſay in general, That whatever he received was by him received and laid out again by his maſter's order. Vern. 208. pl. 204. Mich. 1683. Potts v. Potts.

4. Three *part-owners of a ſhip. One refuſed to fit her out* to ſea, and *the others do it* without his conſent. The *ſhip is loſt* in the voyage. Per cur. the loſs ſhall be equally born by all 3; for *he that did not conſent* would have been equally intitled to a 3d part of the freight, and *ſhould have had an account* here of the 3d part *of the profits of the voyage.* Vern. 297. pl. 291. Hill. 1684. Strelly v. Winſon.

5. T. having *lent* ſir D. T. *ſeveral ſums* of money, *amounting to* 600 *l. ſir D. T. by indenture bargains and ſells a 16th part in a ſhip, and by a* defeazance it was *declared that this aſſignment was* made to the intent *that the plaintiff out of the earnings of the ſhip, ſhould pay himſelf the ſum of* 600 *l. and after* ſuch payment *ſhould account to ſir D. T. of the earnings;* but there was *no covenant* in the defeazance *to pay the money.* Afterwards *the ſhip was loſt*, and the plaintiff brings a bill againſt the executrix of ſir D. T. to have ſatisfaction

ſatisfaction for this debt due from the teſtator. The defendant by her anſwer denies aſſets præter to ſatisfy judgments and debts by ſpecialty. Decreed that the defendant account for the eſtate of the teſtator, and the plaintiff to account for what money he had received out of the earnings of the 16th part of the ſhip, and to be *allowed what ſums he expended in fitting out the ſhip*, though ſhe happened to be caſt away in the 2d voyage. MS. Rep. Mich. 12 Ann. in Canc. Tyrrell v. Lady Thomas.

6. Where there was *no truſt nor infant* in the caſe, *nor any entry* made by the perſon intitled to the rents and profits *in the life-time of the perſon taking them*, the court refuſed to decree an account of them. 2 Vern. 724. pl. 640. Mich. 1716. Hutton v. Simpſon.

7. If *ſeveral executors are ſued in equity*, and *one admits aſſets*, this ſhall not prevent the creditor plaintiff from ſuing the others, who may have poſſeſſed themſelves of part of the eſtate, and ought to be reſponſible, and the other who admitted aſſets, might yet not have any, nor any eſtate of his own; per the maſter of the rolls; and therefore ordered all the executors to account for what they reſpectively have in their hands of the teſtatrix's perſonal eſtate, or the produce thereof. 2 Wms's Rep. 145. Trin. 1723. Norton v. Turvill.

8. *Two perſons* agreed for the *purchaſe* of an *eſtate in moieties* between them, which eſtate was *ſubject to ſeveral incumbrances*, which were *to be diſcharged out of the purchaſe-money; one* of them *had abatements made to him* by ſome of incumbrancers, of ſeveral
[184] ſums due for intereſt, and otherwiſe, which they, in conſideration of ſervices and friendſhip, agreed ſhould be *to his own uſe*; yet on a bill brought for an account of the rents and profits, the court would not allow him the benefit of theſe abatements, excluſive of the other, but held that he muſt account for them, the purchaſe being made for their equal benefit, and on a *mutual truſt* between them. Abr. Equ. Caſes 7. Trin. 1728. at the Rolls. Carter v. Horne.

9. After an *attorney's bill* had been *taxed by the prothonotary* of the court of C. B. upon an account, he ſhall be *allowed to ſue in equity for a new account* there, upon a *ſuggeſtion that he was allowed* on the account by the prothonotary *leſs than he ought to have been*. Comyns's Rep. 612. pl. 263. Hill. 11 Geo. 2. in the exchequer. Oſbaldiſton v. Croſs, Croger and Chancy.

(D. a) Account. In Equity. When, and from what Time. And how.

Quære if this is not a nota of the reporter; but ſee Ibid. 339. S. P. by Hale Ch. J.

1. THE *conuſee of a ſtatute* ſhall not account according to the true, but according to the extended value, and alſo for the whole ſtatute; and if the conuſee is ſatisfied by the extended value the conuſor ſhall recover; or if the conuſor will pay down the reſt of the money which is behind, with damages, he ſhall alſo

alſo recover; but if the conuſor will ſue the conuſee in a court of equity, then he ſhall bring him to account for what he hath received of the profits above the extended value. 2 Vent. 338. Trin. 22 Car. 2. in Canc. in caſe of Marſh v. Dee.

J. who aſſiſted the Ld. Keeper. —Account lies not againſt *conuſee of a ſtatute extended*, until ſuch time as he has *levied the money according to the extent*, and not according to the true value of the land, though the land be *extended only at* 10 *marks where it is worth* 100 *marks*. See 2 Roll. Statutes (T) pl. 2. where he denies the contrary, which is given as a reaſon of denying a re-extent by Fitzherbert in his Abridgment, tit. Extent, pl. 18.

2. *Gratuities given by a ſteward* to be allowed on the party's examination, that he gave them without other proof of payment, and he not to be examined to the particulars, nor to whom given, and cites the Marquis of Wincheſter and Withers's caſe. 3 Chanc. Rep. 72. Mich. 1671. Tredcroft v. White.

Fin. Rep. 36. Mich. 1673. S. C. but S. P. does not appear.

3. A. *extended lands in* 1 *Car.* and held the ſame in extent. *A bill was exhibited to redeem*, and being not redeemed, the bill *diſmiſſed in* 16 *Car.* 1. Afterwards A. *by virtue of the ſaid diſmiſſion, ſold the ſaid premiſes to the defendant.* Afterwards J. S. bought the equity of redemption, and ſues now to redeem. Whereupon the court, notwithſtanding the diſmiſſion and length of time, ordered an *account from the time of the purchaſe*, but no account from any time before, but the profits to go againſt the intereſt to that time. 2 Chanc. Rep. 392. 2 Jac. 2. Cloberry v. Lymonds [alias Simonds.]

4. Lands were *extended* on a judgment 100 *years ago*, and had exchanged hands 5 or 6 times. The queſtion was, whether the defendant ſhould account *for more than the extended value?* It went off, upon a propoſal to allow defendant what he paid, and that he account only for what he received in his own time. Vern. 468. pl. 451. Trin. 1687. Poole v. Guiſe.

[185]

5. An old *aunt lived with a niece, who received the aunt's money for her, and the aunt immediately put it out to intereſt.* The *aunt died inteſtate.* The *niece and J. S. were next of kin.* J. S. brought a bill of diſcovery againſt the niece, to ſet forth what monies ſhe had received. She ſets forth ſeveral ſums received, and when; and that inteſtate immediately put them out again at intereſt to A. B. C. D. and E. F. and ſet forth other ſums which ſhe had received and paid over to the aunt. The cauſe was heard without proof on either ſide, and an account decreed. The maſter of the rolls ſaid, that he looked on the defendant in this caſe to have acted *only in the nature of a ſervant, who* by the juſtice of this court *may*, on a bill brought againſt him by his maſter's executors, *diſcharge as well as charge himſelf by his anſwer, yet as* the *defendant might*, in this caſe, *have proved his anſwer*, as appears by the anſwer itſelf, and had not ſo done, he referred it back to the maſter, and each ſide to make what proofs they could. And he declared, that if the anſwer was *diſproved* as to the ſums put out at intereſt, he ſhould give no credit to it as to the other particulars, *elſe* inclined it ſhould be *a diſcharge* too, *as well as a charge.* Trin. 1702. Abr. Equ. Caſes 10. Bayly v. Hill.

6. Lands were *limited by marriage-ſettlement*, upon failure of iſſue male, *to daughters and their heirs, until* the next remainder-

2 Vern. 578. pl. 521. Hill. 1706.

S. C. heard before Ld. Keeper Cooper, who decreed as mentioned.

man ſhould pay them 3000 *l.* The daughters, being four only, *entered.* On a bill by *creditors by judgment* to be let into a ſatisfaction ſubject to the charge of 3000 *l.* and in exoneration thereof to have an account of the rents and profits, it was inſiſted for the daughters to retain without account till paid 3000 l. at one intire payment; but maſter of the rolls decreed the daughters to account, and the rents and profits to be applied in the firſt place to pay the intereſt of the 3000 l. and then to ſink the principal as in the caſe of a common mortgage. But upon appeal the decree was affirmed with this alteration, that the *principal* ſhould *not be ſunk by ſmall payments;* but when a *third part* was raiſed, *beyond all intereſt due* at ſuch time, it ſhould go to *ſink the principal,* and ſo again when another third was raiſed, &c. 2 Vern. 523. pl. 473. Mich. 1705. Blagrave v. Clunn & Ux' & al'.

7. On a bill to have an account of the rents and profits of lands, &c. Harcourt C. ſaid, that when a perſon has been *ejected at law,* and the other party has been *in poſſeſſion above* 20 *years,* and no account demanded, or bill filed in that time, the *ſtatute* 21 *Jac.* 1. *of limitations,* will bar an account in this court, as well as an action of treſpaſs for the mean profits at law; for jus poſſeſſionis is gone by the ſtatute of limitations, and conſequently the mean profits, and if once the ſtatute begins to attach, incapacity, as coverture, &c. will not aid it. The ſtatute of limitations does not extend to a truſt, but in this caſe the defendant coming in by a recovery at law, and the 20 years elapſed before the bill filed, the bill muſt be diſmiſſed quoad the account of rents and profits. MS. Rep. 19. Trin. 13 Ann. in Canc. Nevarre v. Rutton.

8. A *feme ſole, ſeiſed of lands* in fee *ſubject to a mortgage,* marries A. About 10 *years after the marriage A. pays off the mortgage, and has it aſſigned over to B. in truſt for himſelf,* and *lays out a conſiderable ſum of money in improvements* upon the eſtate; and having iſſue 2 daughters by his wife, makes his will, and *deviſes theſe lands to his youngeſt daughter,* and dies; his *wife ſurvives, and holds the lands for her life;* and after her death the *eldeſt daughter* and her huſband *brings a bill againſt her ſiſter and co-heir, to redeem a moiety of theſe lands,* &c. The great queſtion was upon what terms, and in what manner, the plaintiff ſhould redeem; for if the account was to be taken as between mortgagor and mortgagee in poſſeſſion, then the deviſee muſt account for the profits received by the deviſor, and be allowed for repairs and laſting improvements; but if in this caſe the deviſor ſhould be judged in poſſeſſion by right of his wife, and not by virtue of the mortgage, then the deviſee was not to account for the profits, nor have an allowance for repairs and improvements, but only to have intereſt allowed from the death of the father; for then it would be the common caſe of tenant for life, of lands in mortgage, who is obliged to keep down the growing intereſt during the continuance of his eſtate, and ſhall not have any allowance for the improvements. Cooper C. decreed that there ſhould be no allowance for improve-

[186]

ments

ments by the husband, before he took an assignment of the mortgage; but from the time of the assignment the devisee should have an allowance of the two thirds of the lasting improvements, but nothing for the other third, because he received the benefit of the improvements during his life, according to the usual proportion between an estate for life and the reversion in fee; and that no interest should be allowed during the life of the devisor; for tenant for life is bound to keep down the interest during his estate; per cur. MS. Rep. 24. Pasch. 1 Geo. Canc. Newling v. Abbot.

9. *Bona fide* possessio facit fructus perceptos & consumptos esse suos; but such purchaser or *possessor* shall account after a lis pendens against him, and there ought to be a *retrospect from the beginning of the suit.* MS. Tab. Feb. 15. 1721. Walker & Macpherston.

10. Account directed after 33 *years* acquiescence. MS. Tab. Feb. 17. 1724. Ld. Kingsland v. Lady Tyrconnel.

(D. a) Account opened.

1. ACCOUNT was stated between *mortgagor* and the heir of the mortgagee *under hand and seal.* After several meetings and examinations it was suggested, that on sealing it was *agreed* between the parties, that if there was any *mistake* it *should be rectified.* Defendant denied the agreement, and pleaded the account stated, and set forth the several meetings in order to it, and that it was perused by the plaintiff and a friend before it was sealed, and by him approved, and he consented to it; but it appearing to the court on the hearing, that the account was made up of *interest upon interest*, they set it aside, and ordered them to account ab origine. N. Ch. R. 100. 16 Car. 2. Prowde v. Combes.

Chan. Cases 55. Trin. 16 Car. 2. COMES v. BAUD, S. C. accordingly. —— 3 Chan. Rep. 18. S. C. in the same words of Chan. Cases, 55. —2 Freem. Rep. 183. pl. 253. S. C. That account stated is a good plea; but if there be any agreement to rectify mistakes, it shall not conclude, though under hand and seal.

2. *Cesty que trust borrows* 500*l.* *of the administratrix of his trustee*, and makes a *mortgage* to her for that, and also for 2000*l.* charged by her as due to her intestate from the trust estate, and thereupon she delivered *up all her husband's accounts* to cesty que trust, who examined and approved them; and the trustee having given authority to a servant of trustee's to receive the rents, &c. the same was agreed to be allowed to the administratrix; but at the execution of the mortgage she agreed to allow what could be made appear her husband had received more. The court referred it to a master, &c. to look into the proofs, and if found that plaintiff had surcharged the defendant with any receipts of her intestate, not comprized in the accounts produced, she should be at liberty to discharge herself, and to have all just allowances, and to produce the books of accounts, and the plaintiff on oath to produce acquittances, &c. and if any

thing found to be coming to the plaintiff, the ſame to be allowed out of the mortgage-money. Fin. Rep. 5. Mich. 25 Car. 2. Bedell v. Bedell.

3. An account between *partners in trade*, after the death of one of them, ſhall be taken only from the time the ſame was laſt balanced. Fin. Rep. 190. Beak v. Beak.

4. After an *account ſtated* between A. and B. and the balance being 300l. due to B. and by deed reciting the debt due on the account. *A. covenanted to pay B. the* 300l. *and then B. died.* A. *afterwards finding that his ſervant had paid* 200l. *to B.* and that it was ſo *entered in his account-book, which he had not with him when he made up the account*, brought his bill to be relieved againſt B.'s executor. The executor pleaded the account ſtated, and the balance ſecured by writing under hand and ſeal, and that he being only an executor knew not how to account, and believed that B. upon the account made, delivered up his notes and vouchers, and that no ſtated account could ſtand in court if this or that particular ſhould be queſtioned. The plea was over-ruled, but to proceed no further than anſwer without leave of the court. Chan. Caſes, 262. Trin. 27 Car. 2. Wright v. Coxon.

5. *Factor*'s account was *ſettled by one factory, and confirmed by a ſuperior factory*; and after exceptions to it by the Eaſt-India company here, *confirmed again* by the ſuperior factory, with which *the company complied* by paying ſome bills of exchange, and delivering ſome goods to defendant, yet he was forced to account again; though he inſiſted that ſome vouchers were taken forcibly from him by the king of the country; for per Ld. Chancellor, it is a national cauſe and concern, and nothing ſhould diſcharge the factors in India but a *releaſe* or diſcharge *from the Eaſt-India company itſelf*, elſe their agents, by mutual connivance, may ruin the company. 2 Chan. Caſes, 218. Paſch. 28 Car. 2. Eaſt-India Company v. Mainſton.

6. There ſhall be no examining into an account ſtated, on a ſuggeſtion of fraud and colluſion, but by *charging of particulars*, if the fraud and colluſion be anſwered. Chan. Caſes, 299. Trin. 29 Car. 2. in caſe of Needler v. Deeble.

7. An *adminiſtrator authorized A. to call B. a debtor to account* for what he had in his hands of the inteſtate's. B. thereupon accounted with A. and *A. gave B. a releaſe.* On a bill by the adminiſtrator for a new account, B. pleaded the releaſe, and ſaid he knew of no other monies or goods of the inteſtate more than what he gave an account of, and the court denied any further account. Fin. Rep. 311. Trin. 29 Car. 2. Martin v. Sambrook.

8. An account was ſtated *between* C. and D. *partners*, and on the balance C. was debtor 160l. and *gave a note of his hand for payment* to D. *who at the ſame time promiſed to rectify any miſtake.* On a bill by C. for a new account, D. pleaded the account ſtated, and the note, and a judgment thereupon, and denied the promiſe. A new account was decreed concerning the

the ſtock and trade, and for the payments and receipts, and that each produce the books of account on oath, and what ſhall appear due ſhall be paid with intereſt at the time and place the maſter ſhall appoint. Fin. Rep. 431. Mich. 31 Car. 2. Chandler v. Dorſet.

9. If one prefers a *bill generally for an account*, an *account ſtated* is a good plea; but if in his bill he ſets forth that there was an account, and that there was a miſtake, and *ſets forth a particular miſtake*, there the account ſtated is no good plea; per Hutchins & al'. 2 Freem. Rep. 62. pl. 69. Mich. 1680. Anon.

10. The party gives in an account of debtor and creditor, and ſets down ſo much received and ſo much paid, which being taken as true, a *releaſe* is given. Ld. Keeper North [188] thought it reaſonable to relieve againſt ſuch a releaſe, and let them in to *diſprove the articles* of the account; and ſaid in this caſe, that a releaſe obtained as ſoon as ever the heir came of age by the *guardian*, ſhould never by him be thought a trick, but that it was the proper time; but Finch ſaid it had been otherwiſe held. Skin. 148. Mich. 35 Car. 2. in Canc. Anon.

11. *A man being about to marry an infant*, made an account before marriage with the guardian; the man gave bond to the guardian, that after marriage, on payment of the ſum ſtated, he would releaſe all accounts to him; the marriage was had, and the money paid; the huſband ſued for an account, the guardian pleaded the matter as above. Per North K. the huſband accepted of no money but what was due to him, and the *account made when he had no title*, viz. before his marriage, and there is no releaſe made, as there was in the like caſe by Baſſet, which bound Baſſet and the plaintiff greatly favoured in the accounts, and the marriage was but one year ſince, and the plaintiff's *purſuit is freſh*, therefore anſwer the bill. 2 Chanc. Caſes 157. Mich. 35 Car. 2. Oſborne v. Chapman.

12. The huſband conveyed an *equity of redemption in jointure on his wife, and became bankrupt.* The *aſſignees ſtate an account with the mortgagee.* The jointreſs brought a bill for relief againſt this account, alleging that it was not fairly ſtated, but that by combination with the mortgagee they allowed more than was really due on the mortgage; but Lord K. North ſaid, the account ſtated by the aſſignees is as concluſive as if ſtated by the huſband, they ſtanding in his place, and the bill is not right in charging a general fraud, but particular errors ought to have been aſſigned; however he gave the plaintiff leave to amend. Vern. 179. pl. 172. Trin. 1683. Knight v. Bampfield.

13. Plea of an account of an *orphan's eſtate before the aldermen of London*, was diſallowed, and a ſurcharge allowed to be made thereon by Lord Chancellor. 2 Chanc. Caſes 170. Hill. 1 Jac. 2. Newdigate v. Johnſon.

14. A. is *tenant for life of a truſt, remainder to his ſons.* The truſt was for payment of debts and legacies. A. *before a ſon born,*

born, gets a decree againſt the truſtees to account, which they did. This account ſhall ſtand without being unravelled, all perſons being parties that then could be made parties. 2 Vern. 526. pl. 475. Mich. 1705. Leonard v. Earl of Suſſex.

15. A. and B. were intitled to a perſonal eſtate by the ſtatute of diſtributions, and an *account* thereof was *ſtated* between them. Afterwards A. by *bill demands a diſcovery of particular items ſuppoſed not to be compriſed* in it, and yet at the ſame time allows the account to be fairly taken. The defendant pleaded the ſtated account in bar. And it was inſiſted for him, that *either the items muſt be denied in particular, by falſifying them, or ſaying they were not allowed, or elſe a ſurcharge muſt be brought in*; but that here neither of theſe ways is taken, ſo that the plaintiff would unravel the account, without pointing out one error in it. Ld. Chancellor allowed the plea, and ſaid this muſt not be ſuffered. Barnard. Rep. in B. R. [but this was a caſe in Chancery] Mich. 3 Geo. 2. Bourke v. Bridgeman.

16. An *account* was *made with officers of the crown for the building of Blenheim-houſe*, ordered to be built for the Duke of Marlborough at the public expence, but *afterwards the charge* (upon the duke's falling into ſome diſgrace) *being caſt upon the duke himſelf*, the account was opened at the ſuit of the dutcheſs of Marlborough a ſubject, notwithſtanding it was inſiſted that it would be a great hardſhip upon the workmen to come to a new account before the maſter in chancery for ſo great a ſum as this building has coſt, and to produce vouchers for every particular after ſuch a length of time; beſides that *ſeveral* of
[189] the preſent *defendants were the widows and children, &c. of the deceaſed workmen*; ſo that it would be almoſt impoſſible for them to produce vouchers for work done by thoſe whom they repreſent, after ſo *long acquieſcence* under a ſtated account, by relying whereupon they might be negligent of ſuch vouchers, and might probably have loſt great part of them. 9 Mod. 23. Trin. 9 Geo. The Dutcheſs of Marlborough v. Sir John Vanburgh.

17. Where a *young man juſt come of age was fraudulently drawn in by his truſtee to ſign an account which he had never examined*, the account was decreed to be opened. See Caſes in Equity in Ld. King's Time. 34, 35. Trin. 11 Geo. 1. Weſtern v. Cartwright.

(E. a) After a former Account made with Strangers.

N. Chanc. Rep. 149. Strickland v. Laſke, S. C. accordingly.

1. AFTER an *account* was *decreed to one as heir*, he ſued for a *new account as adminiſtrator*, and it was decreed him; as where a leaſe was made in truſt to raiſe money for ſeveral uſes, and the ſurplus to go to the heir of the leſſor. A. as heir was intitled, and brought his bill by guardian for an account

account of the profits, and dies. B. his brother by guardian revived the ſuit. The account was ſettled, and the ſurplus decreed to be paid him, being then about 19 years old, and was paid accordingly. Afterwards B. being 21, brought an original bill, without taking notice of the former ſuit. The defendants plead the decree, and payment, but it was overruled. 3 Chanc. Rep. 77. 24 Car. 2. Strickland v. Lock.

2. An adminiſtration was repealed, and granted to another; the *1ſt adminiſtrator accounts with the 2d*, in the prerogative court, and delivered him all books of accounts, &c. relating to the inteſtate's eſtate; he is thereby diſcharged from any further account; and ſo a bill againſt the 1ſt adminiſtrator, brought by a creditor of the inteſtate, was diſmiſſed. Fin. Rep. 123. Mich. 26 Car. 2. Parker v. Dee.

2 Chanc. Caſes 200. S. C. but S. P. does not appear. —An account of a perſonal eſtate was taken in the ſpiritual court, and diſtribution decreed there, yet chancery decreed an account of the whole eſtate. 2 Vern. 47. pl. 45. Paſch. 1688. Biſſell v. Axtell.

3. Land is *mortgaged* to A. and then to B. then to C. If A. ſues to redeem, and try his debt by *decree*, they ſhall all be bound by the account which A. made in his ſuit, and pay and contribute to the charges of ſuit, if made without fraud or *colluſion*. 2 Chanc. Caſes 32. Trin. 32 Car. 2. Anon.

4. Second mortgagee accounts with firſt mortgagee and mortgagor what was due to the firſt, and paid him off, and took aſſignment of the mortgage; one that got *judgment in debt intervening*, may oblige the ſecond mortgagee to account again. 2 Chanc. Caſes 123. Mich. 34 Car. 2. Brent v. Engliſh.

5. J. S. *bequeathed 600l. to A. 700l. to B. and 700l. to C.— B. ſued the executor*, who pleaded the legacies to A. and C. in abatement; and that the *will directed, that if the eſtate fell ſhort each ſhould abate proportionably, but if it improved*, then *each legacy to be proportionably increaſed*; and therefore A. and C. ſhould be made parties; for the account made with B. will not conclude A. and C. and ſo he ſhould be put to 2 accounts, and double proof and charge. Ld. Chancellor ordered him to anſwer without coſts. 2 Chanc. Caſes 124. Mich. 32 Car. 2. Haycock v. Haycock.

(F. a) Bar of Account or Demand in Equity. What is. [190]

1. A Bill was brought for an account of *goods taken in execution*, and *ſuppoſed to be ſold at an undervalue*. The defendant *pleads, that before he bought the goods of the ſheriff they were offered to be ſold to the plaintiff at the price himſelf paid for them, and* that *after he had bought them he offered them to the plaintiff for the ſame money* which he paid for them; but that he had ſince, by virtue of the bill of ſale, which he had from the ſheriff, diſpoſed of them to other perſons; and the plea was allowed. Fin. Chanc. Rep. 111. Hill. 25 Car. 2. Dean v. Gavell & al'.

Jekil maſter of the rolls ſaid, that this caſe is not rightly reported in Vern. 452. and that in the regiſter-book of Paſch. 1687. pag. 491. there is this entry, (viz.)

2. An account of a perſonal eſtate being decreed, the defendant endeavoured to charge the plaintiff with a great debt, as due to the eſtate; but upon proof made that the defendant had *opened a bundle of papers relating to that demand*, which had by the inteſtate, who was father-in-law of both plaintiff and defendant, been *ſealed up*, and left with defendant to be ſafely kept, he being told they were matters of concern, the defendant's demand was for that reaſon *diſallowed* per Jefferies C. who at the ſame time declared himſelf ſatisfied, that all the papers were produced. Vern. 452. Paſch. 1687. Wardour v. Berisford.

The lord chancellor, on reading and examining witneſſes viva voce, declared that the papers there called Wynne's accounts, were through the careleſsneſs of the defendant embezzled; and therefore confirmed the maſter's report, which had not made the defendant any allowance for diet, &c. by reaſon of ſuch embezzlement. Wms's Rep. 681. Mich. 1734. in caſe of Cowper v. Earl Cowper.

Jekil maſter of the rolls ſtates this caſe out of the regiſter-books thus, (viz.)

3. *Detinue of charters* and evidences of the ſtewards by the maſter, during the detainer, is a good plea at law in bar of an account; and ſo it is in equity. But to ſay that the plaintiff *did once ſeize* his charters is not a good plea. 2 Vern. 33. Per cur. Hill. 1688. Counteſs of Plymouth v. Bladen.

The defendant was the plaintiff's ſteward, and the bill was brought for an account. Defendant pleaded that the plaintiff had impriſoned him, and upon promiſe of his liberty had got a trunk in which were all his vouchers, inſiſting that though he kept the key, yet it was eaſy to be opened, and that it was to be preſumed it had been ſo; and it was impoſſible for him to prove what the plaintiff had taken out, or to account without his vouchers. This plea was argued, and ordered to ſtand for an anſwer. Afterwards, by an interlocutory order, the trunk was directed to be delivered to the uſher of the court; and upon hearing the cauſe, the then lords commiſſioners decreed the defendant to account, and ordered the trunk to be brought before the maſter, who was to open it in the preſence of both parties, and they to have copies of the papers found in it, as they ſhould think fit; but the *court would not preſume material papers, or even a ſuppreſſion of any ſuch*, though it ſhould ſeem that the trunk was got from the plaintiff in a very unwarrantable manner; and only took the beſt care they could, that the papers, wherever they were, ſhould be produced. 2 Wms's Rep. 681, 682.

For more of Account in general ſee **Debt, Diſcount, Guardian, Incumbrances, Mortgage, Own Oath, Truſt,** and other proper titles.

---

[191]

Ac etiam Billae.

This act was the foundation of ac etiam billæ in writs L. P. R. 13.

1. 13 *Car.* 2. *ſeſſ.* 2. *cap.* 2. *NONE arreſted by proceſs out of the B. R. or C. B. in which proceſs the true cauſe of action is not expreſſed, and for which the defendant is bailable by* 23 *H.* 6. *cap.* 10. *ſhall be forced to enter into bond with ſureties for appearance in any ſum exceeding* 40*l.*

2. In an indebitatus aſſumpſit, the *declaration and recovery was for more than the ac etiam*, and though it was *offered to level it with the ac etiam by entering a remitt' on the record for the reſt*, yet it was

was denied on debate, cited by Holt Ch. J. 6 Mod. 266. as a caſe in Pemberton's time, in which himſelf was counſel, Thompſon v. Collins.

3. In error of a judgement in C. B. againſt a ſheriff for an eſcape, the firſt proceſs was alledged to be an original writ quare clauſum fregit, and was affirmed to be for recovery of a debt by judgment. And the return being (nihil habet per quod attachiari poteſt) a capias was awarded ad reſpondend' the plaintiff in placito prædicto ac etiam in placito debiti ſuper demand' ſecundum conſuetudinem curiæ de banco, and that upon this proceſs the defendant in the ſaid action was permitted to go at large, whereby the plaintiff has loſt his debt. The matter of the proceſs (ac etiam) annexed to the capias was aſſigned for error, but allowed to be good; and the judgment affirmed per tot. cur. 2 Jo. 217. Trin. 34 Car. 2. B. R. Atkins v. Jay.

4. An ac etiam billæ ought not to be made out againſt any *peer* or *peereſs*, or any *executor* or *adminiſtrator*, or upon a *penal ſtatute*, or for any *debt* or *aſſumpſit under* 10*l.* nor in action of *account* render, nor in any action of *covenant* or *trover*, unleſs the damages are 10l. or more; nor in any action of *treſpaſs*, or for *battery*, *wounding*, or *impriſonment*, unleſs there be an order of court for it, or a warrant under the hand of one of the judges of the court, out of which the writ iſſues for that purpoſe. L. P. R. 13.

5. In caſe for *inveigling away* his ſon, who was alſo *his ſervant* (the defendant being a ſeafaring-man) an ac etiam billæ of fifty pounds was ordered on motion and affidavit. Cumb. 311. Paſch. 1 W. M. in B. R. Anon.

6. The plaintiff laid his ac etiam *for* 300*l.* and then *ſwears only* that the defendant owed him above 10*l.* juſt to bring him within the rule for ſpecial bail. The court ordered him to take *common bail for his fraud.* Cumb. 265. Trin. 6. W. & M. B. R. Anon.

7. In an action of treſpaſs, aſſault, and battery, by bill of Middleſex with an ac etiam for 40l. and recovered 100l. the court held the bail ſhould not be liable for more than the ac etiam, for that is the meaſure and ground of his undertaking. 1 Salk. 102. pl. 16. Mich. 3 Ann. B. R. Genbaldo v. Cognoni. 6 Mod. 266. S. C. bail is liable *to anſwer* only what is expreſſed in the ac etiam bill. 2 Ch. R. 55. 22 Car. 2. in Canc. BOULTER v. CHESTER.—And Holt Ch. J. held that he was not liable at all; for his recognizance is to anſwer the condemnation, and ſince that cannot be, he is bound to nothing. 1 Salk. 102. ut ſupra.

8. Defendant in a ſcuffle *bit off the forefinger* of an attorney's right-hand, and in treſpaſs with an ac etiam by a judge's warrant, the bail was not held to juſtify themſelves to a ſum ſuitable to the ac etiam, the defendant being poor. 6 Mod. 230. Mich. 3 Ann. B. R. Cockcroft v. Smith. 6 Mod. 263. 11 Mod. 43. 52. Lord Raym. 177. S.C. but not S. P.

9. It was moved for a ſpecial ac etiam in treſpaſs *for lying with the plaintiff's wife*, which was granted; and held the defendant to 50l. bail. N. B. *Affidavits* were produced of the *indecent liberty* they

[192]

they took together. 11 Mod. 275. pl. 24. Hill. 8 Ann. B. R. Anon.

10. An action with an ac etiam billæ was *brought in a great ſum* to hold the defendant to ſpecial bail *where nothing was due*, as appeared on being ſummoned before a judge to ſhew his cauſe of action; the court held this not to be ſuch a contempt as to grant an attachment againſt the plaintiff, but directed that *if the defendant was damnified he might bring his action.* 8 Mod. 227. Hill. 10 Geo. the King v. Pepper.

For more of Ac etiam Billæ in general, ſee **Bail**, and other proper titles.

Acquittance.

(A) In what Caſes Payment may be refuſed without an * Acquittance given.

* An acquittance in law *ought to be a deed ſealed*, tho' in common practice it is otherwiſe. 3 Salk. 298. pl. 2. Anon.—If ſigned only and not ſealed, it is *only an evidence* or proof of payment, and no pleadable acquittance, becauſe it is no deed, ſo as it nothing differs from proof by witneſſes, only that it is not mortal as they are. Wentw. Off. of Executors 217.

1. THE obligor is not bound to pay without acquittance *upon a ſingle obligation.* Br. Obligation, pl. 10. cites † 41 E. 3. 25. per Thorp.

† Br. Faits, pl. 8. cites S. C.——Br. Conditions, pl. 21. cites S. C.

Br. Faits, pl. 8. cites S. C.——Br. Conditions, pl. 21. cites S. C.

2. *Contra* upon an obligation *with condition*; for there he may aver payment. Note the difference. Ibid.

3. Audita querela upon *defeaſance by indenture to make certain payments*, and that then the eſtate ſhall be void, and *avers the payment without ſhewing the acquittance in writing*; and good per cur. becauſe the covenants were compriſed in the indenture, for then the matter may be averred. Br. Monſtrans, pl. 151. cites 46 E. 3. 33.

4. Audita querela. It is in a manner agreed that where a man is *obliged to diſcharge another* [*of an*] *annuity* or annual rent of 10l. per ann. granted by him to W. S. it is ſufficient to ſay that he hath diſcharged him of it by annual payment to the grantee to this time. And per Needham and Priſot, it is a good diſcharge though it was paid without acquittance; for *it may be intended an annuity with clauſe of diſtreſs*; and payment without acquittance is a good plea of this, becauſe the land is charged with diſtreſs; and

and there it was agreed if the party pays by diſtreſs or without diſtreſs it is ſufficient. *But* if it be an annuity *without clauſe of diſtreſs*, * which charges the perſon, there payment is no plea, but *ſhall ſhew an acquittance*. Quod nota diverſity, and per Needham and Priſot, it may be intended with clauſe of diſtreſs; but per Davers and Moile, it ſhall not be intended but only annuity which charges the perſon, if it be not ſhewn that it was with clauſe of diſtreſs. Br. Bar, pl. 46. cites 37 H. † 4. 18.

† This ſhould be 37 H. 6. 18. b.

5. If a man ſhews to the king's collector an *exchequer tally* for payment of any ſum of money which the king owes him, he ought to offer a ſufficient acquittance to the collector. Br. Faits, pl. 44. 37 H. 6. 15.

Br. Dette, pl. 120. cites S. C. —— Br. Taile de Exchequer, pl. 3.

6. A man may plead payment of the *ſum contained in the indorſement*, without acquittance; per Skrene. Quod non negatur. Br. Conditions, pl. 41. cites 12 H. 4. 23.

7. If one is bound in a *ſtatute-merchant or* ‡ *bond* for payment of money, he is not bound to pay it unleſs the conuſee or obligee will deliver a releaſe or acquittance. Quod non negatur. Br. Faits, pl. 77. cites 22 E. 4. 6.

Br. Conſcience, &c. pl. 23. cites S. C. and it is better here to make him pay the ſum twice than to alter the trial of the law; for in ſuch caſe matter of record may be defeated by 2 witneſſes; per Huſſey & Fairfax; to which the Chancellor agreed as to the ſtatute, becauſe it is a matter of *record*; but differed from them as to the bond, becauſe that is only a matter in fact. —— Br. Obligation, pl. 62. cites S. C.

‡ Br. Faits, pl. 105. cites 1 R. 3. and Fitzh. Verdict, 13.

8. It was ſaid that *in debt upon an obligation*, it is a good plea that the defendant has been *always ready* to pay, &c. *if he could have acquittance*. Br. Tout Temps, &c. pl. 39. cites 1 R. 3.

9. Where the *king grants by patent to J. S. 40 l. per ann.* and granted to him *a liberate currant to receive 40 l. per ann. of the clerk of the hamper*, there the clerk is debtor by *ſhewing of the liberate* to the clerk, if he has aſſets, and this notwithſtanding that the liberate be *that he receive ſo much rendering acquittance*, and he does not deliver acquittance, which is not reaſon as it ſeems. Br. Taile d'Exchequer, pl. 4. cites 2 H. 7. 8.

Br. Dette, pl. 136. cites S. C.

10. J. M. brought action of *debt againſt M. E. late wife of J. E. late guardian of the hamper, upon patent granted to the plaintiff* by the king *of a certain ſum, and had liberate delivered to the ſaid J. E. commanding him to make payment, receiving acquittance; and that ſuch a day, year, and place, the plaintiff offered acquittance, and demanded the ſum* of J. E. and required payment, at which day J. E. had aſſets in his hands; and the *defendant ſaid that the teſtator was ready to pay, in caſe the plaintiff had given acquittance.* And by Townſend, Cateſby, Hody, and Huſſey Ch. J. the plaintiff is not bound to offer acquittance. But the defendant ought upon payment to demand it, and that *never was iſſue taken upon the offer of the acquittance*; and Sulyard, Farefax, and Brian Ch. J. of C. B. e contra, and that the plaintiff ought to offer acquittance; for the patent is to pay receiving acquittance. Br. Taile d'Exchequer, pl. 7. cites 2 H. 7. 8.

11. If *leſſee for years grants all his eſtate*, and intereſt to A. rendering rent by indenture, and for default a re-entry, and the grantor

grantor *demands the rent*, and A. demands an acquittance, but the leſſee for years refuſes; in ſuch caſe A. may * refuſe to pay ſuch rent; for the rent is to be paid in this nature without any acquittance. But contrary if leſſee for years had *leaſed parcel of his eſtate* rendering rent with clauſe of *re-entry*, &c. 4 Le. 209. pl. 338. Mich. 18 Eliz. B. R.

* 'Tis ſo in the report, but ſeems miſprinted, and that the word (not) ſhould be inſerted to make the reaſon congruous.

12. In caſe of a grant of a *bare annuity*, where the grantee has no remedy by diſtreſs, there muſt be an acquittance under ſeal; † otherwiſe it is not of ſo high a nature as the grant; per Hale Ch. B. Hard. 333. in Wilſon's caſe.

In caſe of a *ſingle bill*, or *rent-ſeck*, where no diſtreſs can be taken, or other penalty incurred, payment need not be made without an acquittance. Went. Off. Ex. 218.

† [194]

13. In Mich. 11 Nov. 1738, it was ſaid at the rolls, per the maſter of the rolls, and agreed by ſeveral of the counſel, that in no caſe payment may be refuſed, unleſs an acquittance be given.

(B) *Plea of Payment without an Acquittance. Good.*

1. IN debt the defendant *ſaid that he had performed the conditions of the obligation, and the plaintiff delivered to him the obligation in lieu of acquittance, and after retook it with force and arms*, judgment ſi actio; and a good plea, and the plaintiff was compelled to anſwer to it. Br. Dette, pl. 34. cites 43 E. 3. 23. Contrarium lex per judicium anno 1 H. 7. 14. For matter in writing *ſhall not be anſwered by matter in fact*. Br. Dette, pl. 34.

2. It was ſaid that in writ of annuity *upon preſcription*, *or* upon *grant by deed*, a man ſhall not plead riens arrear without acquittance. Quod nota. Et mirum of preſcription. Br. Annuity, pl. 9. cites 44 E. 3. 18.

Br. Debt, pl. 38. cites S. C.

3. In debt upon indenture of a leaſe for years, the defendant may allege payment by averment without writing, and well. Br. Faits, pl. 13. cites 45 E. 3. 4.

4. *Debt upon an obligation of* 40 l. The *defendant ſaid that the plaintiff had received* 10 *l. part* of the 40 l. *pending the writ, and ſhewed acquittance of it*, judgment of the writ; and per Priſot, Aſhton, and the beſt opinion, This is a *good plea to the writ, and is not only to the action for part*. But per Moyle, he ought to plead it without acquittance, if he ſhall have it to the writ; for *with the acquittance it goes in bar of this parcel*, and it had been a good plea to the writ to have *ſaid that he received part*, &c. *pending the writ, without ſhewing acquittance*, becauſe it is to the writ. Contrary in bar. But by all others except him, it is no plea to the writ, viz. receipt of parcel without ſhewing thereof acquittance; and the reaſon wherefore it is a good plea, viz. *receipt of parcel* to the writ, is, becauſe he *has falſified his own writ*. Et adjornatur, &c. Br. Brief, pl. 256. [260] cites 39 H. 6. 43.

5. *Debt upon an obligation of* 40 *l.* The *defendant pleaded receipt of* 10 *l.* by the plaintiff *after the laſt continuance*, judgment of the writ; and it was held by Danby Ch. J. that it is a good plea to the writ *without acquittance or other ſpecialty*, notwithſtanding that the

the action be upon ſpecialty; but e contra it is, if it be pleaded in bar; nevertheleſs the juſtices did not agree in it, therefore quære. Br. Bar, pl. 78. cites 5 E. 4. 138. & 140. by 4 juſtices the plea is not good, and by 3 e contra.

6. In debt it was ſaid that where the *king delivers a liberate currant to W. S. to receive* 50 *l. per ann.* of the clerk of the hanaper, *rendering acquittance*, that in this caſe *it is not traverſable if the ſaid W. S. offered acquittance* or not; for it is only formal, and not traverſable; *as* in præcipe quod reddat, and the *delivery of a prohibition to the party in attachment upon a prohibition*, thoſe are formal, and not traverſable. Br. Traverſe per, &c. pl. 174. cites 2 H. 7. 8.

7. In debt the *defendant pleaded acquittance*; the *plaintiff ſaid that the acquittance was for another* 10 *l.* abſque hoc *that it was for this* 10 *l.* and a good plea. Br. Traverſe per, &c. pl. 318. cites 3 H. 7. 15. [195]

8. Debt *upon indenture of covenants, where the defendant had covenanted to do ſeveral things, and the plaintiff likewiſe to do ſeveral other things* ad quas quidem conventiones perimplendas *uterque obligatur alteri in* 100 *l.* and the one broke the covenant, by which the other brought debt; and the *defendant pleaded payment* of 10 l. at D. which was all to which he was bound, judgment ſi actio; and no plea per cur. becauſe he does not ſhew deed thereof; whereas the plaintiff declared upon the indenture, which is made. And yet contra in pleading of payment of rent reſerved upon a leaſe for years made by indenture; for there he may levy it by diſtreſs, and therefore averment may come in ure. But contra where all ariſes by ſpecialty where it lies in payment. Br. Dette, pl. 173. cites 25 H. 8. Br. N. C. 15. b. 25 H. 8. pl. 72.

9. One *by indenture was bound to pay* a ſum of money, and in an action of debt thereupon the defendant *pleaded payment*; and without acquittance per Montague, this is no good plea; for this indenture is like a ſimple obligation, payment whereof is no plea without acquittance. But it is otherwiſe if the obligation be with conſent. D. 25. b. pl. 160. Hill. 28 H. 8. Anon.

10. If an *annuity iſſues out of land*, and a writ of annuity is brought, payment is * [no] plea; otherwiſe it is not. Arg. D. 51. pl. 15. Mich. 33 H. 8.

*This ſeems miſprinted, and that the word (no) ſhould be inſerted, and then it agrees with the caſe of 22 E. 4. 51. a. cited in the marg. of D. and ſo is the abridgment of S. C. by Br. tit. Annuity, pl. 41. that where the perſon is charged by writ of annuity, payment is no plea without ſpecialty; but contrary in avowry.——And ſee Raym. 21 Lev. 43. and Sid. 44. pl. 1.

11. The wife dum ſola had *recovered* 26 *l. damages, and had execution, and was yet poſſeſſed of the ſaid money*, and that judgment was reverſed in error, and reſtitution awarded; and afterwards ſhe married the defendant, and thereupon the plaintiff brought *ſci. fac. to have reſtitution.* The defendant *pleaded that after the reverſal, and before this writ brought, he paid the ſaid* 26 *l. to the plaintiff.* The queſtion was, Whether payment was good without acquittance. Barkley J. held it was, becauſe the certainty of the damages appear not of record, and it may be that they were

without proceſs, &c. ſo as the execution appears not of record; but the other 3 juſtices contra, becauſe the ſci. fac. ſhews the recovery to be for 26 l. and that plaintiff had execution for ſo much; therefore the judgment being reverſed, and he demanding reſtitution of 26 l. only, payment is not good without acquittance. Jo. 326. pl. 8. Mich. 9 Car. B. R. Harris v. Harris.

12. In *audita querela to avoid execution of a judgment*, it was ſurmiſed that after the judgment he had paid the intire ſum. Popham thought ſuch ſurmiſe not ſufficient to avoid a judgment upon a bare payment, without writing or other matter of evidence; but Tanfield ſerjeant cited HAWKINS v. MALINS, where it was held a good ſurmiſe, becauſe it *is not only a ſuit in law but in equity alſo*, and is as a commiſſion to examine the cauſe; for it is not reaſon that if the money be ſatisfied he ſhould lie in execution. And ſo held all the court (beſides Popham;) whereupon he was let to bail. Cro. J. 29. pl. 7. Paſch. 2 Jac. B. R. Ognel v. Randol.

13. In *debt on a ſingle bill* the defendant after imparlance *pleaded payment of part puis darreign continuance & petit quod billa caſſetur*, &c. The *plaintiff denied the payment*. The defendant demurred. It was reſolved by Roll Ch. J. that the plea was inſufficient, though pleaded in abatement only, becauſe there ought to be an
[196] acquittance; which is controverted in the old books, where a difference has been taken between ſuch a plea pleaded in bar, and when pleaded in abatement; and cited L. 5 E. 4. 139. 15 H. 7. 10. e. 3 H. 7. 3. g. 7 E. 4. 15. e. But Roll ſaid, if he had had an acquittance he might have pleaded it in bar or abatement, at his election. All. 65. Trin. 24 Car. B. R. Beaton v. Foreſt.

3 Le. 3. pl. 6. S. C. reſolved accordingly.—Bendl. 37. pl. 70. S.C. adjudged accordingly.

14. J. S. *made A. and B. executors, and willed that B. ſhould pay to A. all ſuch debts as B. owed J. S. before B. ſhould meddle with any thing by his will*, and take any advantage thereof for diſcharge of the ſaid debt. B. died, and in debt againſt his adminiſtrator ſhe *pleaded that B. in his lifetime had paid* A. all ſuch debt as he owed the teſtator at his death, *but* becauſe ſhe *pleaded not any acquittance*, judgment was given for the plaintiff, payment being no plea without ſpecialty. Mo. 11. 12. pl. 44. Mich. 1 W. & M. Stapleton v. Trewlock.

15. In debt on a *ſingle bill* payment is no plea without a ſpecialty. See tit. Payment (N)

For more of **Acquittance** in general ſee **Payment** (N), **Account** (P), and other proper titles.

Act.

(A) Where an Act may enure ſeveral Ways, how it ſhall be taken.

1. EVERY act that does enure *to another act by implication* ought to be ſuch as of neceſſity muſt enure to the other act, which cannot be taken to be otherwiſe. Arg. Bridgm. 55.

As where a feme ſole grants a reverſion to which a rent was incident, and afterwards marries the grantee, to whom the tenant pays the rent, this is no attornment; for it is indifferent whether he pays the rent to him as grantee, or in right of his wife. Dy. 302. VIVOR's caſe, who recovered rents of ſeveral tenants as bailiff, and then they are granted to him, and after the grant they are paid to him, this is no attornment; for they may be paid to him as he is bailiff, as well as he is grantee. But if the leſſee do ſurrender to him in the reverſion, then it is a good attornment, for a ſurrender cannot be to any but to him that hath the reverſion. Arg. Bridgm. 55.

2. When the *law implies any act out of the act of the party*, the act of the party muſt be ſuch as neceſſarily makes ſuch a thing to be implied by the law, and that to be ſo neceſſary as that the act of the party cannot be, unleſs the act to be implied be alſo implied to be done. Arg. Bridgm. 82, 83. in caſe of Robinſon v. Greaves.

As 14 H. 7. if tenant for life does ſurrender to the grantee of the reverſion, this is firſt an attornment implied by the law;

3. *But* when the act of the parties may be *without any ſuch implication*, and the matter to be implied reſts indifferent, then it is otherwiſe. Ibid.

for otherwiſe the ſurrender can take no effect. And 5 Rep. fol. 15. if a parſon makes a leaſe to the patron, who grants over the leaſe, this does imply a confirmation of the leaſe; for otherwiſe the grant of the patron ſhall be avoided. Arg. Bridgm. 83.

4. Where a *corporal act has 2 effects*, the one *proper and natural*, and the other *improper and legal*, the act ſhall never enure to the improper effect without declaration; as when a man may revoke a deed by gift of a ring, &c. here, if a ring is given, the proper effect is the alteration of the property of the ring; but the improper effect is the revocation of the uſes, which it cannot enure to without a declaration for what purpoſe it was given. So of hunting or hawking in land, it gains no poſſeſſion, &c. per Whitlock J. Lat. 106. Hill. 1 Car. in caſe of Warner v. Hardwin.

Palm. 433. S. P. per Whitlock J. in caſe of Hardwin v. Warner.

For more of Act in general ſee other proper titles.

* Actions [Qui tam, &c.]

* Actio nihil aliud eſt quam jus proſequendi in judicio quod alicui debetur. 2 Inſt. 40. cites Bract. lib. 3. cap. 1. fol. 98.

(A) Tam pro Domino Rege quam pro ſeipſo.

[1. THO. Molyneux ſued tam pro rege quam pro ſeipſo againſt Hugh Berewicke, for that whereas he was indicted and *arraigned of felony before the defendant*, unde protulit *cartam regis pardonationis*, quam *defendens noluit allocare, dicendo quod the king's writ nihil ſibi valeret*, and then impriſoned him, and threatened to hang him *niſi ſubmitteret Henrico duci Lancaſtriæ*, and become bound in a ſtatute merchant to the ſaid duke in 320l. whereupon *the defendant ſubmitted himſelf, and is pardoned.* Hill. 27 E. 3. B. R. Rot. 42.]

So if the ſheriff *ſuffers him to eſcape*, the debt not being ſatisfied, an action lies tam quam; for ſuffering one outlawed to eſcape, is in contempt to the queen, as well as in prejudice to the plaintiff. Cro. E. 877. pl. 3. Paſch. 45 Eliz. B. R. Eden v. Loyd.

[2. If A. recovers againſt B. in debt, and thereupon outlaws him, and afterwards *upon a capias utlagatum the defendant is taken, and reſcued by a ſtranger*, A. ſhall have an action upon the caſe tam pro domino rege quam pro ſeipſo againſt the ſtranger. Mich. 11. Jac. between *Lane and Stamſhaul* adjudged.]

B. Damages, pl. 65. cites S. C. —— Br. Præmunire, pl. 7. cites S. C.

3. *Attachment upon prohibition upon the ſtatute of præmunire* was brought by the king and his incumbent, for that the defendant had brought *bulls of excommunication from Rome.* Br. Joinder in action, &c. pl. 29. cites 21 E. 3. 40.

Br. Prerogative, pl. 48. cites S. C. — Thel. Dig. 28. lib. 2. cap. 4. (bis) ſ. 1. cites 27 E. 3. 83.

4. Treſpaſs was brought by the king and by J. N. his chaplain, for a *treſpaſs done in the palace of Weſtminſter*, in preſence of the king and of his juſtices, and in contempt of the king, and *contrary to* his *protection*, to the damage of the plaintiff. And ſo ſee that the king and a † ſubject joined in action; but it ſeems that the chaplain ſued pro rege & ſeipſo. Br. Joinder in Action, pl. 57. cites 27 Aſſ. 49.

—— So a writ of treſpaſs was maintained for the king, and a collector of 15th for the king, of *aſſault and battery*, and menace, &c. done *to the collector in collecting the king's money.* Thel. Dig. 28. lib. 2. cap. 4. (bis) ſ. 2. cites 27 Aſſ. 11.

So a writ of *treſpaſs* and contempt was brought in B. R. *for the king and an eſcheator* of the king, *againſt a common hoſtler becauſe the chamber* of the eſcheator, in travelling towards London in the buſineſs of the king, *was broke open in the hoſtery, and his goods taken* and carried away. Thel. Dig. 28. lib. 2. cap. 4. (bis) ſ. 5. cites 42 Aſſ. 17.

† [198]

5. A bill was alſo maintained for the king and the party in B. R. where the defendant had a præcipe quod reddat pending againſt the party now plaintiff with the king, and had *made an aſſault*

aſſault and battery, and menace *to the party in coming to the court with his evidences and charters, to anſwer to the defendant*, &c. in deſpite of the king, &c. Thel. Dig. 28. lib. 2. cap. 4 (bis) ſ. 3. cites 30 Aſſ. 14.

6. One *Brabſon and his feme ſued an aſſiſe* at Wincheſter *againſt one R.* which *R. carried away the feme* of the plaintiff *before the doors of the caſtle* (which was of her aſſent) with him, and the baron would have taken his feme, and R. would not ſuffer him, but *laid his hands upon the baron and reſcued the feme*, &c. upon which the baron ſued a bill for the king and for himſelf againſt R. before the ſame juſtices, of this aſſault *in the preſence of the juſtices, in diſturbance of his ſuit*, and the carrying away the feme, &c. in deſpite of the king and his juſtices, &c. and this bill was maintained. Thel. Dig. 28. lib. 2. cap. 4. (bis) ſ. 4. cites 39 Aſſ. 1.

7. Action tam quam was brought *upon the ſtatute of Winton*, amends not being made by the hundred, nor the robbers taken, and iſſue being found for the plaintiff, he had his judgment. Bendl. 122. pl. 157. Hill. 4 Eliz. Hooker v. Bond & al'.

8. In a *decies tantum* the writ ſhall be in the tam quam; per Dyer. Mo. 64. in pl. 175. Trin. 6 Eliz. Dal. 66. pl. 30.

9. In an action on the caſe for *ſuing in the admiralty for a thing done at land*, the action ſhall be in the tam quam; per Dyer, who ſaid it was lately held ſo: for in this and the caſe above, the action was upon a contempt, and not for a duty. Mo. 64. pl. 175. cites Powtel's caſe. Dal. 66. pl. 30.

10. Action tam quam was brought for *taking toll of an inhabitant of a town diſcharged*, as ſuppoſed by tenure in ancient demeſne; and the action being brought by the pars gravata, the queſtion was whether it was well brought. See 2 Le. 190. pl. 240. Trin. 28 Eliz. B. R. Leiceſter (Town's caſe.)

11. 31 *Eliz. cap.* 5. *ſ.* 1. enacts, that *no perſon at any time before ordered by any of the queen's courts for any miſdemeanour, not to purſue any penal ſtatute, ſhall ſue upon the ſame, unleſs he be the party grieved.*

S. 3. *Provided that this act ſhall not reſtrain ſuch officers as have lawfully uſed to exhibit informations.*

12. In debt upon the ſtatute of 2 E. 6. for *not ſetting forth tithes*, the action was brought tam quam. Exception was taken, becauſe the king cannot have any benefit thereof, and that the ſtatute gives it only to the parties grieved. The court held this a material exception, and ordered judgment to be ſtayed. Cro. E. 621. pl. 11. Mich. 40 & 41 Eliz. B. R. Johns v. Carne.

But where an action tam quam was brought upon the *ſtatute of* E. 6. *of tithes*, it was affirmed to be good; for the *king is to have a fine*. Het. 121. Mich. 4 Car. C. B. Luvered v. Owen.

13. When any *ſtatute prohibits any thing*, &c. if any impleads another [contrary to ſuch ſtatute] *though it be in a legal courſe of proceeding*, yet the *party grieved ſhall have action* upon the ſtatute againſt him that ſues contrary to ſuch ſtatute, *though the words of the ſtatute do not give any action to the party*; for this is a thing conſequent [199]

ſequent to, and implied in every thing prohibited by any ſtatute. 10 Rep. 75. b. in the caſe of the Marſhalſea.

But per Holt Ch. J. where a certain penalty is given by a ſtatute to the party grieved, he needs not join the king; for it is like a private act, only for his benefit. 3 Salk. 7. Anon.

14. Where a *ſtatute prohibits* a thing, but adds *no penalty*, action lies for doing againſt the prohibition of that ſtatute; but ſuch action muſt be brought tam pro rege quam pro ſeipſo, becauſe in ſuch caſe the king is to have a fine. Cro. J. 134. pl. 6. Mich. 4 Jac. B. R. in caſe of Lady Waterhouſe v. Bawde.

Cro. J. 360. pl. 22. S. C. accordingly. S. P. Paſch. 44 Eliz. Cro. E. 877. EDEN v. LOYD.—*And* tho' it be good, being brought in the tam quam, yet *debt lies for the party only, without naming the king* on an eſcape of one condemned in debt, and outlawed after judgment, and who was removed into the king's bench by habeas corpus from Glouceſter, though it was objected that he never was taken in execution, and that he eſcaped after 2 years impriſonment, and that the action for ſuffering an outlawed perſon to eſcape ſhould be brought in the tam quam; for it was held that he may bring his action of debt *for what he hath loſt*. And it was certified by the prothonotary, that the *precedents are both ways*; and ſo adjudged for the plaintiff. Cro. J. 619, 620. (bis) pl. 5. Mich. 19 Jac. B. R. Moor v. Sir Geo. Reynolds. ——Bridgm. 6. S. C. ſays it was objected, that the declaration was inſufficient, becauſe it was not tam quam, it being a contempt to the king; but a precedent being ſhewn between the king and Molineux, where the declaration was for the party only, and all the prothonotaries certifying that the great part of precedents in C. B. for the party only, it was adjudged good either way. —— S. P. was adjudged in C. B. accordingly, and afterwards affirmed in B. R. and upon appeal to the Houſe of Lords affirmed there likewiſe, and chiefly upon the authority of the caſe of Moore and Reynolds, as the reporter ſays. Wms.'s Rep. 685. 693. Hill. 1720. Throgmorton v. Church.

15. B. was taken in *execution by a cap. utlag.* at the ſuit of A. and the *ſheriff ſuffered him to eſcape*; upon which A. brought an action on the *caſe againſt the ſheriff*, and declared tam pro, &c. quam pro, &c. and ſet forth as before, and plaintiff had a verdict. Exception was taken becauſe the action was tam quam; for it ſhould have been in the name of A. only; but it was anſwered, that being taken by cap. utlag. the permitting the eſcape is a *contempt to the king*, and that it is the uſual action in ſuch caſe, though the party ſhall have all * the damages; and it was adjudged accordingly. Roll. Rep. 78. Mich. 12 Jac. B. R. Barret v. Windſcomb.

* S. P. by 3 judges; but Popham ſaid, that this is *de gratia & non de jure*. Yelv. 19. Mich. 44 & 45 Eliz. B. R. Jennings v. Hatley. ——Cro. E. 909. Jennings v. Harley, S. C.—— And Coke held, that in an action *upon the ſtatute de ſcandalis magnatum*, though it be brought in the tam quam, yet the party ſhall have all the damages found, and that the king is joined for honour and conformity. Roll. Rep. 78. ut ſup.

Hob. 209. pl. 264. S. C. but the point of the tam quam does not appear. —Noy. 22. Parkinſon v. Powell

16. Action tam quam lies againſt a *ſheriff*, who *having a capias utlagatum againſt J. S.* delivered to him, and ſeeing J. S. *refuſed to execute it*, though required, but ſuffered him to go at large, *and returned non eſt inventus*, in deceit of the king and prejudice of the party. Adjudged and affirmed in error. Cro. J. 532. pl. 16. Paſch. 17 Jac. B. R. Parkhurſt v. Powell.

S. C. ſays, the ſheriff was often in company of the ſaid J. S. afterwards within his bailywick, and yet he returned non eſt inventus, but does not mention the action being tam quam ——Brownl. 12. S. C. but the tam quam does not appear.—— Jenk. 332. pl. 64. ſays, the king and party may well join, but in this caſe the king may be omitted. —— S. C. cited Arg. Wms.'s Rep. 691.

S. P. For the king is prejudiced by the act, which is the ground of the action; per Holt Ch. J. 3 Salk. 7. Anon.

17. If an action be brought upon the ſtatute *de ſcandalis magnatum*, it may be in the tam quam; per Hutton. Het. 122. Arg. in caſe of Luvered v. Owen.

18. In action *upon* 14 & 15 *H.* 8. *cap.* 5. exception was taken that the college cannot join with the king in debt, and that neither the patent * nor the ſtatute which confirms it gives an action of debt; ſo that in this caſe it ſhould have been an information tam pro domino rege quam pro ſeipſo; but the court held, that *debt lies as well as information*, as well as on 2 E. 6. cap. 13. which gives no action, and judgment for the plaintiff. 3 Keb. 672. pl. 40. Trin. 28 Car. 2. B. R. the College of Phyſicians v. Needham.

19. It lies for *indicting* a man *in a foreign country*. Per Holt Ch. J. 3 Salk. 7. Anon.

20. But in ſome caſes, as upon the ſtat. of *hue* and *cry*, and the ſtat. for not appearing as witneſs, being ſerved with a *ſubpœna*, the party may either bring *debt* or *caſe*. If he bring *debt*, he muſt ſue without the king, for the debt is not due to him but to the party grieved; but if he bring an action on the caſe, he muſt ſue in the tam quam, for the action is founded on the *tort* only, and that is to the king as well as to the party, per Holt Ch. J. 3 Salk. 7. Anon.

(A. 2) Tried where, and by whom. And how.

1. *ASSISE* againſt B. and J.—*J. pleaded villeinage*, and the *writ by this abated where the plea was falſe*, and made by conſpiracy of B. and others; and therefore the *plaintiff* in the aſſiſe *immediately brought bill of conſpiracy thereof before the juſtices of aſſiſe, becauſe they conſpired to make J. plead the falſe plea where J. before was frank*, and the bill was qui tam pro domino rege quam pro parte; and the defendant was compelled to plead, who ſaid not guilty, and was found guilty ad damnum 20 l. for the delay, and was committed to the keeping of the ſheriff. Br. Bille, pl. 19. cites 26 Aſſ. 62.

2. 18 *Eliz.* 5. *Juries not compelled to appear at Weſtminſter.*

Juſtices of aſſiſe, and juſtices of peace in their quarter-ſeſſions, are impowered to hear and determine all offences againſt this act.

Provided that it ſhall be lawful for any perſon grieved by maintenance, champerty, buying of titles, or embracery, to proſecute their ſuits as heretofore.

Nor ſhall this ſtatute reſtrain any perſon, body politic or corporate, to whom any forfeiture, penalty, or ſuit is ſpecially given by any ſtatute (and not generally to any perſon that will ſue) but ſuch perſon, &c. to whom any ſuch is ſpecially given, may proſecute as heretofore.

Nor to extend to officers of record.

3. 31 *Eliz. cap.* 5. *ſ.* 2. enacts, that *in any declaration or information to be exhibited, the offence againſt any penal ſtatute ſhall not be laid to be done in any other county but where the matter was in truth done; and every defendant in ſuch action or information may traverſe that the offence was committed in the county; which being tried for the defendant, or if the plaintiff be therein nonſuited, the plaintiff ſhall be barred.*

But though this ſtatute reſtrains common informers to bring their action only in the proper county where the offence was done, yet it extends not to the party grieved; for he is not a common informer. Cro. E. 645.

645. pl. 53. Mich. 40 & 41 Eliz. B. R. Allen v. Stear.——Debt upon the ſtatute of embracery was brought in the county of C. the defendant pleaded non debet, and it was found that the embracery was in the county of B. The whole court held that the bill ought to abate by this ſtatute, the ſame being in the negative; and when it appears to the court that the action is brought againſt the form thereof, the bill ought to be abated, though the *defendant took no advantage thereof by plea.* And adjudged accordingly. Cro. E. 735. pl. 3. Hill. 42 Eliz. B. R. Pomfreit v. Brownſall.——But in an information for tranſporting raw hides, the fact was laid to be done in Middleſex, whereas it was done in Devon, the defendant pleaded not guilty; and judgment being given for the plaintiff, the ſame was affirmed by opinion of the judges, becauſe the matter in fact did not appear * to the court by the plea; ſo that when he pleaded, without excepting or pleading to the information, the judges cannot take conuſance of the truth of the matter in fact; ſo that though the words of the ſtatute are negative, yet they ſhall be conſtrued reaſonably, viz. if the matter be not pleaded, the defendant cannot take advantage of it; and this appears by the words of the ſtatute. 2 And. 180. pl. 103. Mich. 44 & 45 Eliz. before the lord chancellor and treaſurer in the exchequer chamber, Bankes v. Hudſon.——But ſee ſtatute 21 Jac. 4. ſ. 2.

S. 3. Provided that this act ſhall not extend to any ſuch officer as has uſed to exhibit informations.

S. 4. And provided that this act ſhall not extend to the laying any offence concerning champerty, buying of titles, or extortion, or for defrauding the queen of any cuſtom, &c. or for uſury, or for any offence in any ſtatute againſt ingroſſing, regrating, or foreſtalling, where the penalty ſhall be to the value of 20 l.

The ſtatute of 5 Eliz. cap. 4. does not give the *leet* power to proceed againſt perſons uſing trades not having been apprentices; agreed per cur. notwithſtanding it was urged that the ſtatute 31 Eliz. cap. 5. which wills, that informations and actions upon penal ſtatutes ſhall be brought in the proper counties, and names aſſiſes, ſeſſions, leets. But to this the court, upon reading the laſt words of the ſaid ſtatute, anſwered, that this is intended of other offences there, whereof leet had conuſance before, as of butts, and bows and arrows, &c. And the court directed, that ſuch aliens as uſed trades, not having been apprentices, ſhould be preſented at *ſeſſions, or* in this court of *B. R.* Sid. 289. pl. 4. Trin. 18 Car. 2. B. R. Amy v. Bennet.

S. 7. All ſuits upon any ſtatute for uſing of any unlawful game, or for not uſing of any lawful game, or for not having bows and arrows according to law, or for uſing any art or myſtery in which the party has not been brought up, ſhall be ſued in the quarter-ſeſſions, or aſſiſes of the ſame county, where the offence ſhall be committed, or in the Fleet.

4. Information on a ſtatute does not lie in a *court of piepowders*, nor before *juſtices of peace*, nor in the *courts of towns corporate*, but only in the courts of record at Weſtminſter, notwithſtanding the general words, that in *all the king's* † *courts of record*, &c. Mo. 421. pl. 581. Mich. 37 & 38 Eliz. C. B. Anon.

† Theſe words in the ſtatute of 4 & 5 P. & M. intend the *courts of record at Weſtminſter only*,

and ſo a recovery had in Ludlow court on a plaint upon that ſtatute, for uſing a trade, not having been apprentice for 7 years; and therefore the judgment was reverſed. Mo. 599. pl. 827. Intratur Hill. 38 Eliz. Gregory v. Blaſhfield.——6 Rep. 19. b. S. C. by the name of Gregorie's caſe, accordingly.

Information in Bury, upon the ſtatute 5 Eliz. cap. 4. for uſing a trade, not being an apprentice to it for 7 years. The plaintiff had judgment, and it was afterwards aſſigned for error, that informations upon penal ſtatutes ought to be brought in one of the courts at Weſtminſter, and not elſewhere, unleſs it is otherwiſe expreſsly provided by ſome ſtatute. And of that opinion were Gawdy and Fenner, the other juſtices being abſent; and reverſed the judgment. Cro. E. 737. pl. 7. Hill. 42 Eliz. B. R. Barnaby v. Goodale.——But ſee now the ſtatute of 21 Jac. 1. cap. 4.——So in an information for exerciſing a trade contrary to this ſtatute, judgment was given in the court of Guildhall before the mayor London. Error was brought, and error aſſigned was, becauſe the information was brought in London, whereas this being a penal law, it ought not to have been ſued but in the king's courts at Weſtminſter, where the king's attorney is to acknowledge or deny; and therefore not ſuable there. The judgment was reverſed. Cro. J. 538. pl. 5. Trin. 17 Jac. B. R. Miller v. Regem.

S. P. agreed 2 And. 128. pl. 73. Hill. 35 Eliz. Agard v. Tendiſh.

5. Where a *ſtatute limits ſuits by an informer qui tam to other courts*, yet any one may, by conſtruction of law, exhibit an information in the *exchequer for the whole penalty for the uſe of the king.* 2 Hawk. P. C. 268. cap. 26. ſ. 25.

6. Inform-

6. Information upon the ſtatute of 5 Eliz. becauſe he uſed the trade of a *ſpurrier* in London, not having been apprentice in that trade by the ſpace of 7 years. After verdict exception was taken, becauſe by the ſtatute of 31 Eliz. the information ought to have been brought *before the juſtices of peace where the offence was committed, and* can *not* be brought here, nor *in other of the king's courts.* And of that opinion were Fenner, Yelverton, and Williams; but they would adviſe, becauſe * it was a common caſe, and concerned many informations. Cro. J. 85. pl. 9. Mich. 3 Jac. B. R. Kenn v. Drake.

S. C. cited Cro. J. 179. Trin. 5 Jac. in caſe of SHOYLE v. TAYLOR, and the precedent ſhewn between DEAN AND DRAGE, Paſch. 3 Jac. Rot. 150. for uſing the trade within the pariſh of St. Clements, and it was adjudged that it well lay; but it was ſaid that there was not any queſtion in that caſe, becauſe the offence being in Middleſex, and B. R. ſitting in Middleſex, they had the power of the ſeſſions intended within the ſtatute; but the court held it to be all one, wherefore it was adjudged accordingly.——By the ſtatute of 31 *Eliz. cap.* 5. it is enacted, that *offences againſt the ſtatute of* 5 *Eliz. ſhall be inquired of only in the ſeſſions of peace, aſſiſes, or leets within the county* where the offences are committed, *& non alibi extra comitat'*; ſo as this information upon this ſtatute, in this court, is not maintainable; and of this point the barons were in doubt. But it was afterwards reſolved, upon conſideration of the ſtatute, that the information well lay; for the intent of the ſtatute was, that for ſuch offences men ſhould not be drawn out of the county where the offence was committed; and although the ſtatute mentions that the ſuit ſhall be for them in ſuch courts there named, yet it is not in the negative, (and *not in any other court*) but *not in any other county*; and this being a ſuit for the king, and in this court proper for him, this information is well maintainable, and ſo it was adjudged. Note the principal caſe was afterwards affirmed in a writ of error. Cro. J. 178, 179. pl. 17. Trin. 5 Jac. in the exchequer, Shoyle v. Taylor.——In an information for uſing the trade of a *baker*, it was inſiſted that by the ſtatute 31 Eliz. it ought to be ſued and tried in the ſame county at the quarter-ſeſſions or aſſiſe, and not in any wiſe out of the county; and of ſuch opinion was the court. Hob. 327. pl. 399. Trin. 18 Jac. Nevil v. Yarwood.——It is ſufficient if it be laid in the proper county. Mo. 886. pl. 1245. Hill. 14 Jac. Daviſon v. Baker.—In an information for uſing the trade of a *brewer*, and an exception was taken, that by 31 Eliz. cap. 5. it ought to be brought *at the quarter-ſeſſions*. But per Aſtry, it was lately adjudged in this court, that it was *well brought here*; and the court over-ruled the exception. Comb. 62. Mich. 3 Jac. 2. B. R. the King v. Gibbs.

7. 21 *Jac.* 1. *cap.* 4. *ſ.* 1. enacts, That *offences againſt any penal ſtatute, for which any common informer may ground any popular action, &c. before juſtices of aſſize, niſi prius, or gaol-delivery, juſtices of oyer and terminer, or juſtices of peace in quarter-ſeſſions, ſhall be ſued by way of action, &c. before the juſtices of aſſiſe, niſi prius, oyer and terminer, and gaol-delivery, or before the juſtices of peace of every county, city, borough, or town corporate, and liberty wherein ſuch offences ſhall be committed; and the like proceſs in every popular action ſhall be had as in an action of treſpaſs, vi & armis; and all informations, &c. either by the attorney-general, or by any officer, common informer, or other perſon, in any courts at Weſtminſter, for the offences aforeſaid, ſhall be void.*

If a *penal law* gives liberty to ſue for the penalty by *information, debt, plaint, &c. in any court of record*, reſolved that this is in any of the courts at *Weſtminſter*, therefore on thoſe laws, (viz. penal laws) information may be ſued at Weſtminſter, and is not reſtrained by 21 Jac. 4. For no information by common informer may be brought before juſ-

S. 2. *In all informations, &c. in any ſuit, either by the king or any other, for any offence againſt any penal ſtatute, the offence ſhall be laid in the county where ſuch offence was committed; and if the defendant pleads that he owes nothing, or that he is not guilty, and the plaintiff or informer ſhall not both prove the offence, and that the ſame offence was committed in that county, the defendant ſhall be found not guilty.*

S. 5. *This act ſhall not extend to any information or action againſt popiſh recuſants, or againſt thoſe that ſhall not frequent the church, and hear divine ſervice, nor for maintenance, champerty, or buying of titles; nor for defrauding the king of any cuſtom, or for tranſporting*

tices of peace, juſtices of aſſiſe, or juſtices of oyer and terminer.

of gold, ſilver, ordnance, powder, ſhot, munition, wool, wool-fells, or leather. Jo. 193. pl. 3. Mich. 4 Car. B. R.

If any penal law gives *power to juſtices of peace*, of aſſiſe, or of oyer and terminer, *to hear and determine offences againſt the ſtatute*, and ſays no more, this is by way of *indictment, and not by information*, bill, or plaint, unleſs this was *ſpecially named*. Ibid.

Though a ſpecial clauſe be *to ſue* upon the ſtatute *by bill, plaint, debt, or information* againſt offenders againſt any ſtatute, yet if he be indicted for this before juſtices of aſſiſe, oyer and terminer, or peace, in this caſe the *indictment may be removed to B. R.* and there tried by niſi prius. Ibid.

Upon penal law in *Middleſex* an information may be brought in B. R. though juſtices of peace, &c. have power to hold plea by information, &c. Jo. 193. pl. 3. The reſolution upon 21 Jac. cap. 4. of penal laws.

The ſtatute 21 Jac. 1. cap. 4. *extends* only to acts made before that act, and *not to ſubſequent acts of parliament*; per Holt Ch. J. who ſaid that himſelf and nine other of the judges were of that opinion. 5 Mod. 425. Mich. 10 W. 3. Anon.——S. P. 1 Salk. 373. pl. 14. Reſolved by the opinion of 11 judges, Hill. 10 W. 3. B. R. Hicks's caſe.——12 Mod. 223. the KING v. GALL, S. P. by Holt Ch. J. in delivering the opinion of 10 of the judges who met at Serjeant's Inn, and ſeems to be S. C. with 5 Mod.—And per Holt, Rookby, and Turton, if a ſubſequent act be made that gives a popular action, you muſt in debt lay it in the proper county, and though the party go out of the county, you may proceed againſt him by outlawry.

[203]

An information qui tam *upon the ſtatute of non-reſidence, taken at the aſſiſes*, being removed into the court of B. R. it was moved to quaſh it for want of juriſdiction; but the court denied the motion, and cited 1 Sid. 152. for the *difference* between *informations qui tam* and *ex officio*. The Ch. J. likewiſe cited Paſch. 10 Ann. B. R. the QUEEN v. POTTER, to the ſame purpoſe, where Ld. Parker ſaid, that *informations qui tam are in nature of civil actions*, and that *the informer has an intereſt*. Paſch. 11 Geo. 2. B. R. Garland v. Burton.

8. An information qui tam, &c. was brought *before juſtices of aſſiſe for non-reſidence*, upon the ſtatute 21 H. 8. but becauſe the ſtatute gives it only in the king's courts, where there may be eſſoign, wager of law, or protection, it was reſolved, upon conference with the other juſtices, that it lay not before them, notwithſtanding 21 Jac. cap. 4. appoints that informations taken by inqueſt before juſtices of aſſize, or of oyer and terminer, ſhall be determinable there; and judgment for defendant. Cro. C. 146. pl. 26. Mich. 4 Car. B. R. Green v. Guy.

S. C. cited Keb. 584. pl. 46. Mich. 15 Car. 2. B. R. in the caſe of FRYSER v. BROOK, in which caſe the offence was alleged to be at Newcaſtle, but the action on the 5 Eliz. was brought originally in B. R. which matter being moved in arreſt of judgment, the court agreed, that any cauſe of action for offence in Middleſex might be laid in B. R. but doubted as to this caſe; & adjornatur.

9. In an action on this ſtatute for uſing the trade of a draper, after judgment for the plaintiff, exception was taken becauſe it was brought in B. R. and not in the county where, &c. To which it was anſwered, that though the original *proceſs iſſued out of this court*, yet the *trial thereupon was in the county* where the offence was done, and that the remedy intended by the ſtatute is made uſe of by the trial in the county where the offence was done. Roll Ch. J. told them he directed them to ſearch for precedents, which they had not done; but he conceived the ſtatute not ſatisfied, which ſays, that the party ſhall not be compelled to appear out of the county, whereas here he is compelled, and that this is not helped by the verdict; to which the court agreed. Sty. 223. Trin. 1650. B. R. Nayler v. Aſh.

Debt qui tam, &c. upon the ſtatute 5 Eliz. &c. for exerciſing the trade of a grocer, not being apprentice to it, after a verdict for the plaintiff it was moved that debt would not lie in the court of B. R. becauſe it is enacted by the ſtatute 21 *Jac. cap.* 4. That *actions popular ſhould be brought before juſtices of aſſiſe, &c. or of the peace in their general quarter ſeſſions, and not elſewhere*; by which negative words the juriſdiction of the courts at Weſtminſter is taken away; but adjudged that ſince the ſtat. 5 Eliz. gives a remedy by action of debt, indictment, or information, and ſince actions of debt cannot be brought before juſtices of aſſiſe or of the peace, therefore that ſtatute doth not extend to actions

tions of debt. Vent S. Hill. 20 & 21 Car. 2. B. R. Barnes v. Hughes. —— Sid. 400. pl. 7. S. C. And per cur. the ſtatute of 21 Jac. was to ouſt the courts of Weſtminſter of ſuch actions or informations as might be ſued elſewhere, viz. before juſtices of aſſiſe or of the peace, &c. as informations of indictments; but ſuch actions as cannot be commenced there, the ſtatute intended not to take away, as it muſt do, if they cannot be ſued elſewhere than is directed by the ſtatute; and originals in deb never were returnable before juſtices of aſſiſe, &c. and judgment for the plaintiff. —— Lev. 249. S. C. adjudged accordingly. —— In ſuch a caſe the court ſeemed to incline, that though an *information* cannot be brought here, but *muſt be in the county*, according to the ſtatute, *yet* becauſe an action of *debt cannot be brought before the juſtices of oyer and terminer, nor of the peace*, therefore that ſeemed not to be within the ſtatute; and ſo that it had been formally adjudged between HUGHS and BARNES. Sed adviſare vult. Freem. Rep. 377, 378. pl. 491. Mich. 1674. Nicholls v. Cottrell. —— 2 Lev. 204. cites Nichols and Cochinell, S. C. as adjudged in time of Hale Ch. J. that the action muſt be brought in the proper county; and thereupon in the principal caſe there of CLAPPE v. EDGECOMBE, on the S. P. Mich. 29 Car. 2. B. R. the court ordered it to be put into the paper. —— S. C. of Clappe v. Edgecombe cited by the reporter Lev. 249, 250. ſays the court there were of opinion contrary to the caſe of Barns v. Hughs. —— S. P. and S. C. cited, but notwithſtanding that caſe the court ſaid they would hear arguments. Vent. 364. Paſch. 34 Car. 2. B. R. Curtis v. Inman. —— 5 Mod. 225. cites the caſe of Nichols v. Cockeril, as adjudged Paſch. 27 Car. 2. in B. R. for if debt will lie here by a common informer upon a penal law, the ſtatute of king James the Firſt will be wholly avoided. —— But Trin. 29 Car. 2. an action of debt on this ſtatute for exerciſing a trade in London, not having been apprentice 7 years, *was laid in London, and brought in C. B.* and *tried at the niſi prius*, and the defendant had a verdict; and now the plaintiff, to prevent payment of coſts, objected that this action would not lie in any of the king's courts at Weſtminſter upon this ſtatute, becauſe by the ſtatutes 31 Eliz. and 21 Jac. all informations upon penal ſtatutes muſt be brought before juſtices of peace in the county where the fact was committed. But the court were clear of opinion, that the courts of Weſtminſter-hall have a concurrent juriſdiction with the juſtices; and ſaid it had been often ſo reſolved. 2 Mod. 246. Foreſt qui tam, &c. v. Wire. —— And Paſch 1681. in debt upon the ſame ſtatute for exerciſing the trade of a baker, it was reſolved per cur. that *ſuch actions as do not lie before juſtices in the county may be brought here*; for the deſign of thoſe ſtatutes was not ſo much that actions ſhould be begun in the county as that they ſhould be tried there. Freem. Rep. 534. pl. 721. Denton v. Wilſon. —— So where debt upon the ſame ſtatute *for uſing a trade in Briſtol*, was *brought in C. B. and tried by niſi prius* * *in Briſtol*, it was moved that the action ſhould have been brought at the aſſiſes at Briſtol in the proper county, by the ſtatute 21 Jac. But per cur. debt cannot be brought before juſtices of aſſiſe, therefore the *ſtatute extends not to actions of debt*; and afterwards, upon conference with the juſtices of B. R. judgment was given abſolutely for the plaintiff. 3 Lev. 71. Mich. 33 Car. 2. C. B. Raynor qui tam v. Fittler. —— And 4 Mod. 158, 159. Mich. 4 W. & M. in B. R. the KING and QUEEN v. HICKS, is, that *debt will lie* upon the ſtatute 5 Eliz. cap. 4. in Middleſex, *though the offence was done in Cumberland*, becauſe the ſtatute of 21 Jac. did not intend to deprive the courts of Weſtminſter of ſuch actions, but only of thoſe which might be brought before juſtices of aſſiſe or of the peace. *Informations* may be brought before them as well as in B. R. but debt cannot. —— But Mich 10 W. 3. Holt delivered the opinion of ten of the judges, who met at Serjeant's Inn upon ſome queſtions upon ſtat. 21 Jac. cap. 4. that action of † *debt lies not on the 5 Eliz. cap. 4, or any penal ſtatute by a common informer in a foreign county*, but is taken away by the ſtatute of 21 Jac. but if the *fact* was *committed in the county where B. R. ſits*, then it may be brought in B. R. but not otherwiſe; and denied the caſe of BARNES AND HUGHS, 1 Sid. 400. 1 Vent. 8. to be law. 12 Mod. 223. the King v. Gall. —— Carth. 465. S. C. which was an information by the attorney general on the 5 & 6 E. 6. cap. 14. for ſelling cattle alive, within five weeks after buying them, the court, on reading the ſtatute and 21 Jac. held, that it being clear the defendant might have proſecuted at ſeſſions indictment on the ſtatute of E. 6. this caſe was reſtrained by the expreſs words of 21 Jac. it being an information by the attorney general; and that it had been always ruled that 21 Jac. gives no new juriſdiction to juſtices of peace, or of oyer and terminer, &c. where they had none before, and ſo extends not to penal laws, which can be proſecuted only in the ſuperior courts at Weſtminſter; and the opinions in the books, that debt on a penal law will ſtill lie in the ſuperior courts, are founded on this reaſon, becauſe no ſuch action can be commenced before the ſeſſions, or niſi prius, or oyer and terminer; and the information was quaſhed. —— 1 Salk. 372. pl. 13. S. C.

† 5 Mod. 425. S. P. accordingly, and ſeems to be S. C. —— S. P. reſolved by the opinion of 11 judges. 1 Salk. 373. pl. 14. Hill. 10 W. 3. B. R. Hicks's caſe.

* [204]

10. In debt by a common informer, on the 23 H. 6. cap. 10. *againſt a bailiff for taking 5s. 6d. on an arreſt* on a bond. After verdict for the plaintiff it was moved, that by the ſtatute 21 Jac. cap. 4. it ſhould have been brought in the county where the taking was, whereas the taking was in Buckinghamſhire, and the action was brought in London. Adjornatur. 5 Mod. 225. Trin. 8 W. 3. Newnham v. Lun.

Comb. 370. NEWMAN v. LUN, S. C. Holt Ch. J. ſaid it was adjudged in caſe of BARNS v. HUGHES, that debt lies in this court, and was ſo adjudged ſince in the exchequer; that indeed Ld. Hale adjudged it

it otherwiſe in Nichols's caſe; but Holt ſaid it is not yet ſettled. Et adjornatur.——Nelſ. Abr. 258. tit. Arreſt, pl. 4. cites 5 Mod. 225. that the plaintiff had judgment, [but it is not ſo there.] See pl. 9. and the notes.

(A. 3) At what Time brought, and what the Proſecutor muſt do to bring Action.

1. 37 *E.* 3. 18. *DIRECTS that informers ſhall find* ſureties. *No informations, &c. ſhall be received or filed, unleſs the informer make oath that the offence was committed in the ſame county, and within a year before the ſuit commenced.*

2. 31 *Eliz. cap.* 5. *ſ.* 5. *All actions, ſuits, indictments, or informations on penal ſtatutes, where the forfeiture is limited to the queen only, ſhall be commenced within* 2 *years after the offence, and not after. And all actions, &c. brought for any forfeiture upon any penal ſtatute made, or to be made, (except the ſtatute of tillage) the benefit whereof is or ſhall be limited to the queen, and to any other that ſhall proſecute, ſhall be brought within one year next after the offence committed; and in default of ſuch purſuit, the ſame ſhall be brought for the queen within two years after that year ended.*

S. 2. *Provided that where a ſhorter time is limited by any penal ſtatute, the proſecution muſt be within that time.*

An *information* upon the ſtatute 27 Eliz. of fraudulent conveyances by the party grieved, though *brought after the year*, is good, and not within the ſtat. 31 Eliz. 5. For that is to be intended of common informers. Noy 71. Anon. cites it to have been ſo agreed in one Holden's caſe.

3. Where the plaintiff is *pars gravata* he is *not reſtrained to a year* after the offence committed, but ſuch reſtraint extends only to common * informers; per cur. 3 Le. 237. pl. 326. Mich. 32 & 33 Eliz. in the exchequer. Broughton v. Prince.

* [205]

An information for uſing the trade of an ironmonger, not being an apprentice, was found for the plaintiff.

4. 21 *Jac.* 1. *cap.* 4. *ſ.* 3. enacts, that *no officer ſhall receive any information, &c. upon penal ſtatutes, until the informer hath firſt taken oath before ſome of the judges of that court, that the offence was not committed in any other county than where, by the ſaid information, the ſame is ſuppoſed to have been, and that he believes the offence was committed within a year before the information within the ſame county.*

Error was brought becauſe it does not appear that the fact was done within a year before the information, which by the ſtatute of 21 Jac. the informer was to be ſworn to, before his information was received: ſed non allocatur; for it is no parcel of the record, but it is only a direction to the officers that none ſhall be received, unleſs he be firſt ſworn. Cro. C. 316. pl. 8. Trin. 9 Car. B. R. Anon.

So in an information againſt the defendant for, &c. the defendant *pleads* that the *informer did not ſwear his information*; and reſolved to be no plea; for although the officer be puniſhable for taking it without oath, ſecundum ſtat. 21 Jac. yet the information is well enough without it. Freem. Rep. 376. pl. 487. Mich. 1674. Garrett v. Baſkervill.——3 Keb. 363. pl. 44. Garter v. Baſkervill, S. C.

5. An action on the ſtatute of 14 and 15 H. 8. cap. 5. againſt *practiſing phyſic in London without licence*, was brought for 20 months, and exception was taken that it was not within 31 Eliz. cap. 5. ſ. 5. but the court held that this was intended of popular actions, and not *where parties have intereſt*, as in this caſe, but for perjuries, forgeries, &c. and judgment for the plaintiff. 3 Keb. 672.

672. pl. 40. Trin. 28 Car. 2. B. R. the College of Phyſicians v. Needham.

6. In debt on the ſtatute 23 H. 8. [23 H. 6. cap. 15.] *by a ſtranger for a falſe return of a parliament-man*, the *declaration was above a year after the bill*, but the *latitat was taken out within the year*. Eyre J. held, that ſuch informer is not within the ſtatute 31 Eliz. which extends only where the informer and the king, or the king only, is to have the penalty; and that the latitat brought within the year is a ſufficient commencement of the ſuit within the year, and that the latitat here is as an original. Gregory J. agreed to both points; but Dolben J. doubted its being within the 31 Eliz. the penalty being given ſeverally to the king, and ſeverally to the informer. Holt Ch. J. doubted if it ſhould be taken as a joint penalty for the whole; and held, that the latitat is no commencement of the ſuit within the year, within the 31 Eliz. it being a penal ſtatute; that here the party might have ſued by original, and ſo at no prejudice, and that the treſpaſs in this caſe ſhall be accounted from the time of the offence to the time of filing the bill; but judgment was given for the plaintiff by the opinion of the other 3 juſtices. Comb. 194. Trin. 4 W. & M. in B. R. Culliford v. Blandford.

Show. 353. Calliford v. Blawford, S. C. accordingly, ſays the action was brought on the clauſe which *gives the penalty of 40 l. to the king, and 40 l. more to the perſon choſen and not returned, or to any other perſon as in default of ſuch perſon choſen will ſue, 40 l. the party grieved to bring his action within 3 months after the commencement of the parliament, and if he do not, then any other to have the action.* And that Eyre J. held, that in this caſe the king has nothing of the penalty, and that the informer here is not within 31 Eliz. but comes in by default of the party grieved; that a common informer within the ſtatute is only where he is to have but part of the penalty. Where the *party is to have the whole penalty*, the 31 Eliz. limits no time, no more than it does to the party grieved, and ſo is not a common informer within the ſtatute. Gregory J. agreed, but Dolben J. doubted as to this point. Holt Ch. J. admitted, that if the king were to have nothing, this informer would be out of 31 Eliz. but he thought that the king here was to have a part. ——Carth. 232. S. C. accordingly; and Holt Ch. J. held, that where the penalty is given to the party alone, and none to the king, it is clearly out of the ſtatute 31 Eliz. the plaintiff had judgment, but afterwards a writ of error was brought. ——12 Mod. 27. S. C. accordingly. ——4 Mod. 129. S. C. adjudged for the plaintiff; and Eyre and Gregory J. held, that in this caſe by the party grieved not ſuing within the 3 months, the informer now ſtands in his place. —— S. C. cited by Nevil and Powell J. that in error brought in the exchequer chamber, it was reſolved by the majority of judges then preſent, that where the informer is to have the whole penalty, the 31 Eliz. does nor extend to it, becauſe it is not within the words of the act, and penal acts are not extendible by equity. * But ſays, that Treby Ch. J. and Powell jun. J. were of opinion contrary to that judgment; for if the informer ſhould be bound when the queen is joined with him, he ſhould much more be ſo when he ſues by himſelf. Ld. Raym. Rep. 78. Paſch. 8 W. 3. in caſe of CHANCE v. ADAMS. And the reporter adds a nota, that Treby Ch. J. Rokeby J. and Powell bar. held, that for the ſaid reaſon the judgment in the caſe of Culliford and Blandford ought to be reverſed; but Nevill and Powell juſtices of C. B. and Lechmere and Nevill barons, held the contrary.

* [206]

7. 4 & 5 *W. & M.* 18. *Informer to enter into a recognizance of* 20 *l. to proſecute, &c.*

8. Upon view of 5 Eliz. 4. where a moiety of the penalty goes to the informer, a *proſecution* upon that ſtatute *muſt be within* a year by the informer; but where it is purely at the ſuit of the queen, ſhe has two years, and where the penalty is diſtributed as moiety to the queen and moiety to the informer, and no proſecution within a year, the queen has another year, and ſhall have all the forfeiture; per cur. 6 Mod. 220. the Queen v. Franklyn.

3 Salk. 351. pl. 5. S. C. accordingly.

(A. 4) Writ and Count. How.

Thel Dig. 118. lib. 10. cap. 28. ſ. 11. cites S. C.

1. DEBT of 40 s. the *writ was general, and the count was ſpecial, and declared all the ſtatute of aſſiſes of piked ſhoes*, &c. *that no ſhoemaker ſhall make with pike of more length than* 2 *inches, upon pain of* 20 *s. viz.* 6 *s.* 8 *d. to the plaintiff who ſues*, 6 *s.* 8 *d. to the warden of the craft*, and 6 *s.* 8 *d. to the king*; and counted that the defendant had made 3 pair of ſhoes with pike which paſſed this length, whereof action accrued of 40s. &c. and the count was challenged inaſmuch as it ought to be *qui tam pro domino rege quam pro gardianis illius artis*, &c. *& pro ſeipſo ſequitur*, and not in his name only; and the ſame law in decies tantum, and the like where a ſheriff occupies his office above a year. And by 3 or 4 juſtices, the count is good, and the writ alſo, but per Danby Ch. J. the moſt ſure way is to ſay as the exception is taken. Br. Action Popular, pl. 5. cites 5 E. 4. 117 & 118.

Br. Action ſur le Statute, pl. 4. cites S. C. accordingly; and ſays that he need not

2. Note, that writ of debt upon *the ſtatute of farms againſt a prieſt*, the writ ſhall not be quod reddat to the plaintiff the ſum, but ſhall be quod reddat tam nobis quam parti; and otherwiſe it ſhall abate. Br. Faux Latin, pl. 1. cites 27 H. 8. 23.

rehearſe the ſtatute in the writ; but that if he does it is never the worſe.——Thel. Dig. 118. lib. 10. cap. 28. ſ. 13. cites S. C.——2 Hawk. Pl. C. 267. cap. 26. ſ. 21. S. P. accordingly.

S. C. cited by Dyer Ch. J. who took a difference where an action is *founded upon a contempt*, or upon *a penalty*; for in *decies tantum* the writ ſhall be in the tam quam; and that ſo it was in this caſe for ſuing in the admiralty, for that in thoſe caſes the action was upon a

3. A. brought an action againſt B. *for ſuing, together with C. in the court of admiralty for a thing done upon the land* upon the ſtatutes of R. 2. and H. 4. and the writ was, ad reſpondendum tam pro domino regi, &c. quam A. reciting the ſtatutes; and in the concluſion of the recital he ſaid *quod talis proſecutor in curia admirall' incurr' pœnam erga dominum regem & reginam nunc* 10 *l.* and counted accordingly againſt B. only, with a *ſimul cum prædicto C. proſecutus eſt & implacitavit, viz. ſingulariter*. B. demurred upon the writ and count, 1ſt, becauſe the action was brought by the king and the party jointly; 2dly, becauſe it was againſt B. only, where B. ſimul-cum C. impleaded him. In this caſe was produced the precedent of the lord RICHE'S CASE OF SWANTON v. GILLET, ALIAS WILLET, where two were ſued in the admiralty, and one only brought action without ſhewing the death of his companion, and * it was qui tam pro rege quam pro ſeipſo, &c. See D. 159. b. pl. 37, 38. Paſch. 4 & 5 P. & M. Pointell's caſe.

contempt, and not for a duty; but that in action upon the *ſtatute of apparel*, as the principal caſe there was, the action was given upon a duty accruing by *forfeiture*, and the ſtatute made it ſeveral, viz. one part to the queen and the other to him that would ſue; and therefore he thought that in that caſe the writ ought not to be ad reſpondendum tam nobis quam to the party. Brown J. to the ſame purpoſe, but Waiſh and Weſton J. denied it. Mo. 63, 64. pl. 175. Trin. 6 Eliz. Anon.——Dal. 66. pl. 30. S. C.

*[207]

4. If an information contains *ſeveral offences* againſt a ſtatute, and *ſome* of them be *well laid*, and *others defective*, the informer may

may have judgment for ſo much as is well laid. See Cro. J. 104. pl. 40. Mich. 3 Jac. B. R. Woody's caſe.

5. The plaintiff in an information *demanded the moiety for himſelf, but ſaid nothing of the king's moiety.* Exception was taken thereto, but diſallowed; for all the precedents are ſo, and the informer put firſt to pray his own moiety. Jo. 156. 157. pl. 1. Paſch. 3 Car. B. R. Bedoe v. Alpe.

6. In debt on a penal ſtatute the writ was *præcipe L. quod reddat nobis & S. qui tam pro nobis quam pro ſeipſo ſequitur*, &c. The defendant pleaded *quod ipſe non debet præfato S. qui tam, &c. nec aliquem inde denarium in forma qua, &c.* It was objected, that the writ and declaration was not anſwered; for that the plea ſhould have been as the demand is, viz. quod ipſe non debet dicto domino regi & præfato S. qui tam, &c. which the court regarded the rather becauſe the ſtatute of jeofails excepts penal ſtatutes. Hob. 327, 328. pl. 401. Scot v. Lawes.

In * action qui tam *againſt a juſtice of peace on the act againſt conventicles*, which gives 100 l. forfeiture, one moiety to the king, and one to the informer, the count was unde actio accrevit for 100l. to the king and himſelf. The defendant pleaded non debet the ſaid 100 l. to the informer, nec aliquam inde parcellam & de hoc ponit ſe ſuper patriam & prædictus R. (the informer) ſimiliter. It was moved that the iſſue is misjoined, it being only between the informer and the defendant; and ſo the plea is non debet to the informer, without mentioning the king. And the court was clearly of that opinion, and that a repleader ought to be awarded. Vent. 122. Paſch. 23 Car. 2. B. R. Reynell v. Heale.

[* This in the ſtate of the caſe is mentioned as an information, but is afterwards expreſsly ſaid to have been an action qui tam.]—2 Keb. 788. pl. 22. S. C. and calls it an action, and that a repleader was awarded. — 2 Hawk. Pl. C. 266. cap. 26. ſ. 20. ſays it ſeems to be ſettled at this day that it is in election of him that brings an action on a penal ſtatute, which gives one moiety of the forfeiture to the king, and another to the informer, either to have a writ againſt the defendant quod reddat domino regi & A. B. qui tam, &c. quas ei debet, or to have it quod reddat A. B. qui tam, &c. quas ei debet; and that whether the writ be in the one form or the other it is well purſued by a declaration in the name of the plaintiff only.

R. ſummonitus fuit ad reſpondend' S. qui tam pro domino rege, &c. *quod reddat dicto domino regi & S. qui tam, &c.* 10*l.* and *declares of ſelling two horſes in Smithfield not tolled, contrary to* 31 *Eliz.* by which he forfeits two ſeveral ſums of 5l. per quod actio accrevit dicto domino regi & S. qui tam, &c. vel eorum alteri. The defendant pleaded *non debet prædicto S. qui tam, &c. the ſaid* 10*l. or any part thereof.* The jury found that he owes the 10l. it was moved that here was no iſſue, or not well joined, the demand being of 10l. due to the king and S. qui tam, &c. and the iſſue is non debet to S. only. But it was anſwered, that the ſummons ad reſpondend' is to S. qui tam, &c. only, and that the de placito quod reddat might have been ſo too, and cites Co. Ent. 363. b. Raſt. Ent. 430. (bis) and 207. b. where the ſummons is ad reſpondend' regi & parti qui tam, &c. and ſo the entries are in ſeveral forms, and all good; that the debt is intire to the king and the party, ſo that if he owes to the party he muſt neceſſarily owe to the king, and it being found that he owes to the party, he conſequently owes to the king too, and the plea is non debet the debt or any part of it; and as to the iſſue it ariſes upon his own default, and therefore ſhall not take advantage thereof; and if it be a diſcontinuance it is cured by the ſtatute of 32 H. 8. by the verdict; whereupon the plaintiff had judgment. 3 Lev. 374. Mich. 5 W. & M. in C. B. Sedgewick qui tam, &c. v. Richardſon.

8. In debt on a penal ſtatute for 120l. for abſence from church, the declaration was *per quod actio accrevit eidem domino regi & L. F. qui tam, &c. ad habendum* the ſaid 120l. the defendant demurred pro eo quod declaratio ipſius L. minus ſufficiens, &c. ad ipſum L. qui tam, &c. verſus ipſum T. (the defendant) manutenendum, &c. unde petit judicium. And that the ſaid L. qui tam, &c. ab actione ſua prædicta, &c. præcludatur. L. joined in demurrer. Per cur. this is merely the ſuit of the party; for though the writ be *quod reddat domino regi and the informer*, yet it is preſumed for himſelf, he being as the original party only; for the ſtatute appoints, that no protection or wager of law ſhall be therein; [208]

therein; and the pleading here ſhews, that the plaintiff L. F. ſhall maintain his action; and that the declaration is not ſufficient to compel him to anſwer the informer, and mentions nothing of the king. And the replication and joining in demurrer is only by the informer, viz. that it is not ſufficient to bar him of his action. Cro. C. 10, 11. pl. 1. Trin. 1 Car. C. B. Farington's caſe.

S. C. D. 159. b. marg. pl. 37.—— Being an original writ, it is moſt frequently brought ſo, though ſometimes the other way. And the court conceived it to be good both ways. Cro. C. 256. pl. 1. S. C. in B. R.— 2 Hawk. Pl. C. 266. cap. 26. ſ. 20. ſays, it ſeems to be doubtful whether there be any neceſſity that either the writ or count, in any ſuch action, do expreſs that it is brought by or for the king, as well as the party; and that there is a precedent (Raſt. Ent. 427. pl. 3.) of ſuch action brought in the king's name by A. B. qui pro ſeipſo in hac parte ſequitur; but that it ſeems agreed that every information muſt be in this form, viz. that the informer tam pro domino rege quam pro ſeipſo ſequitur, even where it is brought on a ſtatute which gives one third part of the penalty to a third perſon.

9. Debt was brought upon the *ſtatute* 14 *H.* 8. 5. for practiſing phyſic in London contrary to that act, and the writ was *quod reddat domino regi & præſidenti collegii & com. facultat. medicor' London qui tam pro domino rege quam pro ſeipſo ſequitur* 60 *l. quas eis debet;* and the declaration was in the name of the ſaid preſident qui tam pro domino rege quam pro ſeipſo ſequitur, &c. It was among other things aſſigned for error, that the *writ was in the name of the king and the preſident, and the declaration was in the name of the informer alſo.* But per tot. cur. the writ and declaration are good; and though ſome precedents are, that upon a penal law, the writ was to anſwer the informer *qui tam pro ſeipſo quam pro domino rege ſequitur*, yet they thought the more proper and better way for the writ was to anſwer to the king and the informer; for the *debt is given to them by moieties;* and therefore it is not ſo proper to demand all for the informer, but for the king and the informer to have *judgment ſeveral for moieties;* and ſo is Partridge and Crocker's caſe in the Commentaries; and affirmed judgment in C. B. Jo. 261, 262. Trin. 8 Car. B. R. College of Phyſicians v. Butler.

* If a ſtatute be, that one ſhall forfeit 5 l. to the king, and 5 l. to the party that will ſue, theſe are clearly ſeveral duties, and thereupon ſeveral actions lie; per Brown J. Mo. 64. pl. 175. Trin. 6 Eliz.

S. C. and that informations are always ſo. 343. 373.

9. When it is *by information* it ſhall be, *that the informer informs for the king and himſelf.* Jo. 262. in S. C.

Cro. C. 256. and cites Pl. C. 77. New Book of Entries 160. Old Book of Entries

10. Where a *ſtatute gives one third part to the poor*, and debt is brought *qui tam*, and *demands the penalty for the king and the informer, but ſays nothing of the third part to the poor*, yet it is well enough; for it being an action of debt, the poor cannot ſue, but their part ſhall be ſevered in the judgment; but *in an information* it may be pro domino rege, pro ſeipſo & pro pauperibus. Sed adjornatur. 2 Keb. 820. pl. 30. Mich. 23 Car. 2. B. R. Dickinſon v. Clare.

11. Debt upon the ſtatute for not coming to church, and concludes *per quod actio accrevit eidem domino regi & quer' ad exigend' & habend'.* The exception after judgment was taken, that it ought to have been only *actio accrevit eidem the plaintiff, qui tam,*

&c. and not exigend' & habend' for the king and himſelf. Sed non allocatur; for upon ſearch of precedents, the court were all of opinion, that it was good either way. 2 Mod. 100. Trin. 28 Car. 2. in C. B. Anon.

12. An action qui tam was brought on a penal ſtatute, which gave the forfeiture thus, viz. *one 3d part to the king, one to the informer,* and *one to the poor* of the pariſh where the offence was committed. The declaration laid the offence in the city of Briſtol generally, without ſaying in what pariſh; and upon exception taken, the court held it ill, and * judgment quod querens nil capiat. 2 Jo. 226. Mich. 34 Car. 2. B. R. Powell v. Weekes. Skin. 83. pl. 25. S. C. and S. P. accordingly. —2 Show. 247. pl. 247. S. C. & S. P.

13. In debt brought on the ſtatute for ſelling wine without licence, the declaration was *quod cum he ſold,* &c. contra formam ſtatuti, without reciting the ſtatute. Adjudged well enough, it being in an action of debt; but it would be otherwiſe in an information; per tot. cur. Show. 337. Hill. 3 W. & M. Mallack qui tam, &c. v. Sparing. Carth. 216. S. C., adjudged accordingly.

14. The concluſion of action qui tam was, *et inde producit ſectam* generally, without ſaying, *tam pro domina regina quam pro ſeipſo.* But reſolved, that this muſt be ſo underſtood, and precedents being both ways, the judgment was a reſpondeas ouſter. 10 Mod. 253. Trin. 13 Ann. B. R. Walter and Laughton.

(A. 5) Proceedings in ſuch Actions, and Informations.

1. INformation was made, that where *none ſhall ſhip wool to any place but to Calice* there *had the defendant ſhipped to D.* by which he prayed the 3d part of the forfeiture, according to the ſtatute; and the beſt opinion there was, that *where a penalty is given to the party who ſues,* &c. *by penal ſtatute,* there *if no action be given to him, he ſhall have information in the exchequer, and ſhall recover his part.* Br. Surmiſe, pl. 25. cites 37 H. 6. 4.

2. Nota, that the *king cannot be nonſuit.* Br. Nonſuit, pl. 68. cites 25 H. 8. but ſays, it appears in the Book of Entries, that *an informer* qui tam, or plaintiff in a popular action *may* be nonſuit. S. P. Br. Prerogative, pl. 116. cites the Book of Entries.

3. 18 *Eliz.* 5. *A* ſpecial note *ſhall be made* of the day and year of exhibiting the information, *and the ſame ſhall be taken to be of record from that time, and not before; and until then no proceſs ſhall be indorſed; and upon the proceſs ſhall be indorſed as well the informer's name as the ſtatute upon which the information is brought, upon pain of* 40*s. to be paid by the clerk making out proceſs in other manner, to be divided between the crown and the party grieved.*

Every informer upon a penal ſtatute ſhall exhibit his ſuit in proper perſon, and proſecute the ſame by himſelf or his attorney by information or original action only, without uſing a deputy.

4. 29 *Eliz.* 5. *An appearance to be accepted in a proſecution on a penal ſtatute.*

5. Note, an *action* upon 5 *Eliz. cap.* 14. was brought for *forging of* an obligation; and upon not guilty, it is found for the defendant.

ant. And, upon the motion of Hitchman, it was ordered by the court, that judgment ſhould be ſtaid, becauſe the action is *brought only in the name of the party*, and not tam quam pro dom. rege, &c. Noy 134. Anon.

6. When an action is brought on a *penal ſtatute*, where *part is* given *to the king*, *and part to the party* proſecuting, there upon the joining of *iſſue*, and in the *venire facias* it muſt be ſaid, qui tam pro domino rege, &c. and it is the common courſe to enter the party qui tam pro, &c. but when the king is only named (as an offence againſt the king and the party) and the *king is not to have any part of the ſum recovered*, but only to have a fine, there neither in the iſſue, nor in the ven. fac. is any mention of qui tam, &c. Cro. Car. 336. Mich. 9 Car. B. R. and ſo a judgment in C. B. was affirmed. Anon.

7. A *writ of error* lies in the exchequer, upon a judgment in an action of debt tam quam, notwithſtanding the words in
[210] the ſtatute of 27 Eliz. 8. Raym. 275. Paſch. 31 Car. 2. in the exchequer, Scot v. Knapton.

8. An information filed *without recognizance* entered into by the party is ill, but the court cannot take it off the file. 12 Mod. 154. Mich. 9 W. 3. the King v. Lambert.

9. When a *ſtatute* gives a penalty to be recovered before juſtices of peace, and *preſcribes no method*, it ought to be by bill; per Holt Ch. J. 2 Salk. 606. pl. 4. Mich. 2 Ann. B. R. Anon.

10. In an action qui tam the *plaintiff not* being *to be found*, the defendant *moved that proceedings ſhould be ſtayed till the plaintiff would give ſecurity to pay coſts in caſe*, &c. But the court would not, but granted a rule to ſhew cauſe why proceedings ſhould not ſtay till the plaintiff came home; and Lee Ch. J. cited a caſe of OLDEN v. LAURENCE, Hill. 9 Geo. 2. in an action qui tam for ſelling cattle, where the court granted ſuch a rule till the plaintiff could be found, but denied the motion as to giving ſecurity. Mich. 13 Geo. 2. B. R. Jaques qui tam v. Gofton.

(A. 6) Pleadings in Actions on Statutes.

1. INformation upon the *ſtatute of liveries*, that *A. B.* ſuch a day, year, and place *gave to C. D. a piece of cloth to make a gown, and he there the ſame day and year received it, and made thereof a gown, and uſed it.* Mordaunt ſaid there are ſeveral ſtatutes of liveries, and *you have not counted upon which ſtatute* the information is made, and yet well per cur. for the beſt ſhall be taken for the king. Mordaunt ſaid you *have not rehearſed the ſtatute in the information*; as in waſte againſt tenant for term of life, or termor, he ſhall rehearſe the ſtatute, contra againſt tenant in dower, or guardian in chivalry; for prohibition lies againſt them by the common law; for thoſe ſtatutes are made by the law. Contra of leaſe for life and years. Et non allocatur; for at the common law debt did not lie againſt adminiſtrators, but it lies now by ſtatute, and yet the ſtatute is not rehearſed, &c. and formedon

medon nor quod ei deforceat do not rehearſe the ſtatute; for ſpecial form of writ is given by the ſtatute. Fairfax ſaid it is material to *allege the place where the gown was wore*; but Coniſby ſaid it ſhall be *intended* in the place *where it was received*; as in treſpaſs of goods quod cepit & aſportavit both ſhall be intended in the place where the firſt taking was alleged. And ſo in treſpaſs of aſſault at D. & ipſum verberavit & maletractavit, all ſhall be intended in the firſt place; and yet it may be that it was at divers places, and others e contra; for thoſe ſhall be intended at one and the ſame place and time; but the receipt may be in one place and the wearing in another place; as where a man ſells a thing with warranty, all ſhall be intended in one and the ſame place; for if the warranty was made after the buying, it is void. Et adjornatur. Br. Surmiſe, pl. 27. cites 5 H. 7. 17.

2. In debt for *taking of a ſavage contra formam ſtatuti*, the defendant may plead *nihil debet per patriam*; per Tremail and Fineux, notwithſtanding that it be founded upon a ſtatute; for *it is not only upon the ſtatute, but upon the ſtatute, and upon matter in fact*. Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14. Br. Dette, pl. 124. cites S. C. *Not guilty* is a good plea in an action tam quam; per curiam. Carth. 219.

3. And in *maintenance* the defendant may plead *non manutenuit* or *not guilty*. Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14.

4. And in *forger* de faits he may ſay, that *ne forga pas, or not guilty*, and yet they are founded upon ſtatute. Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14. [211] Mich. 5 W. & M. in B. R. Leonard qui tam, &c. v. Beech.

5. *But* in *debt upon eſcape againſt the warden of the Fleet*, or in debt upon recovery of damages it is no plea as it is ſaid, quære; for they were in doubt of the iſſue, and Rede contra, and that it is no plea. Br. Iſſues Joines, pl. 23. cites 21 H. 7. 14.

6. Where *information* is put *in the exchequer upon a penal ſtatute*, and the *defendant makes bar and traverſes the plea*, there the *king cannot waive ſuch iſſue* tendered *and traverſe the former matter* of the plea, though he may upon traverſe of office and the like, where the king is ſole party, and entitled by matter of record; for, upon the information, no office is found before, and alſo a ſubject is party with the king for recovery of the moiety, &c. per Whorwood attorney general. Br. Prerogative, pl. 116. cites 38 H. 8.

7. 21 *Jac.* 1. *cap.* 4. *ſ.* 4. enacts, that *if any information ſhall be brought for any offence againſt any penal law, either by the king, or by any other, or on the behalf of the king and any other, it ſhall be lawful for ſuch defendants to plead the general iſſue, and to give ſpecial matter in evidence.* In action qui tam for ſelling wines by fraud, after general iſſue the party waived that, and *pleaded* 31 *Eliz. cap.* 5. *that being on a penal law, it muſt be in a year*, becauſe this being debt, and not an information, he could not take the general iſſue; but per Hales Ch. J. ſince 21 Jac. cap. 4. this may be given in evidence as well in debt as in information, which the court agreed ex motione Winnington to accept the plea, and the parties agreed to accept general iſſue, this being for new ſtores without account; but in action for the duty it is not within the ſtatute on nil debet, and in information for ſeiſure non importata fuerunt, contra form' ſtat' is not the general iſſue, as in other informations it is, or nil debet at pleaſure, and both ſtatutes extend to all penal laws. 2 Keb. 859. pl. 11. Hill. 23 & 24 Car. 2. B. R. Burleigh v Child.

8. Information qui tam, &c. *againſt a juſtice of peace for* 100 *l. for neglecting upon complaint to ſuppreſs a conventicle*; the defendant *pleaded*

pleaded non debet, &c. to the informer, & de hoc ponit ſe ſuper patriam, & prædict' (the informer) ſimiliter; and the informer had a verdict; but it was moved, that the iſſue was not well joined, becauſe it was between the informer and defendant, *without mentioning the king*, whereas the act gives a moiety of the forfeiture to the king, and the court was clearly of the ſame opinion. Vent. 122. Paſch. 23 Car. 2. B. R. Reynell v. Hele.

Debt qui tam againſt an attorney of C. B. for exerciſing the office of *under ſheriff longer than one year*; he pleads his *privilege*,

9. An action, qui tam, &c. was brought in the court of B. R. the defendant pleaded in abatement, *that he is an attorney in the court of C. B. and ought not to be ſued out of that court.* Upon a demurrer the court inclined, that the plea was a good plea; for although the king may bring his action in what court he pleaſes, yet the action qui tam is a popular action, and brought by the informer qui tam, and therefore they inclined to allow the plea. Hill. 6 W. B. R. L. P. R. 7.

and it was allowed without making defence. Cumb. 319. Hill. 6 W. 3. B. K. Kirkham v. Wheeler. ——— In action of debt on a penal ſtatute an attorney may have his privilege, but not in an information. Skin. 549. pl. 10. Trin. 6 W. & M. B. R. Baker v. Duncomb.

(A. 7) Qui tam, &c. Bar or Diſcharge. What.

But if the king pardons him *before ſeiſure or ſuit taken*, there this ſhall ſerve

1. WHERE the king *pardons the party pending the ſuit*, this is good againſt the king for his part, *but it is not good againſt* * *the party for his part* in decies tantum, &c. which are popular. Br. Charters de Pardon, pl. 24. cites 37 H. 6. 4.

againſt him and all parties; note the diverſity. Ibid. ——— Br. Surmiſe, pl. 25. cites S. C. ——— *Before action brought* the king *may pardon the penalty*, but *contra after the action* brought; for then the party is intitled to his proper debt. Br. Charters de Pardon, pl. 38. cites 1 H. 7. 3. ——— Br. Releaſes, pl. 41. cites S. C. accordingly, and ſays, quod nota. Br. Actions Popular, pl. 4. cites S. C. ——— Hard. 199. Arg. cites S. C.

* [212]

2. If *the party in decies tantum releaſes* to them *all actions*, yet a ſtranger who brings decies tantum ſhall not be barred by his releaſe, but if the king pardons it, there all parties ſhall be barred. Br. Action Popular, pl. 7. cites 5 E. 4. 2, 3.

The words of this ſtatute being general, the party may aver the covin generally; per Molineux J. Pl. C. 49. b. 50. a.

3. 4 *H.* 7. *cap.* 20. Recovery *in action popular* by covin *ſhall be* no bar *in an action ſued for the ſame thing bona fide.*

The plaintiff *bona fide in ſuch action* may aver *that the recovery was had by* covin, *or that the ſaid other plaintiff was barred by covin. And if the covin be found, the plaintiff bona fide ſhall have recovery and execution.*

No releaſe *of a common perſon made to the defendant ſhall diſcharge an action popular.*

Provided, that no colluſion *is in this caſe averrable where the point of the ſame action, or the colluſion itſelf, hath been* tried by verdict.

Le. 119. pl. 161. S. C. ruled ac.

4. In information on the ſtatute of uſury qui tam, &c. the *queen's attorney entered a non vult proſequi*, which was pleaded in bar

bar againſt the informer for all; but per tot. cur. ſuch entry *is no bar to the party*, and ſaid, that Anderſon and Manwood upon conference were of the ſame opinion; for ſince the law gives the party the moiety, the queen cannot diſcharge it. Cro. E. 138. pl. 13. Trin. 31 Eliz. B. R. Stretton v. Taylor.

cordingly.—S. C. cited by the reporter 11 Rep. 65. b. in DR. FOSTER'S CASE, as adjudged accordingly. Trin. 31 Eliz. B. R. Stretton v. Taylor; and that if the att. gen. pleads a ſpecial plea, though the uſe is for the attorney general to reply alone, yet if he will not reply or proſecute for the king, the informer may for his part; for by commencing the ſuit he has made the popular action his own private action, which neither the king nor any other can releaſe as to his intereſt, and the condemnation or acquittal of the party at his ſuit, is a bar to all perſons, and alſo to the king; and yet the king in all theſe caſes may, before any action commenced, pardon and releaſe it, and this ſhall be a bar to all perſons; and this difference was granted, and denied by none. Cro. E. 138. pl. 13. S. C. ruled accordingly.——S. C. cited Cro. E. 583. per cur. as ruled that the informer may proceed notwithſtanding a non vult proſequi entered; and ſo where the queen will pardon, &c. for it is only for her own part.——S. P. Arg. Hard. 199. cites 1 H. 7. 3. 37 H. 6. 4. 2 R. 3. 12. 5 E. 4. 3.

5. The *nonſuit of the queen* was inſiſted by Popham att. gen. to be a bar to the party in a qui tam; but Wray and Gawdy denied it. Cro. E. 138. in pl. 13. Trin. 31 Eliz.

Le. 119. pl. 161. S. C. & S. P. ruled accordingly.

7. Information on a penal ſtatute qui tam, &c. Before any plea pleaded the *informer died*. The court held, that the attorney general might proceed for the queen. Cro. E. 583. pl. 10. Mich. 39 & 40 Eliz. B. R. Hammon v. Griffith.

S. P. Mo. 541. pl. 715. Mich. 39 & 40 Eliz. Anon.——S. P. for the information by the party ſhall ſerve for the king after his death, 11 Rep. 66. a. in DR. FOSTER'S CASE, cited by the reporter as adjudged, Mich. 39. & 40 Eliz.——By ſuch death the information does not fall to the ground; per Coke Ch. J. 2 Bulſt. 262. Trin. 12 Jac.——The action abates as to the plaintiff's intereſt, though the king may proceed for his. 3 Keb. 804. Mich. 29 Car. 2. B. R. Clappon v. Edgecombe.——If the informer dies there is an end of the ſuit, and the king is not intitled till recovery had, and proſecutors qui tam, &c. are looked on as common informers. 3 Salk. 282. pl. 7. Trin. 7 W. 3. Kirkham v. Wheely.——12 Mod. 74. S. C. & S. P. that there is an end of the ſuit, and the king is intitled to a recovery.——Comb. 319. S. C. but S. P. does not appear.——* Where the king is intereſted qui tam, &c. and the informer dies, the attorney general may proceed. Arg. 12 Mod. 267.

*[213]

8. In an action of debt tam quam againſt a juſtice of peace for 100 l. penalty, upon the ſtatute againſt conventicles, for refuſing to diſturb, having notice; he pleaded *outlawry to the informer*. It was held, that this was a good plea to bar him, ſo that he could not proceed; but notwithſtanding it was held, that *the king might proceed for his ſhare*. Freem. Rep. 235. pl. 246. Mich. 1677. Juſtice Bale's caſe.

Though ſuch a perſon be diſabled to ſue for himſelf, yet he may ſue for the king. 2 Mod. 267, 268. Mich. 29 Car. 2. C. B. per cur. in caſe of Atkins v. Bayles, S. C.

(A. 8) Puniſhment of Informers, and Coſts. In what Caſes.

1. 38 *E.* 3. 9. *INformer promoting a* falſe ſuggeſtion, *ſhall be impriſoned till he ſatisfy the party grieved his damages, and alſo make a fine to the king.*

2. 4 *H.* 7. *cap.* 20. *In every action popular, wherein the defendant ſhall be attainted of covin in ſuffering a recovery to be had againſt him by another plaintiff in action popular, he ſhall have impriſonment of two*

years by capias and outlawry, and that as well at the ſuit of the king as of every other.

3. 18 *Eliz.* 5. *ſ.* 3. *No informer to compound with the defendant but after anſwer, and not then without the conſent of the court, and if the informer ſhall willingly delay his ſuit, diſcontinue, be nonſuited, or a verdict or judgment paſs againſt him, he ſhall pay the defendant his coſts, for which the court may award execution.*

S. 4. *Every informer offending againſt this ſtatute ſhall be ſet in the pillory two hours in the next market-town, and be diſabled to proſecute upon any penal ſtatute, and forfeit* 10*l. to be divided between the crown and the party grieved, to be recovered in the courts at Weſtminſter.*

4. In information by the party grieved, upon 27 Eliz. cap. 4. which gives one moiety to the king, and the other to the party grieved, the party was nonſuit. The court held, that he ſhall not pay coſts and damages by the ſtatute of 18 Eliz. for that, as the title thereof implies, is to redreſs diſorders in common informers, and ſo is the preamble; and the words of the clauſe of coſts and damages are (every ſuch informer), and extends only to popular actions. 2 Le. 116. pl. 156. Paſch. 30 Eliz. B. R. Doghead's caſe.

5. Information upon the ſtatute 21 H. 8. cap. 13. againſt two perſons, (viz.) againſt one for non-reſidence, and againſt the other for taking the farm. One of them pleaded ſickneſs, and that, by advice of phyſicians, he removed into a better air. The other pleaded, that he took the farm for the maintenance of himſelf and family. Theſe were both good pleas; and the informer not proceeding, but having brought this information only for vexation, and to make the defendants compound with him, they exhibited another information againſt him upon the ſtat. 18 Eliz. cap. 5. and moved the court, that becauſe the informer was a mean perſon, he might give bail to anſwer the coſts, but it was denied; but made a rule, that the defendants ſhould not anſwer the information before the informer appeared in perſon. 2 Bulſt. 18. Mich. 10 Jac. Martin's and Gunnyſtone's caſe.

Hob. 250. pl. 328. Mich. 15 Jac. Pie v. Deane, S. C. but the point of coſts does not appear.

6. In an information upon the ſtatute 35 Eliz. againſt inmates, the defendant was found guilty; but becauſe that ſtatute was diſcontinued by the 43 Eliz. the court awarded, that eat inde ſine die. Hobart and * Hutton held, that the defendant was intitled to coſts. Winch doubted of this ſpecial caſe, the matter being found for the informer; but he agreed, if it were upon judgment upon demurrer, or ſpecial verdict, coſts ſhould be given. Warburton J. held, that no coſts ſhould be in this caſe; for he is not capable to ſue where the ſtatute is diſcontinued, and ſo if the venue be miſ-awarded; and he ſaid, he had conferred with the Ld. Ch. Baron, who alſo held, that no coſts ſhould be in this caſe; and ſo the matter reſts. Hutt. 35, 36. Pie's caſe.

* [214]

5 Mod. 355. S. C.—— Lutw. 201. S. P. and adds, but where a certain penalty is given to the *party grieved*, there he ſhall have his coſts and damages. 5 W. & M. Sedgwick v. Richardſon. ——*Coſts on a penal ſtatute*, beſides the penalty. Cumb. 224. Mich. 5 W. & M. in B. R. Company of Cutlers v. Hurſley.

7. No *coſts* are given in actions popular, be the penalty certain or uncertain. 1 Salk. 206. pl. 4. Trin. 9 W. 3. B. R. Shore v. Madiſten.

8. 4 & 5 *W. & M.* 18. *Informer ſhall pay coſts if he delay the proſecution, or a verdict paſs againſt him.*

9. Defendant having been acquitted upon an information, moved for coſts, and had them; and the *difference* is where the *judge*, who tries the cauſe, *certifies probable cauſe* of proſecution, and where not. 12 Mod. 604. Mich. 13 W. 3. Dom. Rex v. Emmery.

(A. 9) What ſhall be ſaid a Popular Action.

1. *DECIES tantum* is a popular action. Br. Decies tantum, pl. 12. cites 21 H. 6. 52.

2. Note per Littleton, arg. in the end of a caſe, that the king and the party grieved may have *præmunire;* and from hence it ſeems, that this action *is not popular* for all; for *none ſhall have it but the king or the party grieved.* Br. Action Pop. pl. 9. cites 7 E. 4. 2.

3. Action *on the* 13 *Eliz.* 5. is not a popular action, but *extends only to the party grieved.* 2 Le. 9. 19 Eliz. C. B. per Dyer & Manwood, in caſe of Creſwell v. Cook.

4. Actions upon the ſtatute *de ſcandalis magnatum*, have always been brought tam pro domino rege quam pro ſeipſo. See 4 Rep. 13. Trin. 20 Eliz. B. R. Actions of Slander.

5. An *action given to the party grieved* is not a popular action; per Ive, ſecondary of the crown-office. 2 Le. 116. pl. 154. Paſch. 30 Eliz.

(A. 10) Proceedings in General.

1. WHERE the king ſhall have fine, the party ſhall be ſatisfied before the king; as in action popular, where the one moiety is to the king, and the other to the party. Br. Execution, pl. 149. cites 39 Aſſ. 18.

2. If a man brings bill *quod reddat T.* 40*l. quas domino regi & prædicto T. debet upon the ſtatute* 23 H. 6. cap. 10. and the *jury paſs againſt the defendant falſely*, attaint lies for the defendant; for the *king is not merely party;* for the *party may diſcontinue or releaſe without the king*, notwithſtanding that the king ſhall recover the moiety; and therefore the attaint was demanded. Quod nota. And ſo it is admitted, that *if the king was merely party*, attaint does not lie. Br. Attaint, pl. 130. cites 20 H. 7. 5. [215]

3. 18 *Eliz. cap.* 5. *ſ.* 3. *prohibits the informer to compound with the defendant before anſwer, or after anſwer, without conſent of the court.*

3. Error of a judgment in Coventry, in an information upon the ſtatute of 5 *Eliz. for exerciſing* the *trade* of an ironmonger, *not being apprentice.* After verdict and judgment there for the plaintiff, it was aſſigned for error, becauſe informers cannot ſue upon

that ſtatute to have the moiety; for by the expreſs words in the ſtatute, *the forfeiture is given to the corporation*, for the benefit of the corporation *for relief of the poor, and for other uſes of the corporation.* Sed non allocatur; for though that ſtatute gives one moiety to the informer, and the other to the king, except in corporate towns, to whom ſuch forfeitures are granted, it is to be underſtood, and ſo hath been always expounded, that in that caſe, *the forfeiture given to the king belongs to the corporation, and the informer is to have his part ſtill;* whereupon judgment was affirmed. Cro. C. 316. Trin. 9 Car. B. R. Anon.

4. It was adjudged that the king has no privilege in an action qui tam pro domino rege, &c. and that the *proſecutor may pray a tales without the conſent of the attorney-general*, and he may be nonſuit. 3 Salk. 7. Anon.

5. The king is *creditor pœnæ*, and all fines for offences *belong* to him. 3 Salk. 285. Dr. Greenvelt's caſe.

Per Probyn J. the plaintiff might drop the qui tam; and this had made an end of the matter, and by this the defendant would have been indemnified. Ibid. 272.

6. Arbitrators cannot *award* a qui tam *to be dropped*, becauſe the *poor of the pariſh* who are intereſted in the ſuit, are not parties to the ſubmiſſion; per Raymond Ch. J. Gibb. 271. in caſe of Phillips v. Knightley.

7. In an action qui tam upon the ſtatute of the 19 of Anne againſt gaming, the plaintiff had a verdict, but, *compounding* with the defendant, would not proceed to judgment; upon which it was *moved on the behalf of the poor* of the pariſh, who are intitled to a ſhare of the penalty, for a rule *to bring in the poſtea.* The court agreed it was a ſcandalous practice, and made a rule to ſhew cauſe. At another day, the plaintiff was ordered to leave the poſtea in court, and enter up judgment as ſoon as poſſible. Hill. 11 Geo. 2. B. R. French v. Wiltſhire.

(B.) For Fire.

Contra, if by misfortune without negligence.

[1. IF my fire *by misfortune burns the goods of another man*, he ſhall have an action upon the caſe againſt me. 2 H. 4. 18.]

Br. Action ſur le Caſe, pl. 30. cites S. C.

[2. If fire *ſuddenly breaks out in my houſe, I not knowing of it, and burns my goods, and alſo the houſe of my neighbour*, my neighbour ſhall have an action upon the caſe againſt me. 42 Aſſ. 9. Admitted. But it ſeems it was adjudged there, that the action did not lie, becauſe it was *vi & armis.*]

[216]

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C.

[3. If my *ſervant puts a candle*, or other fire, in a place in my houſe, *and it falls, and burns all my houſe, and the houſe of my neighbour, an* action upon the caſe lies by him againſt me. 2 H. 4. 18. The ſame law is, if my *gueſt* does it. 2 H. 4. 18.]

[4. *The*

[4. *The ſame* law is of him that *enters my houſe with my leave.* 2 H. 4. 18.]

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C. ——If J. S. *my friend* comes and lies in my houſe, and ſets my neighbour's houſe on fire, the action lies againſt me. Brownl. 197. in caſe of Crogate v. Morris. Obiter.

[5. *The ſame* law is of him that enters my houſe *with my knowledge.* 2 H. 4. 18.]

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C.

[6. *But if a ſtranger againſt my will* puts fire in my houſe, by which the houſe of my neighbour is burnt, no action lies againſt me. 2 H. 4. 18. b.]

S. P. Br. Action ſur le Caſe, pl. 30. cites S. C. If a *ſtranger* to which all *ſets fire to my houſe, and it burns my neighbour's*, no action lies againſt me; per Holt Ch. J. the other juſtices agreed. Ld. Raym. Rep. 264. Mich. 9 W. 3.

[7. An action upon the caſe does not lie *againſt baron and feme for negligent keeping* their fire in their houſe, *by which the houſe of the plaintiff was burnt*, becauſe this action lies upon the general cuſtom of the realm againſt the maſter of the family, and not againſt a ſervant or a feme covert who is in nature of a ſervant. Mich. 1 Car. Regis at Reading, between SHELLY AND BURR, per curiam.]

Fol. 2.

8. J. S. with a gun ſtood at the door of his houſe, and *ſhot at a fowl, and thereby fired his own houſe and the houſe of his neighbour*, who brought an action on the caſe generally, and did *not declare upon the cuſtom of the realm* for negligently keeping his fire. Per tot. cur. the action lies; for the injury is the ſame, though this miſchance was not by common negligence but by miſadventure; and if he had counted upon the cuſtom of the realm, as 2 H. 4. the action had not been well brought, yet conſuetudo regni eſt communis lex. Cro. E. 10. pl. 5. Mich. 24 & 25 Eliz. C. B. Anon.

9. Caſe on the cuſtom of the realm, quare negligenter cuſtodivit ignem ſuum in clauſo ſuo; ſo that the plaintiff's corn in a certain cloſe of his was burnt. It was objected, that the cuſtom extends only to fire in his houſe, or curtelage, which are in his power. Sed non allocatur; for the fire in his field is his fire, as well as that in his houſe, and he made it, and muſt ſee it does no harm, and anſwer for it if it does. But if a ſudden ſtorm had riſen, which he could not ſtop, he ſhould have ſhewed it in evidence. 1 Salk. 13. pl. 4. Mich. 9 W. 3. B. R. Tubervill v. Stamp.

Comb. 459. S. C. adjornatur.—— Carth. 425. S. C. for burning the plaintiff's furze in another field; and ſeveral caſes were cited, which are in the margin of that book, to ſhew where in declarations *fire* was *not alleged to be in an houſe, but generally at ſuch a place*; and the court being of this opinion, judgment was given for the plaintiff.——Skin. 681. S. C. mentions it to be for burning a cloſe of heath of the plaintiff's, and judgment for the plaintiff. ——12 Mod. 151. S. C. of a cloſe of heath; Turton J. thought this not actionable, as it is laid; but by the other 3 judgment was given for the plaintiff.—— Ld. Raym. Rep. 264. S. C. and Turton J. ſaid, that theſe actions, grounded on the common cuſtom of the realm, had been extended very far; and therefore he thought the plaintiff might have action on the caſe for the ſpecial damage, but not grounded upon the general cuſtom of the realm; but the other 3 juſtices gave judgment for the plaintiff. And there is a note there, that Mr. Northey for the plaintiff cited ſeveral old books there mentioned [and the ſame is in the marg. in Carth.] where the declaration was general in ſuch a pariſh, without ſpecifying a particular houſe or ground; but Holt Ch. J. anſwered that that was an antiquated entry. ——Comyns's Rep. 32. S. C. adjudged accordingly.

10. 6 *Ann.* 31. *No action ſhall be maintained or proſecuted againſt any perſon in whoſe houſe or chamber any fire ſhall* accidentally *begin, or any recompence be made by him for any damage occaſioned thereby. And if any action ſhall be brought for any thing done in purſuance of this act, the defendant* * *may plead the general iſſue, and give this act in evidence; and if the plaintiff be nonſuit, &c. the defendant ſhall have treble coſts.*

Provided this act do not make void any agreement made between landlord and tenant.

(B. 2) For Fire. Who ſhall have it.

1. *LESSEE for life leaſed for years;* leſſee for years burnt the houſe. It was held by Fenner and Clench, (abſentibus aliis,) that action on the caſe lies for the leſſee for life, becauſe he is chargeable over. Cro. E. 461. (bis) pl. 12. Paſch. 38 Eliz. B. R. Jeremy v. Lowgar.

12 Mod. 100. S. C. held accordingly. —— Ld. Raym. Rep. 99. S. C. reſolved accordingly.

2. *Leſſee* for years *makes aſſignment*, aſſignee burns the houſe by negligence. Leſſee cannot have action; otherwiſe againſt an *under-leſſee for part of his term* he may, becauſe he is anſwerable over to him that has the inheritance. 1 Salk. 13. pl. 3. Mich. 8 W. 3. B. R. Hicks v. Dowling.

(B. 3) For Fire. Againſt whom it lies.

But this caſe is denied in the Countess of Shrewsbury's caſe, 5 Rep. 13. b. Mich. 42 & 43 Eliz. B. R. and adjudged that action on the caſe lay not againſt tenant at will; for at common law no remedy lay for waſte, either voluntary or permiſſive, againſt leſſee for life or years; for he came in by the act of the leſſor, and it was his folly not to reſtrain him by covenant, &c. And for the ſame reaſon tenant at will ſhall not be puniſhed for permiſſive waſte. —— Cro. E. 777. pl. 10. and 784. pl. 22. the Counteſs of Shrewsbury v. Crompton, S. C. adjudged accordingly.

1. IF *tenant at will* negligently burns the houſe, it is waſte. Quære. Br. Waſte, pl. 52. cites 48 E. 3. 25.

Leſſee for a week, and *ſo from week to week, quamdiu partibus placeret* of a ſtable, by negligence ſix weeks after, fired the ſtable and others adjoining. After 3 weeks he was only tenant at will, and no action for negligence lies againſt *tenant at will*. 3 Lev. 359. Paſch. 5 W. & M. in C. B. Panton v. Iſham. —— 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B. R. S. C. but S. P. does not appear. —— No action for leſſor againſt leſſee at will lies for the ſtable burnt by his negligence, and held at will, if the *fire had ceaſed there*; but if it burns his *next neighbour's* he ſhall have action, becauſe he is a ſtranger, and could not make him covenant to be careful; per cur. 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B. R. Panton v. Iſham.

There is a *diverſity* where a man is leſſee at will *to a tenant in fee*, no action lies; but where he is *leſſee at will to a leſſee for years*, it lies. Agreed. 1 Salk. 19. Panton v. Iſham. —— Same difference agreed, Carth. 203. Hill. 3 W. & M. B. R. in caſe of Cudlip v. Rundle; and cites to that purpoſe Cro. E. 461. 5 Rep. 13. Cro. C. 187. Hern Pleader 161. 1 Jo. 224.

2. Leſſor has *election* to bring his action againſt his leſſee for years, or the leſſee at will of his leſſee for years. Agreed per cur. 1 Salk. 19. pl. 9. Paſch. 13 W. 3. B. R. Pantam v. Iſham.

(B. 4) Pleadings, &c.

1. *TRESPASS for burning the houſe of the plaintiff.* The *defendant pleaded not guilty*, and *was found by verdict that the fire was kindled ſuddenly in the houſe of the defendant, he not knowing, and burnt his goods, and alſo the houſe of the plaintiff;* by which it was awarded that the plaintiff take nothing by his writ, and the plaintiff in miſericordia; and ſo ſee verdict at large. Br. Verdict, pl. 50. cites 42 Aſſ. 9.

2. Iſſue was taken, that the plaintiff's houſe *was not burnt by the fire of the defendant*, and no exception of pregnancy. Br. Negative, pl. 8. cites 2 H. 4. 18.

3. In caſe for not well keeping his fire, by which he burnt the houſes of the defendant and of the plaintiff. The count was *according to the cuſtom of the kingdom of England, that he ought ſo to keep his fire*, &c. And exception taken of this cuſtom becauſe *it is not declared where it was uſed;* & non allocatur, becauſe *the cuſtom of the kingdom is the common law of the kingdom.* And other exception taken to the words * *per ignem ſuum;* for a man cannot have property in fire; & non allocatur. Br. Action ſur le Caſe, pl. 30. cites 2 H. 4. 18. But Brooke ſays, this opinion is condemned. * Br. Property, pl. 31. cites S. C.

4. Treſpaſs of his *houſe burnt, in default of good keeping of the fire* of the defendant; to which he *ſaid, that the houſe was not burnt in default of good keeping of his fire, modo & forma;* and it was found for the plaintiff. Moyle ſaid, that to judgment you ought not to go; for this implies two ſentences, the one, that the houſe was not burnt, and the other, that it was not in default of the defendant; and it was adjourned to be adviſed. Quære. Br. Negative, pl. 3. cites 28 H. 6. 7.

5. Caſe for negligent keeping his fire, *per quod his barn was burnt, & diverſa bona were loſt*, viz. ſuch a thing and ſuch a thing, without ſhewing other particulars; and this was moved in arreſt of judgment. Sed non allocatur; for by Windham J. the diverſa bona is ſufficient, quod curia conceſſit, the ſubſtance being the burning the houſe, and the viz. but an explanation, in which miſtakes hurt not. Judgment for the plaintiff. Keb. 825. pl. 118. Mich. 16 Car. 2. B. R. Prior v. Tufts.

6. Caſe, &c. for negligently keeping his fire, ſo that the plaintiff's *houſe was burnt*, (viz.) *in parietibus, in partitionibus, & in ornamentis*, &c. Upon demurrer it was objected, that it was too general and uncertain; for damages could not be given for walls and ornaments; but it was anſwered, that the action had been well brought without the (viz.) for the enumerating the particulars was only to aggravate the damages, which being to be recovered in this action, may be divided, and given only for what is well laid in the declaration. 5 Mod. 181. Hill. 7 W. 3. Littleton v. Cole.

1 Salk. 13 pl. 3. S. C. but S. P. does not appear. —— 12 Mod. 100. S. C. but not S. P.

7. If leſſee for 3 years leaſes for 2, he may have the action, and it is *not neceſſary he ſhould have* ſuch *reſiduary intereſt in him when he brings the action;* but it is enough that he had ſuch intereſt when the houſe was burnt; and he *ought to ſhew* in his declaration, *that he had an intereſt in him then to come, when the houſe was burnt.* Ld. Raym. Rep. 99. Mich. 8 W. 3. Hicks v. Downing.

8. In caſe for burning a houſe of goods, *the particular goods ought to be mentioned.* Per Holt Ch. J. 2 Ld. Raym. Rep. Hill. 2 Ann. Obiter.

[219]

(C) Againſt a Carrier.

See tit. Maſter and Servant (B) pl. 10. in the notes; and Maſter of a Ship (B) pl. 12. Morſe v. Sluce.

[1.* IF a man *delivers goods* to a common carrier *to carry* to a certain place, if he *loſes them*, an action upon the caſe lies againſt him; for by the common cuſtom of the realm he ought to carry them ſafely.]

* See (L) pl. 4.

Hob. 17. pl. 30. Rich v. Kneeland S. C. adjudged for the plaintiff, and now affirmed on error in the exchequer chamber; and it was reſolved that though it was laid as a cuſtom of the realm, yet indeed it is the common law. —— Cro. J. 330. pl. 9. S. C. adjudged, and affirmed in error that the action lies againſt a common bargeman without a ſpecial promiſe.

[2. *(So)* If a man delivers goods *to a common hoyman*, who is a common carrier of goods, to carry them to a certain place, and gives him according to the cuſtom for the carriage of them, and after by default of good keeping of them they are loſt, an action upon the caſe lies againſt him; for by the common cuſtom of the realm, he ought to keep and carry them ſafely. Mich. 12 Jac. B. between KEELING AND RICH adjudged. Hob. Rep. 25. b. the ſame caſe.]

Hob. 18. pl. 17. S. C. ſays, nota he pleads no diſcharge of the carrying; and alſo the defendant by demurrer in law confeſſes that there was no diſcharge of the carrying. —— Cro. J. 330. pl. 9. S. C. ſays the defendant confeſſed the receipt, and ſaid he was a common bargeman; but that he fearing to carry it, delivered it to J. D. to carry, and that he gave notice thereof to the plaintiff, and he agreed thereto, and diſcharged him of the carriage. The plaintiff traverſed the diſcharging him, and adjudged for the plaintiff; for the delivery by his aſſent is not material; but the only matter traverſable is the diſcharge, which is iſſuable and found for the plaintiff; and the judgment affirmed on error brought.

[3. [*And*] if a man delivers goods to ſuch common hoyman to carry to a place, and after delivers them (being of good value) to another to keep ſafely in the boat, and does not diſcharge the hoyman, and after they are loſt through negligence, an action upon the caſe lies againſt him. Mich. 12 Jac. B. between KEELING AND RICH adjudged. Hob. Rep. 25. b. the ſame caſe.]

Mo. 462. pl. 650. in WOODLIFE's caſe, S. C. and by Gawdy J. the being robbed of the goods is no plea for a carrier, though it is for a factor, &c. per Popham, and cites 9 E. 4. 40. the caſe of a carrier,

[4. If a man delivers goods to a common carrier to carry, and the *carrier is robbed* of them, yet he ſhall be charged for them, becauſe he hath hire for them, and ſo implicitly takes upon himſelf the ſafe delivery of the goods to him delivered, and therefore he ſhall anſwer the value of them if he be robbed. Hill. 36 Eliz. B. R. Rot. between WOODLIFE AND CURTIES reſolved.]

carrier, 3 H. 7. 4. 2 E. 4. 15. 6 H. 7. 12. 10 H. 7. 26. 40 E. 3. 6.—S. P. by Gawdy J. Ow. 57. in S. C. and admitted by Popham; for carriers are paid for their carriage and take upon them ſafely to carry and deliver the things received. —— He is liable in reſpect of his reward, and not of the hundreds being anſwerable over to him; for the hundred is liable by the ſtatute of Wincheſter, but he was ſo at the common law; per Holt Ch. J. 1 Salk. 143. in caſe of Lane v. Cotton.

Though one may think it a hard caſe, that a poor carrier that is robbed on the road, without any manner of default in him, ſhould be anſwerable for all the goods he takes, yet the *inconveniency* would be far more intolerable if it were not ſo; for it would be in his power to *combine with robbers*, or to *pretend a robbery*, or ſome other accident, without a poſſibility of remedy to the party; and the law will not expoſe him to ſo great a temptation, but he muſt be honeſt at his peril; per Holt Ch. J. 12 Mod. 482. in caſe of Lane v. Sir Robert Cotton.——1 Salk. 143. per Holt Ch. J. S. P. in S. C.

(C. 2) Who is chargeable as ſuch, and what he is obliged to do. [220]

1. THE *very taking of the goods* is a general conſideration though he be not a common carrier. And the acceptance of the goods makes him liable; per Holt Ch. J. Show. 104. Mich. 1 W. & M. in caſe of Boſon v. Sandford. Show. 104. S. C. & S. P. by Holt Ch. J. cites Palm. 523.——

Skin. 279. S. C. & S. P. by Holt; and cited Palm. 523. by Hyde Ch. J. Paſch. 4 Car. B. R. in caſe of Symonds v. Darknoll.

2. A common carrier is as much *bound to carry* goods as an innkeeper is to lodge a gueſt. Per Holt Ch. J. Show. 104. Mich. 1 W. & M. in caſe of Boſon v. Sandford. Skin. 279. S. C. & P. 2 Show. 327. Jackſon v. Rogers

S. P.——Per Holt Ch. J. 1 Salk. 18. S. P. their undertaking is in proportion to their power and convenience, cites D. 158.——A carrier *refuſing to carry* goods when he has a convenience, his waggon not being full, is liable to an action on the caſe Per Holt Ch. J. who ſaid he had known ſuch action brought, and a recovery upon it, and never diſputed. Ld. Raym. Rep. 654.——S. P. per Holt Ch. J. though he ſaid the caſes are not reported. 12 Mod. 484.——2 Show. 327. pl. 334. Mich. 35 Car. 2. B. R. per Ld. Jefferyes. Jackſon v. Rogers.

But he may *refuſe to admit goods into his warehouſe before he is ready to take his journey*. per Holt. Ch. J. Ld. Raym. Rep. 652. Paſch. 13 W. 3.——S. P. per Holt Ch. J. 12 Mod. 481.

3. A *common hackney coachman* is a common carrier, becauſe he carries for hire. 2 Show. 127. pl. 127. Trin. 32 Car. 2. B. R. Lovet v. Hobbs.

4. Action lies againſt a common carrier for *refuſing to carry money*, if he does not aſſign a particular reaſon for it. Per cur. 12 Mod. 3. in a note there, Mich. 2 W. & M.

5. A. took a *hackney coach*, and delivered the coachman his goods to be carried with him, but in the paſſage the goods were loſt. Holt Ch. J. at a trial at Guildhall, held that if the *paſſenger pays the hackney coachman for the carriage of the goods* he may charge him for them, but not otherwiſe. Comyns Rep. 25. Hill. 8 W. 3. Upſhare v. Aidee.

6. So where A. took a place in a ſtage-coach for ſuch a town, and in the journey the defendant, by negligence, loſt the plaintiff's trunk; upon not guilty, the evidence was, that the *plaintiff gave the trunk to the man that drove the coach, who promiſed to take care of it*, but loſt it; Holt Ch. J. at niſi prius, held, that the maſter was not chargeable, and that a ſtage-coachman is not within the cuſtom as a carrier is, unleſs the *maſter takes a diſtinct price* But by the cuſtom and uſage of ſtage-coaches, every paſſenger uſes to *pay for the carriage of goods*

above ſuch weight; in ſuch caſe the coachman ſhall be charged for the loſs of goods beyond ſuch weight; per Holt Ch. J. Comyn's Rep. 25. Hill. 8 W. 3. at Guildhall, in the caſe of Upſhare v. Aidee.

price for the carriage of the goods as well as of the perſons. 1 Salk. 282. pl. 11. Mich. 10 W. 3. Middleton v. Fowler.

7. A. *undertaking* in his return from London *to carry* back ſuch goods in his waggon into the country as he could get *for a reaſonable price* is a common carrier. 1 Salk. 249. pl. 5. Hill. 8 Ann. C. B. Giſburn v. Hurſt.

[221]

See tit. Neceſſity (A) pl. 12.

(C. 3) Carrier. Chargeable *or Excuſable.* In what Caſes.

1. A *Box of jewels* was delivered to a ferryman, who not knowing what was in it, and *being in a tempeſt, threw it overboard* into the ſea; reſolved he ſhould anſwer for it. Cited All. 93. by Roll Ch. J. as Bearcroft's caſe.

Hale Ch. J. Vent. 238. Hill. 24 & 25 Car. 2. B. R. cited a like point then lately reſolved accordingly. But if the carrier had told the owner, that it was a dangerous time, and if there was money in it he durſt not take charge of it, and the owner had anſwered as before, this matter would have excuſed the carrier.

2. A. *delivers a box to a carrier's porter appointed to take in goods,* and *told him that there was a book and tobacco in the box,* and in truth *there was* 100*l. beſides.* The *carrier is robbed.* Roll Ch. J. directed, that he muſt anſwer for the money; for A. need not tell him all the particulars in the box; but it muſt come on the carrier's part to make a ſpecial acceptance. But in regard of the intended cheat to the carrier, he told the jury, they might conſider him in damages; but the *jury gave* 97*l. damages,* abating 3*l.* only for carriage, quod durum videbatur circumſtantibus. All. 93. Mich. 24 Car. B. R. Kenrig v. Eggleſton.

He muſt anſwer for all *neglects* of thoſe under him, though he ſhould expreſsly caution againſt it. Per Holt Ch. J. in caſe of Lane v. Cotton. 1 Salk. 18.

3. *Delivery* of goods *to the porter* is a delivery to the carrier, and if parcels of goods delivered to the porter are *loſt,* an action lies againſt the maſter. 2 Mod. 309. Trin. 30 Car. 2. C. B. Staples v. Alden.

2 Show. 81. Baſtard v. Baſtard.

4. There needs no *particular agreement for hire* to render a common carrier liable; becauſe, when there is none, a carrier may have a *quantum meruit* for it. Agreed. 2 Show. 129. Mich. 32 Car. 2. B. R. Lovet v. Hobbs.

Note; the caſe of Kenrigg and Eggleſtone, All. 93. was cited as an authority for the plaintiffs; ſed non allocatur. For the court held their caſe different from the preſent. Carth. 486. Tyly v. Morrice.

5. Four hundred and fifty pounds was delivered to a carrier ſealed up in a bag, and *was told it was* 200*l.* if he is *robbed,* he ſhall *anſwer only for* 200*l.* Carth. 485. Paſch. 11 W. 3. B. R. Tyly v. Morrice.——A like verdict was given on the like point at the ſame time in caſe of Fiſher v. Morrice.

S. P. But if a bailiff or factor

6. The law charges a common carrier, common hoyman, * maſter of a ſhip, &c. intruſted to carry goods, *againſt all events*

* See tit. Maſter of a Ship (B) pl. 12.

but acts of God, and of the enemies of the king; for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable; otherwise these carriers might undo all that deal with them, by combining with thieves, &c. and yet in so clandestine manner as not to be discovered; and the law, as to this point, is founded upon this reason; per Holt Ch. J. 2 Ld. Raym. Rep. 918. Trin. 2 Ann. arg. in case of Coggs v. Bernard.

carries goods, and is robbed, he is not liable to the owner, though he has a premium, because it is only a particular office and a private trust; per Holt Ch. J. 3 Salk. 11. in S. C.

(C. 4) Chargeable. In what Actions, &c. [222]

1. A BOX is bailed to a carrier to carry to Exon, who carries it to another place, and *breaks open the box, and runs away with the goods*, it is felony; for by so doing, the trust of the bailment is determined. Jenk. 132. pl. 69.

S. P. Obiter. 8 Mod. 76. Pasch. 8 Geo. 1.

2. If a carrier *loses goods* committed to him, a general action of *trover* does not lie against him; per Hale Ch. Vent. 223. Mich. 24 Car. 2. B. R. in case of Owen v. Lewyn.

S. P. But it lies against him for an *actual wrong*, as if he breaks it to take out goods, or sell it. 2 Salk. 655. per Trevor Ch. J.—Per Hale Ch. J. Vent. 223. Owen v. Lewyn.

3. If goods are *stolen or gotten away by a cheat* from a common carrier, it is no conversion, and trover will not lie against him, but an action on the case upon the common custom of the realm; but, in trover, evidence must be of some *act of his own;* for his bare delivery over by a token is no conversion. But trover lies against the bailee; and demand after the goods delivered over is no conversion by the carrier; per Hale Ch. J. and Wild; but it was said by Twisden, and affirmed by the bar, as common in circuits, to have trover against the carrier; and ruled, that the trial proceed. 3 Keb. 422. pl. 18. Hill. 26 Car. 2. B. R. Starkie v. Hart.

In trover of 4 butts of oil, the defendant took upon him for wages to carry this oil from the waterside to Wakefield, and he did deliver them there; but the owner could not come by them but were imbezzled. It was holden that this action of trover doth not lie against the carrier, but he shall be put to a special action upon this case. Clayt. 104. pl. 174.

(C. 5) Carrier. What Actions he may have.

1. CArrier is accountable for the goods, and he may have *trover* or *trespass* at his election; per cur. Mod. 31. Hill. 21 & 22 Car. 2. B. R. Arg. in case of Wilbraham v. Snow.

2. Where there is no particular agreement for price, a carrier may have a *quantum meruit* for his hire. 2 Show. 81. pl. 67. Mich. 31 Car. 2. B. R. Bastard v. Bastard.

Ibid. 129. pl. 107. Trin. 32 Car. 2. B. R. S. P. agreed in the case of Lovett v. Hobbs of a common carrier.

(C. 6) Carrier. Pleadings.

1. IN aſſumpſit for that the defendant *promiſed to carry* certain *apples* for the plaintiff by boat *from Greenwich in Kent to London;* and the *boat* in which they were, *by a* great and violent *tempeſt was ſunk* in the River of Thames, ſo as the ſaid apples periſhed, &c. It was holden to be no plea in diſcharge of the aſſumpſit, by which the plaintiff had ſubjected himſelf to all adventures. 4 Le. 31. pl. 86. Trin. 26 Eliz. B. R. Taylor's caſe.

[223]

2. If one delivers goods to a common carrier to be delivered at S. in conſideration whereof the *plaintiff undertakes to content him rationabiliter for the carriage, and the carrier promiſes to deliver them ſafely.* Held that the conſideration that he would rationabiliter content him, is ſufficient, though no ſum certain was mentioned. And adjudged that an action lay upon that promiſe, but not becauſe he was a common carrier. Cro. J. 262. pl. 26. Mich. 8 Jac. B. A. Rogers v. Head.

In caſe againſt a carrier for loſing a box by negligence, *no particular ſum was mentioned to be paid*, or promiſed *for hire*, but only *pro mercede rationabili*, and held good; for perhaps there was no particular agreement, and then the carrier might have a quantum meruit for his hire, and is chargeable in either caſe. 2 Show. 81. pl. 67. Mich. 31 Car. 2. B. R. Baſtard v. Baſtard. ——— Sid. 36. pl. 5. Paſch. 23 Car. 2. C. B. S. P. per tot. cur. adjudged accordingly.

3. A *carrier covenanted to carry goods* of the plaintiff *from D. to London, he paying him for the carriage.* And in covenant for not carrying the goods, he did *not ſhew that he had paid, but that paratus fuit ſolvere*, and well; for by the common cuſtom of the realm he ought not to pay before they are carried; or otherwiſe he will pay for nothing. 2 Roll. Rep. 466. Mich. 2 Jac. B. R. Seabright v. Beale.

4. In caſe, &c. the plaintiff (a merchant) ſets forth, that by the common law every lighterman ought to govern his lighter that the merchant's goods therein be not damaged; that the *plaintiff was a merchant, and the defendant a lighterman*, who carried the plaintiff's goods from &c. to &c. for hire, (viz.) for ſo much money; and that he had ſo negligently governed his lighter, that the goods were damnified. After a verdict, exception was taken that it was *not averred that he was a common lighterman*; beſides, he did *not ſet forth how his goods were ſpoiled;* but both theſe were overruled. Palm. 523. Paſch. 4 Car. B. R. Simonds v. Darknall.

5. In caſe for that he *delivered to* the defendant (being *a water-carrier*) *goods in York to carry* them *from Hull to London*, and that the goods were loſt. It was moved in arreſt of judgment, that the agreement ſet forth was to carry the goods from Hull to London; ſo that the defendant did not undertake to carry them from York to London. But adjudged that he ſhall be *charged upon the general receipt at York*, according to SOUTHCOT's caſe, *though nothing was ſaid of the carriage to Hull.* Sid. 36. pl. 5. Paſch. 13 Car. 2. C. B. Nicholls v. More.

6. Aſſumpſit

6. Aſſumpſit by a carrier, upon a *promiſe to pay ſo much for carrying goods from York to London*; if the *plaintiff* in his declaration *avers performance*, and doth *not ſhew in what pariſh and ward he brought the goods*, it is ill upon a demurrer. Cited per cur. to have been ſo adjudged. Sid. 178. pl. 10. Hill. 15 & 16 Car. 2. B. R. Anon.

7. Though in an action ſur caſe againſt a carrier, the declaration may be good *without recital of the cuſtom of the realm*, as Hobart ſaid, yet the better way is to recite it. Sid. 245. pl. 5. Paſch. 17 Car. 2. B. R. Matthews v. Hopkins.

Reſolved in the exchequer chamber, that though it was laid as a cuſtom, yet indeed it is the common law. Hob. 18. pl. 30. in caſe of Rich v. Kneeland.——It is uſual to declare ſecundum legem & conſuetudinem Angliæ; for it is not a cuſtom confined to a particular place, but is extenſive to all the king's people. Arg. 3 Mod. 227.

8. Action againſt a carrier was brought *in London for loſing goods there, which were delivered to him at Beverley in Yorkſhire to redeliver at London*. Defendant pleaded that he was robbed of the ſaid goods at Lincoln, abſque hoc that he loſt them in London. The court held the declaration good, and the plea naught in ſubſtance; but if it had been good, the traverſe had been ill, becauſe the juſtification was not local, though Scroggs J. was of a contrary opinion. Judgment for the plaintiff. 2 Mod. 270. Mich. 29 Car. 2. C. B. Barker v. Warren.

9. In caſe againſt a carrier for goods loſt, the count was *for 4 ſilver cups & uno poculo argenteo*, without ſaying uno alio poculo, &c. and adjudged good; for if it be aliud the damages ſhall be intended to be given for it, and if it be idem and not aliud, then it is only tautology, and in that caſe the damages may be rightly given. 3 Salk. 19. Anon.

[224]

2 Vent. 78. Mich. 1 W. & M. in C. B. Chamberlain v. Cook, S. C. accordingly.

10. One may turn an action againſt a common carrier into a *ſpecial aſſumpſit* (which the law implies in reſpect of his hire) viz. *that in conſideration of a ſum to be paid, he undertook to carry, &c.* Per Holt Ch. J. Comb. 334. Trin. 7 W. 3. B. R. Anon.

11. Caſe for that the defendant being a common carrier, and uſing to carry goods pro mercede between Worceſter and Litchfield, the *plaintiff delivered him a guinea, to carry and deliver to her ſon T.* and that the defendant in conſideration of ſo much for carriage, *promiſed* to carry it ſafely, and deliver it when required, which was not done, though by the plaintiff often required, and that defendant refuſed to deliver it to the plaintiff, &c. It was moved in arreſt of judgment, that no breach of promiſe is ſet forth, there being no requeſt to pay to T. to whom the money is to be delivered, and ſo no cauſe of action; and though the plaintiff might have countermanded the gift any time before an action brought by T. and conſequently might have had an action for it againſt the defendant, yet that action muſt not have been caſe, but trover or detinue; and therefore here is no foundation for this ſpecial action, without ſhewing a requeſt to deliver it to T. Sed per cur. it being *ſaid generally that ſhe requeſted the defendant to deliver*, though *not ſaid to whom*, and it being after verdict, they held it well, and gave judgment for the plaintiff. Holt ægroto.

11 Mod. 273. pl. 20. Hill. 1709. 8 Ann. B. R. Lewkner v. Plant.

12. Whether *non aſſumpſit* be a good plea to an action brought againſt a common carrier, the court doubted, becauſe the foundation of this cuſtom is upon a ſuppoſed promiſe to deliver the goods ſafely. 8 Mod. 178. Trin. 9 Geo. Harriſon v. Green.

(D) Againſt an Hoſtler [Innkeeper.] *Who* ſhall be ſaid *an Hoſt chargeable.*

Br. Action ſur le Caſe, pl. 41. cites 11 H. 4. 45. S. P.—

[1. HE muſt be a *common inn-keeper* that may be charged for goods ſtole in his houſe. Paſch. 3 Hen. 4. B. R. Rot. 28. Adjudged.]

S. P. 8 Rep. 32. a. in Calye's caſe. ——— See (G. 2.) Maſon v. Grafton. ——— By the law of the land a common inn-keeper is bound to warrant the goods of his gueſt. D. 266. b. marg. pl. 9. cites H. 4. Rot. 16. Midd'. and Paſch. 9 H. 4. Rot. 69. Midd' action for 2 horſes; and Mich. 13 H. 4. Rot. 6. Surr. Will. Cowper v. Robert de Croydon, hoſtler for one horſe.

For if the defendant will keep an inn, he ought at his peril to keep ſafely his gueſts goods, and if he be ſick any more than his ſervants ought carefully to look to them, and he cannot diſable himſelf in this caſe in debt on an obligation. Cro. E. 622. S. C.

[2. If an inn-keeper be ſo diſtempered that he *is non ſanæ memoriæ*, and a *gueſt knowing thereof* inns there, where his *goods are ſtole*, an action upon the caſe lies againſt the inn-keeper; for he cannot diſable himſelf by ſaying he was then non ſanæ memoriæ. Mich. 40, 41 Eliz. B. R. between CROSS AND ANDREWS. Adjudged, but not entered.]

[225]

S. P. cited by Holt Ch. J. as adjudged accordingly. Carth. 161.

[3. If an inn comes to an *infant*, and he keeps it, and *his gueſts are robbed*, yet no action lies againſt the infant. Mich. 40, 41 Eliz. B. R. in CROSS AND ANDREW's caſe. Agreed.]

See (E) pl. 5. and the note there.

[4. If a man that is *not a common hoſt* be *aſſigned per hoſpitatorem domini regis, to receive another man as a gueſt*, he is bound to take charge of the goods of his gueſt. Mich. 3 Hen. 4. Rot. 28. Adjudged.]

5. *Houſes at Epſom*, where they *take in lodgers and boarders* coming to drink the waters there during the ſeaſon, and *dreſs victuals, and ſell them ale and beer*, and *entertain the horſes at 8d. a day, but ſell to no other* perſons, is not an inn or an ale-houſe. 12 Mod. 254. Mich. 10 W. 3. Parker v. Flint.

6. A *ſign is not eſſential to an inn*, but is an evidence of it; per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3.

(E) Againſt an Hoſt. *Who* ſhall be ſaid *a Gueſt to have an Action.*

[1. IF my goods are ſtole in an inn, and I am a gueſt there, but my *goods were delivered to the hoſtler upon another account*, I ſhall have no action againſt the hoſtler. Mich. 40, 41 Eliz. B. R. between BEMON AND WATSON.]

Cro. E. 625. pl. 19. Mich. 40 & 41 Eliz. B. R. S. C. but S. P. does not appear.

[2. If a *man comes to an inn with a hamper*, in which he hath certain *goods* (ſcilicet, hats as the caſe was) *and departs leaving it with the hoſt, and two days after comes again*, whereas in the time of his abſence this was *ſtole*, he ſhall not have any action againſt the hoſt, becauſe he *was not a gueſt at the time of the ſtealing, and the hoſt had no benefit* by the keeping thereof, and therefore ſhall not be charged for the loſs thereof in his abſence. Mich. 5 Jac. B. R. between JELLY AND CLARKE, adjudged. And Juſtice Williams ſaid, that it was ſo adjudged at Hertford term, which intratur Paſch. 4 Jac. Rot. 454.]

Cro. J. 188. pl. 12. S. C. ſays he told the innkeeper that he would return in 2 or 3 days, and ſo he did. The juſtices were of opinion, that the innkeeper was not chargeable as a common hoſtler for the goods ſtolen during ſuch time, unleſs he makes a ſpecial promiſe for the ſafe-keeping of them; and the action ought to be grounded thereupon; but it being a new caſe, and Fleming Ch. J. being abſent, adjornatur. ——— Noy 126. S. C. ſays, that the morning he departed he told his hoſteſs he would return within 2 days, and would leave his hamper there, in which were many hats, and his *hoſt promiſed they ſhould be ſafe*; that he returned accordingly, but the hats were ſtole; and adjudged that querens nil capiat per billam, becauſe he was not a gueſt at the time of the ſtealing, and the hoſt had no profit by the goods being there. ——— S. C cited Arg. Poph. 179. and in 2 Brownl. 255. and in Lat. 127. but by different names, and in neither of thoſe books is the point in Noy of the hoſt's promiſe mentioned.

[3. But if a man comes to an inn *with a horſe* which he rides, and leaves it with the hoſt, and departs from the inn for ſeveral days, and in his abſence the horſe is ſtole, yet the hoſt ſhall be charged for it, becauſe he had a *benefit by the continuance of the horſe* with him, inaſmuch as he is to be paid for it; and ſo the owner is a ſufficient * gueſt to have the action. Mich. 5 Jac. B. R. in the ſaid caſe of JELLY AND CLARKE, it was ſo agreed per curiam.]

Noy 126. S. C. & S. P. accordingly. —— Cro. J. 188. pl. 12. S. C. & S. P.—Mo. 877. pl. 1229. cites S. C. & S. P. as adjudged accordingly. ——— S. P. but otherwiſe if he had left a trunk or a dead thing. 1 Salk. 388. pl. 2. Mich. 3 Ann. B. R. York v. Grindſtone.

* [226]

[4. If an *hoſt invites one to ſupper*, and the night being far ſpent, invites him *to ſtay there all night*, if he is after *robbed*, yet the hoſt ſhall not be charged for it; for this gueſt *was not any traveller*. 25 Eliz. CARR'S CASE, adjudged. Cited Paſch. 7 Jac.]

8 Rep. 32. b. in the 2d reſolution in Calye's caſe, S. P. accordingly; for the writ is ad hoſpitandos homines, &c. tranſeuntes in eiſdem hoſpitantes, &c. ——— 2 Brownl. 254. S. P. by Coke Ch. J.

[5. [*So*] If an *hoſt be aſſigned per hoſpitatorem domini regis to entertain J. S. as a gueſt*, he is not bound to warrant J. S.'s goods; for he is not a traveller that is lodged for his money within the intent

The caſe of BARNHOR-BY v. WILKINS, D.

158. b. marg. pl. 12. and cites the record. ——See (D) pl. 4.

intent of the law. Paſch. 3 H. 4. Rot. 28. adjudged. But there it ſeems that the hoſt *was not a common hoſt.*]

Poph. 127. Trin. 15 Jac. S. C. but S. P. does not appear.—— Roll. Rep. 449. pl. 11.

[6. If a *man takes my horſe, and rides* him to *an inn*, where he is *ſtole*, I ſhall not have an action againſt the hoſt, though I am the owner, becauſe I am not his gueſt. Trin. 15 Jac. B. R. between ROBINSON AND WALTER; per Cro. & Dod. & Hought. but Mount. e contra.]

S. C. but S. P. does not appear.——3 Bulſt. 269. S. C. but S. P. does not appear.

Poph. 127. S. C. but S. P. does not appear. ——Roll. Rep. 449. S. C. but

[7. *But* if my *ſervant upon my buſineſs* comes to an inn, and rides upon my horſe, and he is there ſtole, I may have an action againſt the hoſt, becauſe the abſolute property is in me. Trin. 15 Jac. B. R. between ROBINSON AND WALLER, per Mount. Cro. & Dod.]

S. P. does not appear.——3 Bulſt. 269. S. C. but S. P. does not appear.—— So if the ſervant has money of his maſter's in a bag in the inn, which is ſtolen by default of the inn-keeper and his ſervant; adjudged that action lies for the maſter; and ſaid that it had been ſo reſolved before. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris.——Yelv. 162. S. C. accordingly; for no one can have ſatisfaction but he that has the loſs, and that is the maſter; and whether he were ſervant or not to the plaintiff at the time of lodging in the inn is not material; for if he was his friend, by whom he ſent the money, and is robbed in the inn, the very owner ſhall have the action; per tot. cur. And judgment accordingly.——S. C. cited D. 158. b. marg. pl. 52.——S. C. cited Lat. 127.——Poph. 179. cites S. C.——S. P. adjudged for the plaintiff. Lat. 126. Trin. 1 Car. Drope v. Thaire.—Poph. 178. S. C. adjudged accordingly.——Noy 79. S. C. adjudged.——Dal. 8. pl. 1. Mich. 7 E. 6. cites H. 4. S. P.——3 Bulſt. 271. S. P. by Montague Ch. J.

8. Whitfield J. held, that *ſoldiers billetted*, though they had been in the inn 14 *days*, were gueſts; and denied Caley's caſe 8 Rep. which ties the abode of a gueſt to 3 *days*, and that, if the abode is longer, it ſhall be ſaid a *commorancy*; for he ſaid, the time may be longer, as a lawyer at the aſſiſes, a gentleman at a horſe-race, &c. Clayt. 97. pl. 164. 1641. Harland's caſe.

9. If an *attorney hires a chamber in an inn for a whole term*, the hoſtler is not chargeable with any robbery in it, becauſe the party is quaſi a leſſee. Mo. 877. pl. 1229. cited by Warburton J. as reſolved.

S. C. cited Arg. Poph. 179.—S. C. cited Arg. Lat. 127.—S. C. cited Cro. J. 189.

10. One *left goods* in an inn, and *went abroad* about his buſineſs, *and returned the ſame day*, the hoſtler ſhall anſwer for the goods, if ſtolen in the mean time; but if the owner does *not return within* 3 *or* 4 *days*, it is otherwiſe. Mo. 877. pl. 1229. cited by Warburton J. as 1 Jac. Sir Edwin Sand's caſe.

[227]

But Ibid. 127. Trin. 1 Car. Doderidge ſaid, that if *clothiers come to London to ſell their cloth, and ſtay a week or more*, and *ſo of ſuch as come to term* here, yet in theſe caſes they ſhall have an action againſt the hoſt, he being a common inn-keeper. To which Jones agreed; but otherwiſe if he ſtays a quarter of a year, or boards there; but if he *ſtays half a year without* ſuch *agreement for board*, &c. he is within the cuſtom.——Poph. 179. S. P. by Jones and Doderidge J. agreed.——S. P. ſaid, and not denied. Het. 39. 50.——It was ſaid at bar, and not denied, that the declaration ſhould ſay *tranſiens hoſpitavit*; for if he boards or ſojourns for a certain ſpace in an inn, the action does not lie. Het. 49. Grimſton's caſe.

11. If a paſſenger *lodges* 3 *days together* in an inn, the hoſtler is not anſwerable for his goods, if they are ſtolen out of his chamber; per Doderidge J. Lat. 88. Paſch. 1 Car. in Gulielm's caſe.

12. An inn *in London* is an inn; and if a gueſt be robbed in ſuch an inn, he ſhall have remedy as if he was paſſing through the country. Poph. 179. Paſch. 2 Car. B. R. Drope v. Thaire.

13. If one comes to an inn, and *makes a previous contract for lodging for a ſet time, and does not eat or drink there*, he is no gueſt, but a lodger, and ſo not under the innkeeper's protection; but if he eats and drinks there, it is otherwiſe; or if he pays for his diet there, though he does not take it there; per Holt Ch. J. 12 Mod. 255. Mich. 10 W. 3. arg. in the caſe of Parker v. Flint.

(E. 2) Where one, in reſpect of Intereſt, though not the very Gueſt, ſhall have an Action againſt the Hoſtler.

1. IF a *common carrier has a pack* of goods of J. S. *to carry to D.* and it is *ſtole from him in a common hoſtry*, J. S. ſhall have action againſt the hoſtler for the pack, and not the carrier; for they are not the carrier's goods; per Brown and Portman, and Hales accorded. Dal. 8, 9. pl. 1. Mich. 7 E. 6. Anon. Quære, and ſee (1) pl. 1.

2. If one *ſends money by his friend, who is robbed in an inn*, the very owner ſhall have the action; per tot. cur. Yelv. 262. Mich. 7 Jac. arg.

3. If a *ſtranger takes another's horſe, and ſets him up in an inn, and he is ſtolen* away, the party may have his remedy againſt the innkeeper; per Mountague Ch. J. 3 Bulſt. 271. Mich. 14 Jac.

(F) Againſt an Hoſtler.

†[228]

[1. IF an hoſt *refuſes a gueſt, upon pretence that his houſe is full of* gueſts, if this be falſe, an action upon the caſe lies. Paſch. 4, 5 Ph. & Ma. Dyer 158. 32.] S. P. by Ley Ch. J. and Dodderidge and Chamberlaine J. 2 Roll. Rep. 345.—S. P. per cur. Palm. 367. & 374. Br. Action ſur le Caſe, pl. 76. cites 39 H. 6. 18. So of a *victualler who will not ſell me victuals*; and yet in debt for theſe victuals the defendant may wage his law. Per Moile J. per Priſot it is true; for the victualler or hoſtler is not bound to ſell you his victuals, unleſs he will, nor the hoſtler to lodge you againſt his will. Quære thereof; for then it ſeems by his reaſon, that action upon the caſe does not lie. Quære; for it ſeems that *if an hoſtler will not lodge a man*, the *conſtable, upon complaint, ſhall compel him.* And per Danby, an hoſtler *is not bound to give meat to his gueſt's horſe till he be paid* beforehand; for he is not bound to truſt him. ——S. C. cited 9 Rep. 87. b.—Note by all the juſtices, that if a common hoſtler *will not lodge me*, I ſhall not have an action, but *complain to the ruler of the will*, and he ſhall take direction upon it. Br. Action ſur le † Caſe, pl. 92. cites 5 E. 4. 2.—Dalt. Juſt. cap. 7. ſ. 8. makes a quære how the officer ſhall compel him; and ſays it ſeems that all the officer can do is either to cauſe ſuch alehouſe-keeper to be ſuppreſſed, or to preſent ſuch offence at the aſſiſes or ſeſſions of the peace, that ſo ſuch offender may be thereupon indicted; and ſays that at a Lent aſſiſes 1622, Ley Ch. J. delivered it in his charge, that an inn-keeper or alehouſe-keeper offending herein might be *indicted, fined, and impriſoned* for the ſame, or elſe that the party grieved might have an action upon the caſe againſt the inn-keeper or alehouſe-keeper refuſing to lodge him.——Hawk. Pl. C. 225. cap. 78. ſ. 2. S. P. and cites S. C.

If an inn-keeper *takes down his ſign*, but ſtill keeps an hoſtry, caſe lies for denying to lodge a traveller for his money; but otherwiſe if he takes down his ſign, and gives over keeping an inn. Godb. 346. in pl. 440. Trin. 21 Jac. B. R. by Dodderidge J.—S. P. by Ley Ch. J. and Dodderidge and Chamberlaine J. 2 Roll. Rep. 345, 346. in S. C.——Palm. 374. S. P. in S. C. by Dodderidge.

[2. If a *traveller* comes to an hoſtler to lodge, and the *hoſt aſſigns him a chamber to put his goods in*, and after the gueſt is there *robbed* of his goods, he ſhall have an action upon the caſe againſt the hoſt. * 42 Aſſ. 17. adjudged. And there ſaid to be adjudged in the council. Co. 8. CALYE's caſe 32.]

* Br. Action ſur le Caſe, pl. 86. cites S. C.

[3. If a man comes to a common hoſtler to lodge, and *deſires that his horſe be put to paſture*, and the hoſt puts him to paſture accordingly, where the horſe is *ſtole*, the hoſt ſhall not be charged, † becauſe the hoſt is not bound by the law to anſwer for any thing which is out of his inn, but only for thoſe things which are within his inn. Co. 8. CALYE 32. b. Reſolved Hill. 37 Eliz. B. R. between DALE AND GIBSON agreed; but there ſaid, that before it had been held contra per curiam. Paſch. 40 Eliz. B. R. between ‡ MOSLEY AND FOSSET per curiam.]

† Fol. 4.

S. P. ruled accordingly 4 Le. 96. pl. 196. Windham v. Mead.—2 Brownl. 255. S. P. by Foſter J.

‡ Mo. 543. pl. 720. Hill. 40 Eliz. S. C. but S. P. does not clearly appear.

[4. *But if the owner does not require* the hoſt *to put his horſe to graſs*, but the hoſt does it of his own head, he ſhall anſwer for it, if the horſe be ſtole. Co. 8. CALYE 32. b.]

S. P. ruled accordingly 4 Le. 96. pl. 196. Windham v. Mead.—2 Brownl. 255. S. P. by Foſter J.

[5. [*But*] if the hoſt, *upon command of the gueſt*, puts the horſe to graſs, and the horſe *by the voluntary and wilful negligence* of the hoſt *is ſtole*; as if the hoſt voluntarily *leaves open the gates of the ground*, by which means the horſe ſtrays out, and ſo is ſtole or loſt, an action upon the caſe lies againſt the hoſt. Paſch. 40 Eliz. B. R. between MOSLEY AND FOSSET. Per Poph.]

Mo. 543. pl. 720. S. C. but S. P. does not clearly appear; but there the caſe is, that the defendant took the horſe to graſs at 2s. per week, and was to keep him ſafe, and re-deliver him when required; and ſhewed that he kept it ſo negligently that it was taken away by perſons unknown. Upon demurrer Popham and Fenner held, that the action lay not without alleging a requeſt to re-deliver; and likewiſe that the horſe was eloigned, dead, or loſt; but Gawdy and Clench e contra, the action being founded on the negligence, and ſpecial aſſumpſit to keep him ſafe. But all agreed, that without ſuch ſpecial aſſumpſit the action would not lie.

6. If one brings a bag or cheſt of *evidences* or *obligations*, *deeds*, or other ſpecialties, and they are loſt by default of the hoſtler, the hoſtler ſhall anſwer for them. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 5th reſolution in Caley's caſe.

7. An innkeeper is not compellable *to receive the horſe of* any, if his *maſter* is *not lodged there*. 2 Brownl. 254. Per Coke Ch. J. Paſch. 7 Jac.

8. If an hoſtler keeps a *horſe* left with him at livery ſo negligently that he *is taken out of his ſtable, and rid a long journey, and damaged*, an action lies; ſo if he keeps him ſo negligently, that he is *beat or abuſed, or wanted reaſonable provender in his inn*. 6 Mod. 224, 225. Mich. 3 Ann. B. R. per tot. cur. Obiter.

(G) Againſt an Hoſtler. Collateral Matter to *excuſe* the Hoſtler.

[1.] IF an hoſt *refuſes* a gueſt *becauſe his houſe is full* of gueſts, and the *party ſays that he will ſhift among the other gueſts*, and there he is *robbed*, the hoſt ſhall not be charged. 4, 5 Ph. & Ma. Dyer 158. 32.]

Ibid. in the caſe of WHITE v. AN HOSTLER OF TUNBRIDGE.—Bendl. 60. pl. 103. S. C. by the name of BIRD v. BIRD accordingly by all the juſtices of C. B.—And. 29. pl. 69. S. C. accordingly; and by And. and Bendl. it appears that the plaintiff went to a bed in the inn by ſufferance of another perſon, but without the aſſent of the hoſtler or his ſervants.

[2. If an hoſt *tells a gueſt that he muſt go abroad*, and ſo he cannot be attendant to him; and thereupon the gueſt *takes up his lodging there at his peril*, if his goods are ſtole, the hoſt ſhall not be charged. 11 Hen. 4. 45.]

S. P. Br. Action ſur le Caſe, pl. 41. cites S. C. And the hoſtler pleaded that he told the plaintiff that he could not take upon him the charge of the goods, becauſe he muſt go early in the morning to the ſheriff upon a writ of inquiry, &c. and that thereupon the plaintiff aſked him to deliver the key of his chamber and ſtable, which the defendant did accordingly, and went his way, &c. The court agreed that the delivery of the key was nothing to the purpoſe; but per Hill, when the defendant notified that he could not attend, and thereupon the plaintiff took up his lodging there at his peril, the defendant was diſcharged. And per cur. none ſhall be compelled to anſwer as hoſtler but a common hoſtler. And becauſe the plaintiff *had not counted that the defendant was a common hoſtler, nor does it appear of record*, therefore the plaintiff took nothing by his writ. Quod nota. And though the defendant admitted ſuch writ, and counted, yet if the court perceive it they will not permit it, by which judgment was ut ſupra.

[3. If an hoſt *takes in a gueſt, and goes abroad* of his own head *without proceſs of law*, yet he muſt anſwer for the goods of his gueſt, for he ought to have a ſervant to take care of them in his abſence. 11 Hen. 4. 45.]

[4. *So* it ſeems it would be, if he was at another place *by action of law*; for his ſervants ought to have the care in the mean time. Contra 11 H. 4. 45.]

5. Action upon the caſe againſt an hoſtler, becauſe he *carried away his goods* in his hoſtry, which were embezzled by ill people for default of good keeping, &c. and the *defendant ſaid, that he did not deliver the goods to him, and* alſo *that he had the* * *key of his chamber*. Et non allocatur, but judgment for the plaintiff, and *elegit* awarded *of the land, which he had the day of the judgment*, and not the day of the writ; and he prayed *capias ad ſatisfac.* which was denied, as where hue and cry is made; for he did no wrong, *but laches*. Br. Action ſur le Caſe, pl. 15. cites 42 E. 3. 11.

* It is no excuſe for an hoſtler to ſay, that *he delivered to the gueſt the key of the chamber in which the gueſt lodged, and that the gueſt left the door of the chamber open*; for he ought to keep the goods of his gueſts there in ſafety. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 4th reſolution in Caley's caſe. And ſays that with this reſolution agrees 22 H. 6. 21. b. 11 H. 4. 45. a. b. 42 E. 3. 11. a.

6. Where a *man is lodged in a chamber with me by my good will, and not by the hoſtler*, and he robs me, the hoſtler ſhall not be charged. Contra, if he was lodged there by the hoſtler. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21. per tot. cur.

S. P. For it is the gueſt's fault to have ſuch a companion or ſervant. 8 Rep. 33. a. in the 4th reſolution in Caley's caſe, cites S. C.

[2. If a *traveller* comes to an hoſtler to lodge, and the *hoſt aſſigns him a chamber to put his goods in*, and after the gueſt is there *robbed* of his goods, he ſhall have an action upon the caſe againſt the hoſt. * 42 Aſſ. 17. adjudged. And there ſaid to be adjudged in the council. Co. 8. CALYE's caſe 32.]

* Br. Action ſur le Caſe, pl. 86. cites S. C.

[3. If a man comes to a common hoſtler to lodge, and *deſires that his horſe be put to paſture*, and the hoſt puts him to paſture accordingly, where the horſe is *ſtole*, the hoſt ſhall not be charged, † becauſe the hoſt is not bound by the law to anſwer for any thing which is out of his inn, but only for thoſe things which are within his inn. Co. 8. CALYE 32. b. Reſolved Hill. 37 Eliz. B. R. between DALE AND GIBSON agreed; but there ſaid, that before it had been held contra per curiam. Paſch. 40 Eliz. B. R. between ‡ MOSLEY AND FOSSET per curiam.]

† Fol. 4.

S. P. ruled accordingly 4 Le. 96. pl. 196. Windham v. Mead.—— 2 Brownl. 255. S. P. by Foſter J.

‡ Mo. 543. pl. 720. Hill. 40 Eliz. S. C. but S. P. does not clearly appear.

[4. *But if the owner does not require* the hoſt *to put his horſe to graſs*, but the hoſt does it of his own head, he ſhall anſwer for it, if the horſe be ſtole. Co. 8. CALYE 32. b.]

S. P. ruled accordingly 4 Le. 96. pl. 196. Windham v. Mead.—2 Brownl. 255. S. P. by Foſter J.

[5. [*But*] if the hoſt, *upon command of the gueſt*, puts the horſe to graſs, and the horſe *by the voluntary and wilful negligence* of the hoſt *is ſtole*; as if the hoſt voluntarily *leaves open the gates of the ground*, by which means the horſe ſtrays out, and ſo is ſtole or loſt, an action upon the caſe lies againſt the hoſt. Paſch. 40 Eliz. B. R. between MOSLEY AND FOSSET. Per Poph.]

Mo. 543. pl. 720. S. C. but S. P. does not clearly appear; but there the caſe is, that the defendant took the horſe to graſs at 2s. per week, and was to keep him ſafe, and re-deliver him when required; and ſhewed that he kept it ſo negligently that it was taken away by perſons unknown. Upon demurrer Popham and Fenner held, that the action lay not without alleging a requeſt to re deliver; and likewiſe that the horſe was eloigned, dead, or loſt; but Gawdy and Clench e contra, the action being founded on the negligence, and ſpecial aſſumpſit to keep him ſafe. But all agreed, that without ſuch ſpecial aſſumpſit the action would not lie.

6. If one brings a bag or cheſt of *evidences* or *obligations*, *deeds*, or other ſpecialties, and they are loſt by default of the hoſtler, the hoſtler ſhall anſwer for them. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 5th reſolution in Caley's caſe.

7. An innkeeper is not compellable *to receive the horſe of* any, if his *maſter* is *not lodged there*. 2 Brownl. 254. Per Coke Ch. J. Paſch. 7 Jac.

8. If an hoſtler keeps a *horſe* left with him at livery ſo negligently that he *is taken out of his ſtable, and rid a long journey, and damaged*, an action lies; ſo if he keeps him ſo negligently, that he is *beat or abuſed, or wanted reaſonable provender in his inn*. 6 Mod. 224, 225. Mich. 3 Ann. B. R. per tot. cur. Obiter.

(G) Againſt an Hoſtler. Collateral Matter to *excuſe* the Hoſtler.

[1.] IF an hoſt *refuſes* a gueſt *becauſe his houſe is full* of gueſts, and the *party ſays that he will ſhift among the other gueſts*, and there he is *robbed*, the hoſt ſhall not be charged. 4, 5 Ph. & Ma. Dyer 158. 32.]

Ibid. in the caſe of WHITE v. AN HOSTLER OF TUNBRIDGE.—Bendl. 60. pl. 103. S. C. by the name of BIRD v. BIRD accordingly by all the juſtices of C. B.—And. 29. pl. 69. S. C. accordingly; and by And. and Bendl. it appears that the plaintiff went to a bed in the inn by ſufferance of another perſon, but without the aſſent of the hoſtler or his ſervants.

[2. If an hoſt *tells a gueſt that he muſt go abroad*, and ſo he cannot be attendant to him; and thereupon the gueſt *takes up his lodging there at his peril*, if his goods are ſtole, the hoſt ſhall not be charged. 11 Hen. 4. 45.]

S. P. Br. Action ſur le Caſe, pl. 41. cites S. C. And the hoſtler pleaded that he told the plaintiff that he could not take upon him the charge of the goods, becauſe he muſt go early in the morning to the ſheriff upon a writ of inquiry, &c. and that thereupon the plaintiff aſked him to deliver the key of his chamber and ſtable, which the defendant did accordingly, and went his way, &c. The court agreed that the delivery of the key was nothing to the purpoſe; but per Hill, when the defendant notified that he could not attend, and thereupon the plaintiff took up his lodging there at his peril, the defendant was diſcharged. And per cur. none ſhall be compelled to anſwer as hoſtler but a common hoſtler. And becauſe the plaintiff *had not counted that the defendant was a common hoſtler, nor does it appear of record*, therefore the plaintiff took nothing by his writ. Quod nota. And though the defendant admitted ſuch writ, and counted, yet if the court perceive it they will not permit it, by which judgment was ut ſupra.

[3. If an hoſt *takes in a gueſt, and goes abroad* of his own head *without proceſs of law*, yet he muſt anſwer for the goods of his gueſt, for he ought to have a ſervant to take care of them in his abſence. 11 Hen. 4. 45.]

[4. *So* it ſeems it would be, if he was at another place *by action of law*; for his ſervants ought to have the care in the mean time. Contra 11 H. 4. 45.]

5. Action upon the caſe againſt an hoſtler, becauſe he *carried away his goods* in his hoſtry, which were embezzled by ill people for default of good keeping, &c. and the *defendant ſaid, that he did not deliver the goods to him, and* alſo *that he had the* * *key of his chamber*. Et non allocatur, but judgment for the plaintiff, and *elegit* awarded *of the land, which he had the day of the judgment*, and not the day of the writ; and he prayed *capias ad ſatisfac.* which was denied, as where hue and cry is made; for he did no wrong, *but laches*. Br. Action ſur le Caſe, pl. 15. cites 42 E. 3. 11.

* It is no excuſe for an hoſtler to ſay, that *he delivered to the gueſt the key of the chamber in which the gueſt lodged, and that the gueſt left the door of the chamber open*; for he ought to keep the goods of his gueſts there in ſafety. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 4th reſolution in Caley's caſe. And ſays that with this reſolution agrees 22 H. 6. 21. b. 11 H. 4. 45. a. b. 42 E. 3. 11. a.

6. Where a *man is lodged in a chamber with me by my good will, and not by the hoſtler*, and he robs me, the hoſtler ſhall not be charged. Contra, if he was lodged there by the hoſtler. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21. per tot. cur.

S. P. For it is the gueſt's fault to have ſuch a companion or ſervant.

8 Rep. 33. a. in the 4th reſolution in Caley's caſe, cites S. C.

7. *And if my own ſervant who comes with me robs me in the hoſtery*, the hoſtler ſhall not be charged. Quod nota. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21. per tot. cur.

8. A *clothier came to an inn with a waggon of wool* to lodge there, and at his entry the *hoſtler told him, that, if he would have him to take charge of his waggon, he ſhould draw it into the inner-court, or otherwiſe he would not anſwer for it.* The clothier did not do ſo, and the wool was ſtolen. In action brought againſt the hoſtler, he was diſcharged by this ſpecial matter. Mo. 159. in pl. 299. cited by Periam as adjudged in 7 & 8 Eliz.

S. C. cited 8 Rep. 33. a. in Caley's caſe.

9. In action againſt an hoſtler for goods loſt, he ſaid, in excuſe, that he *bid the plaintiff put his goods in ſuch a chamber, and lock them up there, and then he would warrant them, but not otherwiſe;* but that the gueſt let them lie in an outer-court at large, where they were ſtole. Upon demurrer, the opinion of the court was againſt the plaintiff. D. 266. b. pl. 9. Mich. 9 & 10 Eliz. Saunders v. Spencer.

10. In caſe againſt an hoſtler for goods ſtolen, the defendant *pleaded an agreement between them, that the defendant ſhould not be charged for any goods brought by the gueſt, except ſuch as he delivered to the hoſtler or his wife;* and ſaid, that he did not deliver the goods ſtolen either to him or his wife, and ſo not chargeable. And the court held this a good plea in bar. Mo. 158. pl. 299. Hill. 26 Eliz. Brand v. Glaſſe.

11. If an innkeeper *demands of his gueſt* to tell him *what goods or money he has brought, whereof he ſhall be charged, and the gueſt ſays he has none, or leſs than he really has*, the hoſtler ſhall not be chargeable if the goods are ſtolen; per Anderſon, but Windham and Periam e contra. Mo. 158. pl. 299. Hill. 26 Eliz.

12. Though the gueſt *does not deliver his goods to the hoſtler to keep, nor acquaints him of them*, yet if they are ſtolen, the hoſtler ſhall be charged. 8 Rep. 33. a. Paſch. 26 Eliz. B. R. in the 4th reſolution in Calye's caſe, and ſays, that with this accords 42 E. 3. 11. a.

13. The *not knowing by whom the goods were ſtole* is no excuſe for the hoſtler, but that he ſhall be charged. 8 Rep. 33. a. in Calye's caſe, cites 22 H. 6. 38. 8 R. 2. tit. Hoſtler 7.

(G. 2) Actions againſt an Innkeeper. Writ and Declaration.

1. WRIT of *treſpaſs vi & armis* was maintained againſt an hoſtler for one who loſt his goods in default of his hoſt. Thel. Dig. 114. cap. 24. ſ. 14. cites Mich. 8 R. 2. Hoſtler 7. and ſays, the form of the Regiſter fol. 105. is to ſuppoſe, *quod malefactores quandam cameram in qua*, &c. *in defectu def. vi & armis noctanter fregerunt*, &c.

Br. Count, pl. 81 cites S. C.——

2. In caſe againſt an hoſtler for not ſafely keeping the goods of his gueſt, &c. the *writ may be J. N. yeoman*, or the like, but in

in the *declaration* he *ſhall be* named *common hoſtler;* and otherwiſe the writ does not lie. Br. General Brief, pl. 16. cites 11 H. 4. 45. Br. Office del, &c. pl. 12 & 22. (bis) cites pl. 58. cites

S. C. —— Thel. Dig. 51. lib. 6. cap. 5. ſ. 2. cites S. C. ——— Br. Action ſur le Caſe, 22 H. 6. 21. where the writ was labourer but the count was hoſtler. —— Thel. Dig. 51. lib. 6. cap. 5. ſ. 2. cites 21 H. 6. 24. S. C. that one may have writ againſt one who is a common hoſtler, without naming him hoſtler in the writ. ——— The writ need not mention that the defendant keeps a *common inn*; for the words of the writ in the Regiſter are infra hoſpitium ejuſdem B. but it is to be ſo intended in the writ; for the recital of the writ is, hoſpitatores qui communia hoſpitia tenent, &c. and the one part ought to agree with the other. And the plaintiff ought to count that he holds commune hoſpitium. And ſo the books of 22 H. 6. 21. 11 H 4. 45. a. b. 10 Eliz. D. 266. &c. are well reconciled. 8 Rep. 32. a. b. Paſch. 26 Eliz. B. R. in the 1ſt reſolution in Caley's caſe.

* In caſe for goods ſtolen out of the inn, it was moved after verdict, that it was *not alleged to be in communi hoſpitio.* (Quære if both in the writ and declaration) yet becauſe the declaration laid it as the cuſtom for common inns, and then ſaid that he hoſpitatus in hoſpitio, &c. it was adjudged for the plaintiff; for it ſhall be intended. And it is domus, and not hoſpitium, if it be not commune. Hob. 245. pl. 307. Maſon v. Grafton.

3. If one declares of *goods carried away* out of an inn, he need *not count who carried them away.* Br. Toll, pl. 2. cites 9 H. 6. 45.

4. Treſpaſs upon the caſe againſt W. H. labourer, inaſmuch as according to the law and cuſtom of the realm, an hoſtler who holds common hoſteries ought to keep the goods of them who are lodged in their hoſteries, ſo that no damage ſhall come to them by perſons unknown, and that certain goods, and ſhewed what of the plaintiff's were carried out of the houſe of the defendant by perſons unknown; and the writ was awarded good according to the law and cuſtom of the realm; for the cuſtom of the realm is the common law, and *where it is the common law, there he need not rehearſe the cuſtom. Contra* where it is *private cuſtom*, and not the common law. And the *writ nor the* † *count did not rehearſe that the houſe of the defendant was a common hoſtery*, but they paſſed over, &c. and the writ was, that 100s. of the plaintiff *in hoſpitio defendentis hoſpitati receperunt*, &c. which word *(hoſpitati)* per Aſcu, has relation to the perſon of the plaintiff and not to the goods; for the perſon may be lodged there, and the 100s. in another houſe, where the writ ſhould be 100s. *ipſius quer' ibidem invent' cepit*, &c. and yet the writ was awarded good. Br. Action ſur le Caſe, pl. 58. cites 22 H. 6. 21.

† In the marg. of pl. 16. it is ſaid that the count was hoſtler; but I do not obſerve it ſo here.

5. Plaintiff declared upon the common cuſtom of the realm, that innkeepers *ought to keep the goods of their gueſts, and all other goods brought into their inns ſafely, &c.* After verdict for the plaintiff, it was moved, that there is no ſuch cuſtom that the goods of others ſhould be ſafely kept unleſs they were gueſts; ſed non allocatur; for the cuſtom is ſufficiently alleged to maintain the action. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris. Yelv. 162. S. C. but S. P. does not appear. —Lat. 127. cites S. C. & S. P. and ſays, that ſo is the precedent in Lord Coke's Entries, fol. 345. ita quod damnum non eveniat hoſpitibus nec aliquibus aliis, &c. ——— Poph. 179. cites S. C. and S. P. and ſays it was alſo reſolved that the maſter who brought the action ought to conclude that *pro defectu, &c.* and apply the cuſtom to himſelf as being maſter.

6. If a ſervant be robbed in an inn, the maſter may have an action againſt the common hoſtler, and need *not ſhew that the ſervant was in his journey;* for he may be at the end of it, as at London about his buſineſs. Noy. 79. Trin. 1 Car. B. R. Drope v. Thaire. Poph. 179. S. C. & S. P. —— Lat. 127. S. C. & S. P.

7. And there it is ſaid by Jones and Doderidge J. that *miſrecital of the cuſtom* is not material, becauſe it is the common law. And judgment for the plaintiff. Lat. 127. Trin. 1 Car. B. R. Drope v. Thaire.

8. In caſe by a carrier for goods loſt out of an inn, the count was of *certain packs full of linen cloth and other goods*. After verdict it was moved, that it did not appear what ſort of cloth it was, nor of what value, and ſo uncertain. But Roll Ch. J. held the declaration good enough, eſpecially after a verdict. Sty. 370. Paſch. 1653. Herbert v. Lane.

9. An innkeeper was *indicted for not receiving one taken ill with the ſmall-pox*, and it was quaſhed for *not ſaying he was a traveller*. 12 Mod. 445. Hill. 12 W. 3. the King v. Luellin.

1 Salk. 404. pl. 1. S. C. but S. P. does not appear.——6 Mod. 224. S. C. but S. P. does not appear.

10. In caſe againſt an innkeeper for damaging a *horſe left* with him *at livery*, it *need not be ſhewn* in the declaration *that the defendant agreed to maintain and keep the horſe for a præmium*; for ſince it appears by the declaration, that the horſe was delivered to the defendant himſelf to be kept, &c. for a reaſonable price to be paid to him by the plaintiff, one cannot intend but that the defendant agreed to it. 2 Ld. Raym. 796. Mich. 1 Ann. Stanian v. Davis.

[232] (G. 3) Plea by Hoſtler in Actions. Good or not.

1. THE *eſcheator* of North. *brought action* upon the caſe *for the king and for himſelf*, that whereas he was travelling towards London in the king's buſineſs, he came to H. and *was lodged in the houſe of W. who delivered him a chamber* to put in his ſtuff, and put in ſo much, &c. and ſhewed what, which was carried away wrongfully, and to the damage of 20 l. and W. came and *ſaid, that not damnified by his default*; and no plea, becauſe it was not denied but that the defendant is a common hoſtler, and that the plaintiff was lodged with him, during which time he ought to be protected by the hoſtler, by which the plaintiff recovered his principal, and 40s. damages by award, which ſeems to be coſts, becauſe he anſwered for himſelf, his ſervants, his chambers, and his ſtables; and the *plaintiff prayed capias ad ſatisfaciend'* becauſe the defendant came by capias. Per Kniveț, you ſhall not have it, for he *is not charged of his own act, but by the law*; by which they *prayed elegit of the land which he had when he firſt came in to anſwer*, which was the other term, and could not have it, but day of the plea pleaded. Br. Action ſur le Caſe, pl. 86. cites 42 Aſſ. 17.

2. Treſpaſs againſt an hoſtler by cuſtom of the realm, where he counted *that his ſervant was lodged there, and* 3 *of the horſes of the plaintiff were ſtole*, &c. The defendant pleaded, *that he was not a common hoſtler, nor the ſervant of the plaintiff was not lodged there, but by prayer*. Priſt, and the other e contra. Br. Action ſur le Caſe, pl. 28. cites 2 H. 4. 7.

3. Treſpaſs

3. Treſpaſs upon the caſe againſt an hoſtler, for goods of the plaintiff taken out of the hoſtery, who *ſaid, that he delivered the key of the chamber to the plaintiff, and he brought A. B. and C. D. with him, who carried away the goods.* The *plaintiff ſaid, that the ſaid A. B. and C. D. whom he brought into the chamber, did not carry away*, &c. Per Newton, this is negative pregnant, viz. that *they did not take the goods, and* another, *that he did not bring them into the chamber;* therefore ſhall ſay, that he did not bring them [into the chamber], &c. or that they did not carry away his goods. Quod nota. Br. Negativa, pl. 22. cites 22 H. 6. 21. Br. Action ſur le Caſe, pl. 58. cites S. C.

4. *And* it is ſaid there, that *to ſay that the goods were not carried away in default of the defendant*, is a good plea. Br. Negativa, pl. 22. cites 22 H. 6. 21. Br. Action ſur le Caſe, pl. 58. cites S. C.

5. Treſpaſs upon the caſe againſt a common hoſtler, and counted accordingly. The *defendant ſaid, that they were not taken in default of him nor of his ſervants;* and it was held negative *pregnant*, by which he *ſaid, that the plaintiff himſelf lodged a perſon unknown with him in his chamber in the hoſtery, who carried away the goods; abſque hoc that they were carried away in default of him or his ſervants;* and yet held *pregnant*, by which he waved it, and *ſaid that the goods were not carried away out of his houſe modo & forma, prout*, &c. & ſic ad patriam. Br. Negativa, pl. 24. cites 22 H. 6. 38. S. P. Br. Action ſur le Caſe, pl. 59. cites S. C.

(G. 4.) Againſt an Hoſtler. Judgment, &c. [233]

1. IN *treſpaſs* upon the caſe againſt an hoſtler, for ill keeping of the goods in his hoſtery, the plaintiff recovered, and prayed ca. ſa. and was denied; for it *is not a tort* in the defendant, *but lackes*. Br. Execution, pl. 16. cites 42 E. 3. 11. Br. Exigent, pl. 12. cites S. C. —— S. P. becauſe *he is not charged by a tortious act, but* by his *negligence and by the law*. Ibid. pl. 127. cites S. C. —— S. P. Ibid. pl. 87. per Knivet, cites 42 Aſſ. 47. —— Br. Elegit, pl. 17. cites S. C.

2. In caſe againſt an inn-keeper for goods loſt, the plaintiff had judgment; and it was aſſigned for error that the judgment ought to have been quod capiatur, and not *in miſericordia*, according to the precedents Hill. 9 H. 7. Rot. 310. the old Book of Entries 377. which is a capias; for this action comprizes in itſelf a contempt contra legem, &c. Sed non allocatur; for it is not ſuch contempt for which the king ſhall have a fine, as it is in actions which are contra pacem. Cro. J. 224. pl. 4. Trin. 7 Jac. B. R. Beedle v. Morris. Yelv. 162. S. C. but S. P. does not appear.

(G. 5) Remedy for Hoſtler againſt his Gueſt.

1. A Man was arraigned of felony, and it was found that he was a lodger in the houſe of J. N. and went to his bed, and *aroſe in the night, and took a carpet and two ſheets out of the* A gueſt may be guilty of *felony* by

taking away goods; for it is the inn-keeper's poſſeſſion, and the party hath the bare uſe of them.

chamber, and put them *into the hall to the intent to ſteal them,* and went to the ſtable to inquire for his horſe, and the hoſtler took him, and it was adjudged felony. Br. Corone, pl. 107. cites 27 Aſſ. 39.

Arg. Show. 54. cites 27 Aſſiſe, pl. 34.——1 Salk. 388. S. P. in pl. 1.

2. Though an inn-keeper in London may, after long keeping, have the *horſe appraiſed* and ſell him, yet when he has in ſuch caſe had him appraiſed, *he cannot juſtify the taking him to himſelf at the price he was appraiſed at.* Barnard. Rep. in B. R. 301. ſays it was ſo held by the judge at Lent aſſiſes, Hill. 3 Geo. 2. 1729.

See tit. Inn and Inn-keepers (B)

(H) For keeping a Dog accuſtomed to bite. [And how the Action ſhall be brought.]

*[234] And it is no plea that the defendant did not know that he uſed to bite, but he ſhall anſwer that he did not bite the ſheep, or that it was not his dog. Quare inde. Br. Action ſur le Caſe, pl. 11. cites 28 H. 6. 7. Br. Negative, pl. 3. cites S. C.——Br. Traverſe per, &c. pl. 20. cites S. C.——Cro. C. 487. pl. 12. Mich. 13 Car. B. R. Kinion v. Davis, S. P. and ſeems to be S. C. but ſays that upon reading the declaration all the court held (abſente Brampſton) that it was not good; whereupon rule was given that the judgment be reverſed niſi, &c.——In caſe the count was that the *defendant a certain bitch accuſtomed to bite men, did knowingly retain and keep, &c.* it was held by all the court, that the *knowingly* ought to be referred to the biting, or elſe it would be ſurpluſage and idle; for one cannot be ſaid to have a dog or bitch if he does not know it, and the (knowingly) here is not traverſable. And by all the court judgment was given for the plaintiff; and they thought the caſe of 28 H. 6. 7. is expreſs in the point, and the record of the caſe of Cockeram and Davis was produced in court, expreſs in the point that judgment ſhould be for the plaintiff; and that as to the caſe in Cro. C. of Kinion v. Davis, they ſaid it was not upon any debate, and the rule for judgment was niſi; and that it was the plaintiff's negligence not to make any defence in ſo good a cauſe. 2 Sid. 127. Hill. 1658. B. R. Cropper v. Matthews.

[1. IT is a good writ and declaration to ſay *quod defendens quendam canem ad mordendum oves conſuetum ſcienter retinuit,* without ſaying, *quod retinuit quendam canem ſciens canem prædictum ad mordendum oves conſuetum;* for this is tantamount; for the word *ſcienter* goes to all the precedent matter, and the Regiſter 111. is * accordingly, and the old Book of Entries, Treſpaſs du Chien 2. and this is the conſtant courſe of B. and within a year laſt paſt adjudged good there, as was remembered by Juſtice Mallet. Mich. 17 Car. B. R. between COCKERAM AND DAVIES. Adjudged per curiam, this being moved in arreſt of judgment, Intratur Trin. 16 Car. Rot. And the court ſaid that the †*ſciens is not traverſable, but ought to be proved in evidence;* and ſo in this caſe, otherwiſe the action does not lie.]

† S. P. For it is no direct allegation, but muſt be proved in evidence on the general iſſue; per cur. 4 Rep. 18. b. in pl. 14. Arg. [And ſee there (d) many caſes referred to in the margin.]

2. If my dog kills your ſheep, and I *freſhly after tender you the dog,* you are without remedy. F. N. B. 89. (B) in the new notes there (b) cites 7 E. 3. Barr 290.

And in action on the caſe for ſuch killing,

3. If a man has a dog that *kills ſheep,* the *maſter* of the dog *being ignorant of ſuch quality,* the maſter ſhall not be puniſhed for this killing; but if he has notice of ſuch quality, it is otherwiſe.

D. 25. b. pl. 162. per Fitzherbert & Shelly J. Agreed Hill. 28 H. 8. Anon. the plaintiff was compelled by Anderſon Ch. J. to *prove in evidence that the dog had uſed to kill ſheep*. Ibid. marg. cites 24 Eliz. Dogge v. Cook. ——— Ibid. marg. cites Ex Libro Magiſtri Noy a caſe, Paſch. 19 E. 3. B. R. Rot. 10. Cronet v. Morgan, S. P.

Note, to maintain action for the biting of defendant's dog, it muſt be proved that he *knew his dog* to be *uſed to bite*; but one inſtance is ſufficient in that caſe. 12 Mod. 555. Trin. 13 W. 3. Anon.

4. If a man's dog *runs at ſheep and kills them*, and it is not with his conſent, there no action will lie; but otherwiſe if *with his conſent*. Het. 171. Trin. 7 Car. C. B. Baker v. Webberley.

5. Action upon the caſe, for that he kept a maſtiff, *ſciens that he was aſſuetus ad mordendum porcos*, which maſtiff *bit the plaintiff's ſow great with pig, ſo as ſhe died* of the biting. It was ſaid, the declaration was not good, for that ad mordendum porcos aſſuetus is not good; for it is proper for a dog only to hunt, and not to kill ſwine. Reſolved, the action did well lie; for it is not lawful to keep dogs to bite and kill ſwine. Adjudged for the plaintiff. Cro. C. 254. pl. 5. Paſch. 8 Car. B. R. Boulton v. Banks. S. C. cited Arg. Lord Raym. Rep. 607.

6. If one *keeps a dog accuſtomed to bite ſheep*, &c. and he *knows it*, and notwithſtanding he keeps the dog ſtill, and *afterwards the dog bites a horſe*, this ſhall be actionable, notwithſtanding that the *precedents are all of the ſame ſpecies*; becauſe the owner, after notice of the firſt miſchief, ought to have deſtroyed or hindered him from doing any more hurt; per Powell J. Ld. Raym. Rep. 110. Mich. 8 W. 3. Arg. in caſe of Jenkins v. Turner.

† [235]

7. In caſe the count was, that the defendant *quendam canem moloſſum** [Anglice, a mongrel maſtiff] *valde ferocem, and did let him go unmuzzled in the publick ſtreet, &c. ſo that pro defectu curæ of the defendant, the plaintiff was bit* and worried as he was peaceably going about his † buſineſs in ſuch a ſtreet. And another count was, that defendant *knew the dog ad mordendum aſſuetus*. The defendant demurred to the firſt count, and pleaded not guilty to the 2d. Gould J. thought, that this being a mongrel, and laid to be valde ferox, this muſt be an innate and not an accidental fierceneſs, and to maintain this iſſue, they muſt give a natural fierceneſs in evidence. Holt Ch. J. held, that if it had been *ſaid, that the defendant knew the dog to be ferox*, he ſhould think it well enough; that the law takes notice that a dog is not of a fierce nature, but rather the contrary; and the preſumption is againſt the plaintiff, it not being imaginable that a man would keep a fierce dog in his family wittingly. And judgment for the defendant by Holt and Turton, Gould mutante opinionem ſuam. 12 Mod. 332. Mich. 11 W. 3. Maſon v. Keeling.

*Ld. Raym. Rep. 606. Mich. 12 W. 3. S. C. but nothing mentioned of ſuch 2d count; and Holt Ch. J. and Turton J. held the declaration ill, for want of ſhewing that defendant knew the dog was fierce; for there is great *difference between horſes and oxen*, in which a man has a valuable property, and which are not ſo familiar to mankind, *and dogs*; the owner ought to confine the former, and take all reaſonable caution that they do no miſchief, otherwiſe an action lies againſt him; but otherwiſe it is of dogs, before he has notice of ſome miſchievous quality. But Gould J. thought the declaration good, becauſe the averring the dog was fierce made the owner liable. But adjornatur; and afterwards the parties agreed, and no judgment was given.

8. If A. *has a dog uſed to bite, &c.* and he knows it, *and he gives it to B. who is conuſant of this quality*, if the dog bites, an action will

will lie againſt B. otherwiſe if B. had not been conuſant of this quality; per Holt Ch. J. Ld. Raym. Rep. 608. Mich. 12 W. 3. Arg. in the caſe of Maſon v. Keeling.

(H. 2) Actions for Miſchief by Beaſts, or other Creatures. And who ſhall anſwer the ſame.

1. IF a man has an unruly *horſe* in his ſtable, and leaves open the ſtable-door, whereby the horſe gets forth and does miſchief, an action lies againſt the maſter; per Wild J. Vent. 295. Trin. 28 Car. 2. B. R.

2. If one has kept a *tame fox*, which gets looſe and grows wild, he that kept him before, ſhall not anſwer for the damage he doth after he hath loſt him, and he hath reſumed his wild nature; per Twiſden J. Vent. 295. in caſe of Mitchel v. Alleſtree.

3. Treſpaſs quare vi & armis clauſum fregit, & equum ſuum cuſtodivit tam negligenter ut *equus fregit clauſum & momordit equas querentis*, per quod they were ſpoiled and died. Verdict pro querente, and judgment was ſtaid becauſe he did *not ſay ſcienter* cuſtodivit equum. Freem. Rep. 534. pl. 722. Paſch. 1681. C. B. Sketchet v. Eltham.

4. The plaintiff declared that the defendant kept a *bull* that *uſed to run at men*; but did *not ſay ſciens or ſcienter*, &c. This was held naught after a verdict; for the action lies not, unleſs the maſter knows of this quality; and he cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration. 2 Salk. 662. pl. 1. Paſch. 8 W. 3. C. B. Buxendin v. Sharp.

3 Salk. 12. S. C.—— S. C. cited Arg. Ld. Raym. Rep. 109. & ibid. 110. by Powell J. accordingly. —Lutw. 90. Bayntine v. Sharp, S. C. held accordingly, and ſo judgment was arreſted.

* [236]

5. The plaintiff declared that the defendant kept a *boar ad mordend' animalia conſuet', and knew of this habit*, and that the boar did bite, &c. * This was held good after verdict, though it was objected, that theſe animals may be frogs or mice, &c. For we muſt intend there was proof of biting ſuch animals as will ſupport the action, otherwiſe the judge and jury would not have concurred in this verdict, whereby the plaintiff recovers damages; and as to another objection, viz. that the defendant cannot know what animals he is to defend againſt, it was anſwered, that no evidence can be given of killing any animals but what he has knowledge of. 2 Salk. 662. pl. 2. Mich. 8 W. 3. C. B. Jenkins v. Turner.

3 Salk. 13. S. C. accordingly. Ld. Raym. Rep. 109. S. C. the action was for biting a mare of the plaintiff's, of which bite ſhe died; and judgment was given for the plaintiff.

Powel J. ſaid the fact was that the boar had bit a child before, of which the defendant had notice, and afterwards bit the plaintiff's mare, and that it ſeems the plaintiff ſhould have ſhewn particularly what miſchief the boar had done before, and that upon a demurrer it would have been ill for want thereof; but this now is aided by verdict. At the end of this report it is ſaid, note, though this caſe was ſeveral times argued, yet Treby Ch. J. did not give his opinion, the judgment being given by Powel J. in his abſence.—— 12 Mod. 335. Mich. 11 W. 3. Holt Ch. J. ſaid he did not doubt, but if it were generally laid that the *dog was uſed to bite animalia, and the defendant knew it*, it will be enough to charge him

him for biting ſheep, &c. And by animalia ſhall not be intended frogs or mice, but ſuch in which the plaintiff has property.

6. There is a *difference* between beaſts that are *feræ naturæ*, as lions and tygers, which a man muſt always keep up at his peril, and beaſts that are *manſuetæ naturæ*, and break through the tameneſs of their nature, ſuch as oxen and horſes: in the latter caſe an action lies, if the owner has had notice of the quality of the beaſt: but in the former caſe an action lies without ſuch notice. 2 Ld. Raym. 1583. Per Ld. Ch. J. Mich. 4 Geo. 2. B. R. in delivering the opinion of the court.

(I) Upon a * Trover and Converſion. Who ſhall have a Trover and Converſion.

See Executors (Q)

* There is a *trover in fact, and a* trover *in law*. When the goods (‡) Fol. 5. are bailed over, this is a trover in law; but when one has goods per inventionem, this is a trover in fact; per Coke Ch. J. 2 Bulſt. 313. Hill. 12 Jac. Arg.

[1. IF a † *common carrier* has goods delivered to him to carry to a certain place, and a ſtranger takes them out of his poſſeſſion, and converts them to his own uſe, an action of trover and converſion lies for the carrier (‡) againſt him; for he had a ſpecial property in the goods, and is to make ſatisfaction for them to the owner. Trin. 15 Car. at Guildhall, upon evidence in ſuch action ruled per Brampt. Ch. J. between § GOODWIN AND RICHARDSON, upon a trial there, upon not guilty pleaded.]

† He may have *trover or treſpaſs* at his election; per cur. Mod. 31. in pl. 75. Mich. 21 & 22 Car. 2. B. R. Arg.

§ S. C. cited Lev. 282.

2. If a *feme covert bails goods to a man, and after ſhe takes him to baron*, and he dies, the feme ſhall not have action of bailment; for the bailment was diſcharged by the intermarriage; but ſhe may declare upon a trover. Quod nota. Per Fineux. Br. Bailment, pl. 6. cites 21 H. 7. 29.

3. A. *ſold* 100 *load of wood to B. to be taken of his trees at the aſſignment of A.* Afterwards *A. ſells to C.* 100 *load, to be taken at his pleaſure.* B. aſſigns his intereſt to D. The *vender aſſigns trees, C. takes them away*, and D. recovered in an action of trover. Noy 32. Baſſet v. Baynard. Cro. E. 819. BASSET v. MAYNARD, Paſch. 43 Eliz. B. R. pl. 3. S. C. adjudged accordingly. —— Mo. 691. pl. 955. Maynard v. Baſſet, S. C. adjudged accordingly in B. R. ‖ and affirmed in the exchequer chamber. —— 5 Rep. 24. b. Sir Tho. Palmer's S. C. adjudged in B. R. accordingly.

‖ [237]

4. A *ſheriff took goods in execution, and the defendant took them away* from him, he may have trover for them. See tit. Sheriff (Y) pl. 2.

5. Where *goods* are *bailed to A. to deliver over to B.* if *A.* afterwards *refuſes to deliver them* over, and converts them to his own uſe, he is liable to an action of trover not only by him who firſt delivered them, but alſo by him to whom they were to be delivered; for though he never had the poſſeſſion of the goods, yet the

the converſion of them is a wrong done to him; and therefore an action of trover brought by him is well brought; per cur. and judgment accordingly. Bulſt. Mich. 8 Jac. Flewellin v. Rave.

6. If a *leſſee of a manor ſeiſes a heriot without right* to it, and the *lord of the manor* brings trover and converſion for it, yet if *the property does not appertain to the lord*, he cannot maintain the action; for the defendant had the *firſt poſſeſſion*. Winch 46. 57. Glouceſter (Biſhop) v. Wood.

7. A. *lord of a manor made a leaſe to P. of all coal-mines open, or to be found* in his ſaid manor *for* 99 *years* rendering rent, and died. B. his ſon and *heir entered upon a copyhold held by J. N. for life, and there opened a new pit*, and digged coals, and converted them to his own uſe; whereupon P. brought trover; and per cur. neither P. nor the leſſee of the coal-mines, nor both together, could enter on the copyhold during the life of the copyholder, without being treſpaſſers; but *when once the coals are digged*, be it by whom it will, *they belong to the leſſee* of the coal-mines, and he may have an action of trover for them. Jo. 243. Trin. 7 Car. B. R. Player v. Roberts.

See 4 Rep. 62, &c. Herlakenden's caſe.

8. A. was *tenant for life, without impeachment of waſte, excepting voluntary* waſte, the *reverſion to B.*—*B. ſold timber-trees* growing on the land to W. *A. cut them* down, *and ſold them* to S. Whether W. the bargainee of B. can have trover againſt the vendee of A. who was ſtill living, was the queſtion. It was argued, he could not; for though B. the reverſioner had a general property in them, yet he has no authority to ſell during the life of A. the tenant for life; and, if ſo, his bargainee has no intereſt to maintain trover. Cro. Car. 274. pl. 11. Mich. 8 Car. B. R. Waller v. Sands.

Poſſeſſion without property is good cauſe to maintain

9. *Mere poſſeſſion* ſuffices to maintain trover; per cur. Het. 167. Paſch. 7 Car. C. B. in caſe of Green v. Brooker and Greenſtead.

an action in general, viz. treſpaſs, but not trover; for many pleas will ſerve in treſpaſs which will not ſerve in trover; per Dodderidge J. 2 Bulſt. 135. Mich. 11 Jac. — *Executor* may bring trover without an actual poſſeſſion, and that by reaſon of the property. See Lat. 214. Mich. 30 Car. Hudſon v. Hudſon.

S. P. accordingly by Twiſden J. 2 Keb. 589. in pl. 5.

10. The *commiſſioners of bankrupts* may have action of trover, if they did actually ſeiſe any goods of the bankrupt, as they might by law; per Twiſden J. Mod. 31. Hill. 21 & 22 Car. 2. Arg.

Trover by the *aſſignee of commiſſioners of bankrupts* againſt the defendant,

11. Trover *by aſſignees of commiſſioners of bankrupts*; but afterwards the plaintiff was nonſuited, becauſe he could not prove that the party was a bankrupt before an execution executed at the ſuit of another for thoſe goods. 2 Lev. 113. Mich. 26 Car. 2. B. R. Nelthorp v. Dorrington.

who pretends to have ſeiſed the goods for rent. Before Holt Ch. J. at the ſitting in Middleſex. Comb. 453. Trin. 9 W. 3. B. R. Meggot v. Watſon. ——— Note, the commiſſion muſt be ſhewed, and the aſſignee muſt prove an act of bankruptcy as well as the aſſignment by the commiſſioners; and prima facie it ſhall be intended that the aſſignment was executed at the time it bears date. Comb. 453. ut ſupra.

12. *Three jointenants* were *of goods, two of them brought trover;* and, becauſe the defendant *pleaded not guilty*, recovered damages for two parts; but the defendant might have pleaded in abatement of the writ for ſo much. 2 Lev. 113. Mich. 26 Car. 2. B. R. Nelthorp v. Dorrington.

13. *One part-owner of a ſhip* may have trover for the whole ſhip. Per Holt Ch. J. Comb. 367. ſaid, it was ſo adjudged in lord Hale's time, upon a writ of error of a judgment at Cheſter, which was reverſed, and a new judgment given for the plaintiff for that very reaſon. And in the principal caſe trover being brought by the ſurviving part-owner for a ſhip which had been ſeiſed by order of king Charles 2. Holt Ch. J. ſaid, the order was illegal, and the ſubject muſt take care how he executes it at his peril. And the jury found for the plaintiff, and gave him above 2600l. damages. Paſch. 8 W. 3. B. R. Dockwray v. Dickenſon.

14. *A. finds goods* of B. and refuſes to deliver them to him, his remedy is trover; and if *C. happens to get them*, A. may maintain trover againſt him, but he ſhall have but one ſatisfaction; but after A. has recovered againſt C. B. may maintain trover againſt A. Per Holt Ch. J. 12 Mod. 602. Anon.

(K) [*Trover and Converſion.*] For what Things it lies.

[1. TRover and converſion lies *of money*, though it is *not in a bag*, becauſe the thing itſelf is not to be recovered, but damages for it. Mich. 3 Jac. B. R. ſaid to have been often adjudged. Mich. 12 Jac. B. R. ISAAC AND CLERK, Hill. 13 Jac. B. R. between * WOOD AND DR. SUTCLIFF adjudged, and admitted upon a writ of error. Hill. 9 Jac. B. Per curiam. Trin. 17 Jac. between SIR THOMAS TEMPLE AND SIMS, for 100l. of money numbered in a bag.]

* Godb. 210. pl. 299. Mich. 11 Jac. CLARK's caſe, S. C. and S. P. agreed therein.—See Roll. Rep. 59. pl. 1. and 126. pl. 9. S. C.—2 Bulſt. 306. S. C.——Mo. 841. pl. 1136. S. C. where the count was of money in a bag; but in arguing the caſe it was ſaid Roll. Rep. 59. that monies in or out of a bag are all one, and that trover and converſion will lie for money out of a bag, quod fuit conceſſum; per Haughton & Coke, who ſaid that it is common experience.

Roll. Rep. 293. pl. 8. S. C. & S. P. admitted.——3 Bulſt. 150. S. C. & S. P. ſeems to be admitted.—Cro. J. 430. pl. 12. S. C. but S. P. does not appear.—— Ow. 131. HALL v. WOOD, S. P. not adjudged, but ſaid by Warburton, that if the money were loſt in the view of a 3d perſon, upon ſuch trover the action will lie, becauſe there it may be proved that it was the plaintiff's money, and Walmſley agreed.——Cro. E. 841. pl. 19. Trin. 43 Eliz. B. R. Hall v. Dean & Wood, S. C. adjudged for the plaintiff.——S. P. Roll. Rep. 132. cites Paſch. 24 Eliz. in the exchequer. Wilkins's caſe.—S. P. held accordingly, Cro. E. 818, 819. pl. 12. Paſch. 43 Eliz. B. R. Draycot v. Piot.——Cro. E. 870. pl. 6. S. P. agreed.——It was ruled by Roll Ch. J. that trover lies for money delivered by the plaintiff himſelf to the defendant to keep, though not in bags; both which points he ſaid had been doubted and reſolved. All. 91. Mich. 24 Car. B. R. Davis v. Dyos.—— Error of a judgment in trover for 190l. in pecuniis numeratis, was aſſigned that trover would not lie for *money out of bags*; but all the juſtices and barons agreed, that it being found by a jury that he converted the plaintiff's money, the plaintiff had good cauſe of action, and affirmed the judgment; and ſaid it lies as well out of a bag as of corn, which cannot be known. Cro. C. 89. pl. 11. Mich. 3 Car. C. B. Kinaſton v. Moore.

See tit. Maſter and Servant, (M. 2) pl. 4. Holyday v. Hix.——See tit. Money, (B) pl. 3. S. C.

[2. [So]

[2. [So] Trover and converſion lies *of* 40*l. of money numbered in a box, without ſaying that the box was ſealed or locked,* as the uſe is in replevin. Hill. 15 Car. B. R. between WESTBURY AND WAKEFIELD, adjudged in a writ of error upon a judgment in Briſtol, and the firſt judgment affirmed accordingly. Intr. Tr. 15 Car. Rot. 501.]

Contra by 3 judges, Cro. E. 723. pl. 54. Mich. 41 & 42 Eliz. C. B. Watſon v. Smith.——But S. P. admitted that the action lies. Cro. J. 637. pl. 7. Paſch. 20 Jac. B. R. Upchard v. Tatam.——S. P. admitted accordingly. Cro. C. 262. pl. 8. Trin. 8 Car. B. R. Wilſon v. Chambers.——Goldſb. 89, 90. pl. 19. Paſch. 30 Eliz. S. P. admitted accordingly.——See 2 Bulſt. 313. Per Coke Ch. J. Arg.——Trover *de ſcripto ſuo obligatorio per quod obligatus fuit cuidam J. S.* and held good on motion in arreſt of judgment; for it might be given to the plaintiff, and it ſhall be ſo intended, and then it was ſcriptum ſuum; and there is no abſurdity, though it was made by him to another, this being a deſcription only of the deed. 2 Salk. 654. pl. 1. Mich. 9 W. 3. C. B. Arnold v. Jeffreyſon.——Ld. Raym. Rep. 275. S. C. accordingly, and that any ſtranger may maintain trover for a bond upon a ſpecial property by bailment, as well as the obligee himſelf.

*[3. Trover and converſion lies *of an obligation.* P. 14 Car. B. R. between SIDDOWNE AND MILLER. Adjudged per curiam in a writ of error.]

Cro. C. 545. pl. 10. S. C. Jones and Berkley inclined that the declaration was not good; but Jones J. conceived it good enough, becauſe it is aided by the allegation that he was poſſeſſed of it ut de bonis propriis, and that the defendant knowing it to be his hawk converted her, &c. and that it differed from Sir RICHARD FINES's caſe, in D. 306. cited; for there, though the exception was taken to the count that it was expreſsly alleged that the hawk was reclaimed, yet it does not appear but that the count there was held good enough; but becauſe the defendant's plea in that caſe was held good, it was adjudged againſt the plaintiff, not for the inſufficiency of the count, but upon demurrer upon the plea in bar, which was held ſufficient. Afterwards the principal caſe was moved again, but the court being always divided in opinion, the plaintiff for expedition conſented that judgment be entered againſt him, and brought a new action.——Mar. 12. pl. 32. S. C. ſays that all the juſtices, except the Ch. J. who was abſent, did agree very ſtrongly that judgment ſhould be ſtaid, and ſo it was.——Cro. C. 19. pl. 11. Mich. 1 Car. C. B. the caſe of Fines v. Spencer was cited per cur. and diſtinguiſhed that caſe, being a trover and converſion from an action of treſpaſs for ſtriking and killing his hawk, which laſt he only can have who has the poſſeſſion; whereas the former lies not but of a hawk reclaimed, and which may be known by her varvels, bells, or ſome other mark, whereby notice can be taken of her owner.
3 Lev. 336. cites the caſe of Liſter v. Home.

[4. No trover and converſion lies *of a hawk,* without *alleging it to be reclaimed,* becauſe it is *feræ naturæ,* whereof he had no property. Tr. 15 Car. B. R. between Sir MARTIN LISTER AND HONE, per curiam agreed; but the court doubted whether it was not *good after a verdict* for the plaintiff, by which it was found, that he was poſſeſſed of it as of his proper goods, as is alleged in the declaration; and note, this was a ramage-hawk, and it is alleged, that he loſt it out of his poſſeſſion, and ſo the property gone.]

[5. Trover and converſion lies *of a ſpaniel-dog;* for he is reclaimed. Between PELLS AND LEMAN, adjudged in B. upon a demurrer. See Hob. Rep. caſe 363. between PELLES AND LEMAN, and a writ of error brought in B. R. where no opinion was given in it; but it was reverſed for another reaſon, viz. for want of an original. Intr. Tr. 14 Car. B. R. Rot. 217.]

6. A wager was laid about the quantity of yards in a velvet cloak, and the ſtakes were depoſited in the hands of J. S. The winner brought trover againſt J. S. for the money, and judgment niſi for the plaintiff. Cro. E. 870. pl. 6. Hill. 44 Eliz. B. R. Ledeſham v. Lubram.

7. The

7. The *feme loſt* 40*l.* *of her huſband's money at cards*; the baron ſhall recover this again in an action of trover againſt the gameſter. Sid. 122. cites it as adjudged Trin. 6 Jac. Rot. 1717. Rey v. Stephens.

8. It lies for *a parrot*, becauſe it is merchandize, and valuable. Cro. J. 262. Mich. 8 Jac. B. R. in pl. 25.

9. It lies for 100 *muſk-cats*, and 60 *monkeys*, though not ſhewn that they were tame, or reclaimed, for they are merchandize, and valuable. And adjudged for the plaintiff. Cro. J. 262. pl. 25. Mich. 8 Jac. B. R. Grymes v. Shack. Bulſt. 95. S. C. accordingly. S. C. cited 3 Lev. 336.

10. It lies *pro uno fulcro lecti*, for that may be underſtood of all the furniture of a bed. 10 Rep. 130. Mich. 11 Jac. B. R. Oſborn's caſe. Jenk. 270. pl. 87. —— S. C. cited Arg. Hard. 41.

11. In trover and converſion of a *wine licence*, it was objected, that a *record* cannot be converted. Sed non allocatur; for the *words letters patent here ſignify the exemplification* of them under the broad ſeal; and ſo it is intended in common parlance. Hard. 111. pl. 3. Paſch. 1658. in the exchequer, Jones v. Winkworth. [240]

12. Trover lies *for an eſtray without an actual ſeiſure*; per Twiſden J. 2 Keb. 589. in pl. 5. Hill. 21 & 22 Car. 2.

13. Trover will lie *for a negro*; for they are bought and ſold as merchandize; and judgment niſi, &c. 2 Lev. 201. Trin. 29 Car. 2. B. R. Butts v. Penny. 3 Keb. 785. 35. S. C. ſays it was in trover for ten negroes and a half, and judgment for the plaintiff, niſi, &c. —— Freem. Rep. 452. pl. 616. Trin. 1677. Anon. ſeems to be S. C. and ſays it was held per cur. that though by the law with us, a man cannot have an abſolute property in the body of another, yet the *cuſtom of India concerning buying and ſelling being found*, a trover and converſion would lie well enough. — Ld. Raym. Rep. 147. cites it as adjudged that trover will lie for a negroe boy, Hill. 5 W. & M. Gelly v. Cleve. —— 3 Lev. 336, 337. Arg. ſays it has been adjudged accordingly. —— And 5 Mod. 187. Arg. cites it accordingly. —— But by Holt Ch. J. contra. Ld. Raym. Rep. 147. Hill. 8 & 9 W. 3. in caſe of Chamberlain v. Harvey, Arg. —— It does not lie. 2 Salk. 666. pl. 2. Mich. 4 Ann. B. R. Smith v. Gould. —— See tit. Negroe (A).

18. If *goods* are *condemned, and proclaimed by the court as forfeited*, the property is altered ſo as no action of treſpaſs or trover will lie by the proprietor againſt the perſon that ſeiſes them. Raym. 336. Mich. 31 Car. 2. in the exchequer. Ekins v. Smith.

19. As an encouragement to the building *of ſhips*, being of that univerſal advantage to the publick in point of trade and commerce, to contrive and veſt the owners property in them, both by the common laws of this realm, and the maritime laws, it is provided that in caſe a ſhip be taken away, or the owners diſpoſſeſt, they may maintain an action of *trover and converſion for* an 8th, a 16th, or any other *part* or ſhare of the ſame. 2 Molloy 220. cap. 1.

20. If a *ſhip* be *taken away*, or the owners diſpoſſeſt, they may maintain an action of trover and converſion for an *eighth or ſixteenth part* of the ſame, as well by the common laws of this kingdom as the law marine, and they *need not join with the reſt* of their owners. 2 Molloy 226. cap. 1.

21. It was ruled at a trial at niſi prius by Holt Ch. J. Paſch. 6 W. & M. that where *A. purchaſed the intereſt of a leaſe for years*, and

and the *writings were left in the hands of B. an attorney, to draw an aſſignment* of it; *B. drew it, and it was ſealed*, but *B. refuſed to deliver it until A. paid for it*, upon which A. brought trover againſt B. for the deed. That the action well lay, becauſe B. might have an action for what he deſerved, but he cannot detain for it. Lord Raym. Rep. 738. Anon.

22. Trover was brought of 500 *pieces of ends of deal boards*. It was objected that this was of uncertain ſignification; but per Powel, this being a particular term of art among the houſe and ſhop-joiners, and generally underſtood by workmen, is a proper denomination for all ſhort pieces; and adjudged good. 11 Mod. 66. pl. 6. Mich. 4 Ann. B. R. Knight v. Barker.

23. Trover was brought for *S. S. Stock* transferred to the defendant by one that perſonated the plaintiff, and the Ch. J. directed the jury to find for the plaintiff. 8 Mod. 9. Mich. 7 Geo. 1. at niſi prius in C. B. Monk v. Graham.

24. In trover *for a certain quantity of barley*, it appeared upon the plaintiff's own evidence, that the barley was *delivered* by the plaintiff to the defendant *to be made into malt*; upon which judge Page declared that trover would not lie for the barley, becauſe it was delivered for another purpoſe, viz. to be made into malt; and that it would not lie for the malt, becauſe it did not appear that
[241] any tender was made of the money due for making the barley into malt. Accordingly the plaintiff was nonſuited. Barnard. Rep. in B. R. 471. Hill. 4 Geo. 2. Lent aſſiſes. Adams v. Hutton.

(L) In what Caſes it lies. What ſhall be ſaid a Converſion.

S. P. and upon ſpecial demurrer judgment was for the plaintiff niſi, becauſe it amounts only to the general iſſue. 2 Keb. 405. pl. 20. Mich. 20 Car. 2. B. R. Denny v. Terry.—S. C. Ibid. pl. 437. pl. 86. and judgment for the plaintiff, niſi, &c.

[1.] If a man *takes my horſe and rides him, and after re-delivers* him to me, yet I may have this action againſt him, for this is a converſion, and the re-delivery is not any bar of the action, but ſhall be only a mitigation of damages. Trin. 38 El. B. C. Per curiam, in the COUNTESS OF RUTLAND'S caſe.]

If one comes into my cloſe, and *takes my horſe and rides him*, it is a converſion. Per Holt Ch. J. 6 Mod. 212. Trin. 3 Ann. Arg.

Cro. E. 495. pl. 13. S. C. all the juſtices abſente Popham held it was a converſion by the denial only: but it being afterwards moved again, Popham held it to be no converſion. Et adjornatur.—— Goldſb. 152. pl. 79. Eaſt v. Newman, S. C. adjornatur.——S. C. cited by Doderidge J. and grounded his opinion in the principal caſe there upon it. 2 Bulſt. 310. Hill. 12 Jac.——S. C. cited Roll. Rep. 131. And it was ſaid, at the bar, and by Coke Ch. J. that they had the report of the

[2. If a man *finds my goods*, and knows them to be my goods, and he refuſes and *denies to deliver* them to me, this is a converſion in law. Mich. 38 & 39 El. B. R. between EASTON AND NEWMAN, per curiam, which intratur Hill. 37 El. B. R. Rot. 460. for the denial makes him a treſpaſſer ab initio, for this ſhews his intention to have been ſo ab initio.]

the caſe in which the court was divided; but it was afterwards adjudged as alleged. And Coke ſaid the reaſon of the 2 who held the denier a converſion was its making him a treſpaſſer ab initio, which he ſaid could not be law, it being only *non feaſance*, and they came to them before by lawful trover. ——— S. C. cited by Doderidge J. Mo. 841. pl. 1136.

If one finds my goods, and *refuſes to deliver them* to me, an action on the caſe lies againſt him, though he converts them not to his own uſe. Per Roll Ch. J. Sti. 353. Mich. 1652. Anon.

If he *refuſes to deliver them to the owner, till he knows him to be the owner*, it is no converſion, if h keeps them for him. Per Coke Ch. J. 2 Bulſt. 312. in caſe of Iſaac v. Clerk, cites 2 R. 3. 15.

[3. If *I deliver goods* or money to another, *and afterwards he denies to render them to me upon my demand of them*, yet this is not any converſion, but *only evidence* of a converſion, inaſmuch as he came to them by my own delivery. H. 12 Jac. B. R. between ISAAC AND CLARK dubitatur.]

Mo. 841. pl. 1136. S. C. the money was delivered as a pledge for the redelivery of goods taken in execution on certain conditions which were not performed, nor the goods re-delivered; and it was agreed by all, that when money is delivered as a pledge, it is a ſpecial bailment, and denial in ſuch caſe is no converſion. ——— Godb. 210. pl. 299. S. C. but S. P. does not appear. ——— Roll. Rep. 59. S. C. adjornatur. 126. S. C. argued by the court, but differed in opinion as to this point. — 2 Bulſt. 306. S. C. and S. P. debated before by the court, and adjudged that the plaintiff had no juſt cauſe of action. ——— S. C. cited 2 Mod. 245.

If I *deliver my goods* to B. *to keep*, and I requeſt them, and B. denies the delivery of them, an action of trover lies, but not without a denial. Brownl. 12. Hill. 9 Jac. Anon.

Harris ſaid, that it was the common experience, that the *detainment* of goods from an owner *after requeſt*, is allowed for a ſufficient evidence to maintain a converſion. And per Hobart Ch. J. though legally it were not a converſion; yet in that caſe it was reaſonable to allow it for an evidence to prove a converſion. Becauſe if you have goods of mine lawfully by finding or bailment, yet when I require them of you, you can no longer lawfully hold them; and therefore when you ſtill detain them from me, it argues that you claim them as your own, and ſo uſe them. Hob. 187. pl. 266. Mich. 11 Jac. in caſe of Agar v. Liſle. ——— Hutt. 10. S. C. but if it be found ſpecially, it ſhall not be adjudged a converſion.

Though *a demand and denial* be evidence of a converſion, and ſufficient inducement to a jury to find a converſion, yet that of itſelf is not a converſion. 2 Show. 179. pl. 176. Hill. 33 & 34 Car. 2. B. R. Brook v. Miller.

* *But* per Holt Ch. J. the very denial of goods to him that right has, is an actual converſion, and not only an evidence of it, as has been holden; for what is a converſion but *aſſuming upon one's ſelf the property and right of diſpoſing another's goods*; and he that takes on himſelf to detain another's goods from him without cauſe, takes on himſelf the right of diſpoſing of them; ſo the *taking and carrying away another's goods* is a converſion. 6 Mod. 212. Trin. 3 Ann. B. R. in caſe of Baldwin v. Cole.

* [242]

[4. If I deliver goods to a common carrier to carry to ſuch a place, and after the *goods* are *ſtole from the carrier*, this *is no converſion in the carrier* ſo as to charge him in a trover and converſion, *but* an action upon the *caſe lies* againſt him as a carrier upon the cuſtom of the realm, to carry goods ſafely, and to deliver them as he is appointed. Mich. 14 Car. B. R. between GEORGE AND WIBURN, per curiam, in arreſt of judgment.]

Fol. 6.

See (C) pl. 1. ——— S. P. by Hale Ch. J. and Wild J. for it is no converſion where the goods are ſtolen, or *got away by a cheat*; but evidence muſt be of ſome act of his own; for his bare delivery over by a token is no converſion, but trover lies againſt the bailee, and demand after the goods delivered over is no converſion. But Twiſden J. ſaid and affirmed at the bar, as common in circuits, to have trover againſt the carrier. 3 Keb. 422. pl. 18. Hill. 26 Car. 2. B. R. Starkie v. Hart.

Trover does not lie *againſt a common carrier for negligence*, as for *loſing a box*; *but* it does *for an actual wrong*, as if he breaks it open to take out the goods, or ſell them; per cur. 7 W. 3. B. R. for if the thing appears to have been really loſt by negligence, a denial is no evidence of a converſion; but if that does not appear, or if the carrier had it in his cuſtody when he denied to deliver it, that is good evidence of a converſion; per Trevor Ch. J. 2 Salk. 655. pl. 4. Trin. 3 Ann. at niſi prius at Guildhall.

If *goods* are *delivered to a carrier*, and he does not deliver them according to the direction given him, upon demand of the goods from him, and refuſal by him to deliver them, *trover* lies againſt him; *or* an action upon the *caſe* lies againſt him *upon the cuſtom*. *But if* the goods be *delivered to a ſervant* of the carrier, *or to his warehouſe-keeper*, and they are not delivered, &c. an action of trover does not lie againſt

the carrier, &c. without an actual converſion by him. Ruled by Holt Ch. J. upon a trial at niſi prius at Hertford, 4 Aug. 1 Ann. 2 Ld. Raym. Rep. 792. Tayler v.

[5. If the *king's purveyor takes beds, and appoints the king's ſervants to lie in them*, this is not any converſion. Mich. 13 Jac. B. per Warberton. An action of trover lies when a man *finds goods*. 7 H. 6. 22.]

[6. An action of trover and converſion for goods *lies againſt baron and feme, ſuppoſing by the declaration that they converted them to the uſe of the baron*; for the feme may be a treſpaſſer, and may convert goods to the uſe of her baron, or to the uſe of a ſtranger, though ſhe cannot convert them to her own uſe, ſhe being a feme covert, Mich. 13 Car. B. R. between GRANGER AND MEADER, adjudged; this being moved in arreſt of judgment. *But* in an action of trover and converſion againſt baron and feme, if the *declaration* be *that they converted to their own uſe*, this *is not good*, becauſe the feme cannot convert goods to her own uſe, Mich. 13 Car. B. R. in the caſe of GRANGER AND MEADER, agreed per curiam Mich. 15 Car. B. R. between * HODGES AND SAMPSON, adjudged upon good advice in arreſt of judgment, after they had given judgment once e contra; intr' Hill. 14 Rot. 714. P. 1649. between † GALLOP AND HIS WIFE, AND HOLE; adjudged in a writ of error upon a judgment in B. where the converſion was ſuppoſed *by baron and feme and another perſon to their own uſe*, but is now reverſed, per curiam; intr' Paſch. 23 Car. B. R. Rot. 25.]

* Jo. 443. pl. 4. S. C. ſays that rule was given to ſtay judgment. Mar. 60. pl. 94. S.C. adjornatur.——Mar. 82. pl. 134. Paſch. 17 Car. ſeems to be S. C. ſays the jury found the feme not guilty; and that the court held that this naughty plea [count] is made good by the verdict.

† Sty. 115. Trin. 24 Car. S. C. and the judgment in C. B. reverſed niſi, &c.——Ibid. 126. Trin. 24 Car. Gallop v. Chaſe, S. C. The caſe was moved again, and judgment reverſed.

[7. In trover and converſion *againſt baron and feme, ſuppoſing that the feme converted to the uſe of herſelf and huſband*, this is not good; becauſe the feme cannot convert to her own uſe, Hill. 14 Car. B. R. between DIGGS AND PERRY, adjudged in a writ of error upon a judgment in Marlborrow, but reverſed for this cauſe; intr' ‡ Trin. 13 Car. Rot. 402. the feme being found guilty by verdict; and ſo it was adjudged, Trin. 17 Car. B. R. between ‖ REMES AND HUMFRY, Rot. 1202.]

Cro. C. 494. pl. 2. Perry v. Diggs, Hill. 13 Car. B. R. and the judgment in Marleborough reverſed accordingly.

‖ Cro. C. 254. pl. 5. Paſch. 8 Car. B. R. Rhemes v. Humphreys, S. C. adjudged for the defendants.——See tit. Baron and Feme, (U) pl. 1. S. C. and the notes there.

Trover *againſt huſband and wife*, and declared of a converſion by the wife during the coverture; and per cur. the action is well brought; for by Jones J. though ſhe cannot make a contract for goods during her coverture, yet ſhe may convert them. Noy 79. Newman v. Cheyney.——Lat. 126. Paſch. 2 Car. S. C. accordingly by 3 juſtices, but Crew Ch. J. ſpoke doubtfully.

‡ [243]

If *A.* takes goods from me, and theſe *afterwards* come to the hands of *B.* by buying or otherwiſe, and he converts them to his uſe, B. ſhall not be charged to me without a *new demand made* of them unto him, *and a detention afterwards*. Clayt. 57, 58. pl. 99. before Berkley J. in Holdſworth's caſe.

8. Where a man *finds my goods* he is *chargeable to me into whoſeſoever hands the goods ſhall come after*. Brooke makes a *quære*; for he ſays, it ſeems, that if he *impairs or bails them over* he ſhall be charged; but if he *loſes them caſually* he ſhall not be charged after. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8.

He that finds goods muſt anſwer for them to him that has the property, and if he delivers them over to any one but the right owner, he ſhall be charged for them; per Coke Ch. J. 2 Bulſt. 312. in caſe of Iſaac v. Clerk, cites 2 R. 3. 15.

If

If *A. takes goods from J. S. and B. takes them from A.* J. S. may have treſpaſs or trover againſt either A. or B. at his election; though the opinion in Cro. is, that J. ſhall not have treſpaſs againſt B. Sid. 438. pl. 3. Hill. 21 & 22 Car. B. R. in a nota there.

9. An action of trover and converſion was brought for oats, &c. and the caſe upon proof was, that certain *treſpaſſers had taken theſe oats from the plaintiff, and brought them to the mill to make into oatmeal;* and the plaintiff came to the miller before any thing done, and *demanded the oats as his, and forbad him to proceed* to make them into oatmeal; *but the miller did proceed* for all that, and made it into oatmeal; and the judge directed this to be a converſion in the miller, and directed the jury accordingly, though it was urged by the counſel of the defendant, that a miller was a public officer, and did but his duty in this caſe. Clayt. 57. pl. 99. before Berkley J. 1638. Holdſworth's caſe.

10. To prove the converſion, it was offered, that the plaintiff did *demand ſatisfaction for* the corn; and it was ruled good evidence, the demand being to the *party himſelf*, who took this corn, though the corn itſelf was not demanded, but ſatisfaction. Clayt. 122. pl. 114. before Germin J. 1647. Rookby's caſe.

11. A. puts beaſts to agiſt with B. and, after the time expired, A. demands his cattle of B. and cannot have them delivered. It was holden here in this action, which was trover, and converſion brought by A. that this action doth not lie, becauſe the defendant came to them by the plaintiff's own delivery. Clayt. 127. pl. 227. before Germin J. 1647. Walker's caſe.

In trover of 5 kine, a ſpecial verdict was found, that one *B.* was *poſſeſſed of* thoſe 5 *kine*, and *put them to paſturage with the defendant*, and *agreed to pay* him 12 d. for every cow *weekly, as long as they remained* with him at paſture; and that afterwards *B. ſold them to the plaintiff*, and he required them of the *defendant*, who *refuſed to deliver them to the plaintiff, unleſs he would pay* for the paſturage of them for the time that they had been with him, *which amounted to* 10 *l. Afterwards one F. paying him the* ſaid 10 *l. by the appointment of B. he delivered the beaſts to F.* Jones and Croke (abſentibus cæteris juſticiariis) conceived, that this denial upon demand, and delivery of them to F. was a converſion, and that he may not detain the cattle againſt the buyer, until the 10 l. be paid, but muſt have his action againſt B. who put them to paſturage. Cro. C. 271. pl. 7. Mich. 8 Car. B. R. Chapman v. Allen. ——*And* it is *not like to* the caſes of an *inn-keeper or tayler*; they may retain the horſe or garment delivered them, until they be ſatisfied; but not when one receives horſes or kine, or other cattle, to paſturage, paying for them a weekly ſum, unleſs there be ſuch an agreement betwixt them. Whereupon rule was given that judgment ſhould be entered for the plaintiff. Cro. Car. 271. Chapman v. Allen.

* [244]

12. In trover and converſion of butter, the count was, that it was impaired by negligent keeping; but per tot. cur. if a man comes to * goods by trover, he is not bound to keep them ſo ſafely as he who comes to them by bailment. Per Walmſley, if a man finds my *garments*, and ſuffers them *to be eaten with moths* by the negligent keeping of them, no action lies; but if he *weareth them*, it is otherwiſe, for the wearing is a converſion. 1 Le. 224. pl. 305. Mich. 32 & 33 Eliz. C. B. Mulgrave v. Ogdem, or Walgrave v. Ogden.

S. P. and S. C. Cro. E. 219. pl. 6. *So* if he of purpoſe miſuſeth it; as if one *finds paper, and puts it into the water, &c.* but for negligent keeping no law puniſheth him. ——Ow. 141. Moſgrave v. Agden, S. C. accordingly. ——If one *finds a horſe, and gives him no ſuſtenance*, no action on the caſe lies; per tot. cur. Cro. E. 219. pl. 6. —— *But* per Coke Ch. J. if a man finds goods, an action on the caſe lies for his ill and *negligent keeping* of them, but no trover or converſion, becauſe it is but a non-feaſance; per Coke Ch. J. 2 Bulſt. 312. Hill. 12 Jac. B. R. Iſaac v. Clerk.

Cro. E. 824. pl. 25. Paſch. 43 Eliz. C. B. the court divided.

13. Trover. The defendant's *bailiff ſeiſed* the plaintiff's *beaſts for an heriot, whereas there was none due;* whereunto the defendant agreed, and converted them. It was argued, that it was in the plaintiff's election, whether he will admit himſelf to be out of poſſeſſion, or not; for he might have had a replevin, if he would; and that in this action, the trover is not traverſable, but the converſion. And reſolved he had election to bring *trover, or treſpaſs*, at his pleaſure. And by three juſtices againſt Daniel adjudged for the plaintiff. Cro. J. 50. pl. 21. Mich. 2 Jac. C. B. Biſhop v. Montague (Viſcounteſs).

Mo. 757. pl. 1045. Adyn v. Ayre, S. C. adjudged the ſale was good. —— Yelv. 44. contra, ſays it was adjudged by Popham, Fenner, and Yelverton (Gawdy being abſent) that the ſale was not good. —— 2 Saund. 47. pl. 5. cites S. C. and ſays it was adjudged as reported in Mo. and Cro. J. contrary to the report in Yelverton; and the roll of it is in Paſch. 44 Eliz. Rot. 318.

14. Trover againſt a *ſheriff*, who ſeiſed the plaintiff's *goods by a fi. fa. to the value of the debt, and paid part* of it; and *the goods not* being *ſold, nor the writ returned, he was diſcharged of his office, and then ſold the reſidue without a writ of venditioni exponas.* Adjudged that the ſale was good; and judgment for the defendant. Cro. J. 73. pl. 2. Trin. 3 Jac. B. R. Ayre v. Aden.

If the *ſheriff upon an extent for the king againſt A. ſeiſes the goods of B.* B. cannot have trover againſt the ſheriff, becauſe by the ſeiſure the property veſted in the king. Ruled by Holt Ch. J. at the ſummer aſſiſes at Warwick 1699. 11 W. 3. Ld. Raym. Rep. 736. the King v. Woodward.

Noy 137. S. C. accordingly. Bulſt. 29. S. C. accordingly. —— Yelv. 178. S. C. accordingly.

15. A *hat-band ſet with pearls and diamonds was pawned*, and the money lent was tendered. Upon refuſal to deliver it, trover lies, though pawnee had the poſſeſſion by lawful delivery, and not by trover. Cro. J. 244. pl. 2. Trin. 8 Jac. B. R. Ratcliff v. Davis.

16. *Intermeddling with goods, which is not juſtifiable*, is a converſion. Yelv. 194. Mich. 8 Jac. B. R. in caſe of Gomerſale v. Medgate.

Hutt. 10. S. C. and S.P. accordingly. —— If a diſtreſs for rent be lawfully taken, it is no converſion at all; but otherwiſe it is if not lawfully taken; per cur. Yelv. 10. Mich. 44 & 45 Eliz. B. R. in Salter's caſe. —— Cro. E. 901. pl. 5. Salter v. Butler, S. C. —— Noy 46. S. C. *and that putting beaſts into a pound overt* is no converſion; for they are in the cuſtody of the law. —— So of *driving cattle by virtue of a replevin*; for at that time they are in cuſtodia legis, and the law at ſuch time preſerves them ſo, that no property can be changed, and conſequently there can be no converſion; per cur. 2 Mod. 244. Trin. 29 Car. 2. C. B. in caſe of Mires v. Solebay.

17. If a man does a thing which is *allowable by law*, it is no converſion, *as to diſtrain cattle, or impound them;* but if he work them, it is a converſion. Brownl. 5. Mich. 11 Jac. Agar v. Liſle.

S. C. cited 2 Bulſt. 310. by Doderidge J. who ſaid he agreed that caſe; and that ſo it

18. *T. had timber in the land of H.* and T. came to H. *and demanded to have* his timber, and *H. denied it.* T. brought trover; and it was ruled to be no converſion, becauſe *it was in an open field*, and ſo it appeared that there was no converſion; cited by Haughton J. as THIMBLETHORPE'S CASE; and Coke Ch. J. and Doderidge J. ſaid, it was ruled to be no evidence to prove a converſion;

verſion; and that the jury was directed accordingly. Roll. Rep. 60. Trin. 12 Jac.

would be of a ſow of lead demanded, and denied, if it be found lying there ſtill after the denier, it ſhall be no converſion; but where it is altogether uncertain, and cannot appear that he made any converſion, but only a denier, there it is good evidence to the jury, and direction to the court (if other matter does not appear to the contrary) that this is a converſion. ——— S. C. and S. P. cited per Haughton. Roll. Rep. 131. ——— See pl. 3. and the notes there. ——S. P. cited accordingly per cur. Trin. 29 Car. 2. C. B. 2 Mod. 245.

16. There is no converſion of a *bond*, unleſs it be *cancelled*, or the like, and without that, the receiving of the money is not evidence; for the obligor may be forced to pay it again. But the proper action is *detinue*. Roll. Rep. 132. Hill. 12 Jac. B. R. in Iſack and Clerk's caſe.

19. If a ſtranger enters my cloſe, and *cuts my trees, and carries them away*, I may have trover, although that after the cutting, and before the carrying away, I could not claim them, and there was *no actual poſſeſſion in me*. Noy 125. Sir James Skidnes v. Huſon.

20. It lies for goods found and converted, *though they come afterwards to the hands of the perſon who loſt them*. Sty. 261. Paſch. 1651. B. R. Gower's caſe.

22. Adjudged that where in trover and converſion an *actual taking* is given in evidence, it is good enough, *without* proving a *demand and refuſal*; as taking my hat off my head is an actual converſion: but if it come by trover, there muſt be an actual demand, &c. Sid. 264. pl. 15. Trin. 17 Car. 2. B. R. in Bruen and Roe's caſe.

23. A *ſervant* ſhall not be charged in trover for taking goods by the command of his maſter. 2 Mod. 242. Trin. 29 Car. 2. C. B. Mires v. Solebay.

22. *Denial by an innkeeper to deliver a horſe* in his hands, is no converſion, nor evidence of a converſion, unleſs the *plaintiff tenders* in particular *what the horſe has eat out*, and the jury is to judge if it be ſufficient. 2 Show. 161. pl. 148. Paſch. 33 Car. 2. B. R. Anon.

23. A *bank-bill* was *payable to A. or bearer. A. gave it to B. B. loſt it. C. found it, and aſſigned it over to D. for valuable conſideration. D. went to the bank, and got a new bill in his own name.* A. brought trover againſt D. for the former bill; and ruled by Holt Ch. J. at Guildhall, 1698, that an action did not lie againſt D. becauſe he had it for valuable conſideration. Ex relatione m'ri Daly. Ld. Raym. Rep. 738. Anon.

24. A *captain contracted with ſeamen* to go a voyage, and after he had *got them on board he would not pay them* according to agreement; upon which they *demanded their goods*, which he refuſed, if they did not *ſtay till he had ſearched for them, which he refuſed to do then*; and this was held good evidence of a converſion. 12 Mod. 344. Mich. 11 W. 3. Anon.

25. An executor ſeveral years before had left goods in the houſe by conſent of the heir, who uſed them after; and within 6 years of the action brought, the executor demands the goods, and the

heir refuſed to let him have them; whereupon *trover* was brought, and the ſtatute of *limitations* pleaded. Per cur. the *uſer with conſent, before the demand*, was no converſion or evidence of it; and the demand being within 6 years, the *refuſal* which enſued it, and is the only evidence of a converſion in the caſe, was within 6 years; and if a trover be before 6 years, and a converſion after, the ſtatute cannot be pleaded. 7 Mod. 99. Mich. 1 Ann. B. R. Mountague v. Sandwich.

28. In trover at niſi prius, upon evidence the caſe was this; a *carpenter ſent his ſervant to work for hire to the queen's yard*, and
[246] having been there ſome time, when he would go no more, the *ſurveyor of the work would not let him have his tools, pretending a uſage* to detain tools, to enforce workmen to continue till the queen's work was done; and a demand and refuſal being proved at one time, and a tender and refuſal after, per Holt Ch. J. if the plaintiff had received them upon the tender, notwithſtanding the action would have lain upon the former converſion, and the having of the goods after, would go only in mitigation of damages; and he made no account of the pretended uſage. 6 Mod. 212. Trin. 3 Ann. B. R. Baldwin v. Cole.

29. *And* Holt Ch. J. compared it to the doctrine among the army, that if a *trooper brings his horſe into the ſervice*, the property thereof was immediately altered and veſted in the queen, which he had already condemned. 6 Mod. 212. Trin. 3 Ann. B. R. in caſe of Baldwin v. Cole.

(L. 2) Againſt whom.

1. ACTION of trover will lie by the *aſſignee of one partner, a bankrupt, againſt the other*; which was ruled at the trial, and agreed now. 2 Keb. 750. pl. 3. Paſch. 23 Car. 2. B. R. Thomas v. Day.

2. Trover does not lie *for a bank-bill payable to A. or bearer, and loſt by him, againſt one that afterwards comes to it for a valuable conſideration.* Ruled by Holt Ch. J. at Guildhall, 1698. Ld. Raym. Rep. 738. Anon.

2 Salk. 441. pl. 2. S. C. 3. It was ruled by Holt Ch. J. at Guildhall, Mich. 10 W. 3. that if A. being a *pawnbroker, employs B. his ſervant in* the way *of his trade*, and *B. upon a pawn of goods lends money to C. and C. tenders the money to B. at the day, and demands the goods.* B. ſays that the goods are ſold; trover will lie for C. againſt A. Ld. Raym. Rep. 738. Mich. 10 W. 3. before Holt Ch. J. at Guildhall. Jones v. Hart.

4. Trover was brought *againſt the book-keeper of a carrier, for goods delivered to her in order to be ſent by the waggon to London.* It was inſiſted, that the action, being founded on a tort, was well brought againſt her; but on the other ſide it was ſaid, that it ſhould have been brought againſt the carrier himſelf, and the judge was of that opinion; and accordingly the plaintiff was non-ſuited.

ſuited. 2 Barnard. Rep. in B. R. 234. Hill. 6 Geo. 2. 1732. Bury Aſſiſes. Harvey v. Syliard.

(L. 3) Writ and Declaration good in general.

1. IN trover *for a hawk*, it was objected that the plaintiff ought to have ſet forth that the hawk was tame and reclaimed; but he having declared, *that he was poſſeſſed, &c. ut de bonis ſuis propriis*, it was held well enough. D. 306. b. pl. 66. Mich. 13 & 14 Eliz. Fines's caſe. [247]

2. In trover and converſion the want of alleging a *place of converſion* (which is a thing material) being alleged in arreſt of judgment, the bill was abated. Cro. E. 78. pl. 39. Mich. 29 & 30 Eliz. B. R Hubbard's caſe. S. P. and ſo of the *time of converſion*, the want whereof being alleged, the bill was abated. Cro. E. 97, 98. in pl. 15. cites it as adjudged in Leak's caſe. ——Goldſb. 90. pl. 19. Paſch. 30 Eliz. cites STAYNSHAM's caſe in trover of an obligation. It was found that he had broken the ſeals, and becauſe he did not ſhew the time and place of the converſion he could never get judgment; and in the principal caſe the juſtices were of the ſame opinion, only Anderſon ſeemed to doubt.

3. The *place of* the *trover was alleged, but not of* the *converſion*; but after verdict judgment was arreſted for that reaſon. Roll. Rep. 132. cited by Crooke as Mich. 26 & 27 Eliz. B. R. Matthew v. Stranſon. And the place of converſion muſt be found by the jury for the maintenance of the action. 2 Bulſt. 313. S. C. cited by Coke Ch. J. ——D. 121. marg. pl. 14. cites Mich. 37 & 38 Eliz. C. B. as adjudged upon long argument that in trover the converſion is not traverſable, and therefore need not allege time or place of converſion, but may count that primo die Maii he was poſſeſſed of the ſaid goods and loſt them caſually, and that afterwards they came to the hands of the defendant, and he converted them. And ſays that ſo it was adjudged Mich. 22 Jac. B. R. and Trin. 15 Jac. B. R. Rot. 199.

The alleging a *place of converſion is material*, and the want thereof being alleged in arreſt of judgment, the bill was abated. Cro. E. 78. pl. 39. Mich. 29 & 30 Eliz. B. R. Hubbard's caſe.

But in trover no other *place* is to be *expreſſed* in the declaration, but only that place *where the goods came to the defendant's hands*; per tot. cur. clearly. Bulſt. 206. Paſch. 10 Jac. Atkyns v. Wheeler.

4. In trover the plaintiff ſhewed that he was *poſſeſſed, and afterwards, viz. tali die loſt them*, and they came to the hands of the defendant, where in truth the poſtea, viz. tali die, was before the time of the poſſeſſion. The viz. is void, and the declaration good. Lat. 201. cites Hill. 43 Eliz. Drake v. Young. Poph. 201. cites S. P. accordingly, 15 Jac. B. R. Deſmond v. Johnſon.—Palm. 508. S. C. cited accordingly.——Cro. J. 428. pl. 3. S. C adjudged accordingly for the plaintiff. Teſmond v. Johnſon.

5. In trover of goods, the declaration was that he *was poſſeſſed of ſuch goods*, ſhewing what they were in ſpecie, *cum aliis implementis ad valentiam 3 l. and of other parcels cum aliis neceſſariis; as alſo de ſuibus*, ſetting not forth their number, and damages were entirely aſſeſſed for all; but becauſe of this uncertainty, the declaration was holden by the court not to be good, and it was adjudged for the defendant. Cro. E. 817. pl. 7. Paſch. 43 Eliz. B. R. Wood v. Smith.

6. Action upon the caſe, that he *delivered certain wools to the defendant to keep, and* that *he converted them* to his own uſe. Exception Mo. 623. pl. 852. S. C. but S. P. does not appear.

ception was taken, becauſe he *ſays not that he loſt them*; and that the converſion doth not take away the property, but he may have detinue. But per cur. the converſion takes away the property, and it is an offence for which the action lies; per Gawdy and Fenner J. cæteris abſentibus, and adjudged for the plaintiff. Cro. E. 781. pl. 17. Mich. 42 & 43 Eliz. B. R. Gumbleton v. Grafton.

7. In trover, the plaintiff as adminiſtrator, declared *of a portal with hinges, and of a hand-mill, a brewing lead, and a* waſh-fat. It was objected, that theſe things appear to be fixed to the freehold. Sed non allocatur; for the plaintiff having declared that he was poſſeſſed of them ut de bonis ſuis propriis, it ſhall be intended they were ſevered from the freehold, the defendant not having ſhewn the contrary. Cro. J. 129. pl. 2. Mich. 4 Jac. B. R. Wood v. Smith.

8. Error of a judgment in trover *de* 300 *todis lanæ*, becauſe todæ is no Latin word; but judgment was given for the plaintiff, and that judgment affirmed; for it is a framed word to ſhew the meaning of the parties, and in the Regiſter there is *pipa vini*, & *barrella cerviſiæ*. Cro. J. 307. Mich. 10 Jac. B. R. Cliſon v. Proctor.

[248] 9. One may count upon a *devenerunt ad manus generally*, or ſpecially *per inventionem*, but the latter is the better, viz. per inventionem; and this is the moſt certain and the better count; per Coke Ch. J. 2 Bulſt. 313. Hill. 12 Jac.

10. Trover and converſion was brought againſt A. and B. A. pleads not guilty, and that iſſue is found againſt A. B. pleads, and traverſes abſque hoc, that he and A. converted, &c. and that iſſue is found for B. againſt the plaintiff; yet it ſeemed to the court that the plaintiff ſhall have judgment againſt A. upon the firſt verdict; for although that the declaration be, that they converted, &c. yet that ſhall be intended jointly and ſeverally. And ſo the opinion of the court was againſt A. Noy 144. Gee v. Long.

11. In trover the *value of every particular parcel ought to be ſhewn*, becauſe the judgment is conditional to recover the thing itſelf, and if not, then damage in lieu thereof. By Ley Ch. J. and Doderidge J. 2 Roll. Rep. 447. Trin. 21 Jac. B. R. Goodwin v. Harwood.

He needs not ſhew the day, becauſe it is loſt and the defendant has enjoined it, and he is not to recover the debt but damages. Adjudged. Cro. J. 617. pl. 7. Paſch. 20 Jac. B. R. Upchard v. Tatam.

12. In trover and converſion of a *bond*, which defendant being required ſuch a day to deliver, he refuſed, and converted it to his own uſe. Exception was taken, becauſe *no date* of the bond *was mentioned, nor the day and place of the converſion* alleged. Sed non allocatur; for it being loſt, he did not perhaps know the certain date of it; and if he ſhould recite a date, and miſrecite it, it might be a failer of his ſuit; and the denying to deliver it upon requeſt, is a converſion, and the aſſignment of the place were not material, and the day, year, and place are thereby alleged, and is ſufficient; and ſo a judgment in C. B. affirmed. Cro. C. 262. pl. 8. Trin. 8 Car. B. R. Wilſon v. Chambers.

13. Trover,

13. Trover, &c. the writ was, *that ſuch a day at A. in com. S. he was poſſeſſed of the goods, and loſt them, and the defendant found and converted them;* and in the declaration he *ſhewed the trover and converſion to be apud A. prædict'*. Exception was taken to the writ, becauſe the place of converſion was not ſet forth. But adjudged by two juſtices only in court, that ſince the poſſeſſion was ſuppoſed to be at A. the loſs, trover, and converſion, being *all joined with a copulative*, all ſhall be intended at one place. Cro. Car. 525. pl. 3. Hill. 10 Car. B. R. White v. Haulie.

14. In trover and converſion of *letters patents* of a wine licence, exception after verdict was taken in arreſt of judgment, that the plaintiff *did not allege that he was poſſeſſed of them ut de bonis propriis.* Sed non allocatur, after a verdict. Beſides the declaration does mention that the defendant *knowing them to appertain to the plaintiff, converted them;* which implies as much. And judgment niſi, &c. Hardr. 111. Paſch. 1658, in the exchequer, Jones v. Winkworth.

15. In trover *for a ſword* the plaintiff *declared that he was poſſeſſed ut de bonis propriis, and that defendant cepit eadem bona.* The defendant demurred. Twiſden inclined that it was ill, as in forgery of falſe deeds, and counts but of one; but curia contra, and judgment for the plaintiff niſi, &c. 2 Keb. 188. pl. 20. Paſch. 19 Car. 2. C. B. Bird v. Watſon.

16. In trover, the plaintiff declared that he was poſſeſſed *de bonis & catallis* ſequen' ut de bonis & catallis ſuis propriis, viz. *de uno ſcripto obligatorio, & de una warrantia*, &c. The defendant pleaded in abatement that the bond and warrant were not chattels; and upon a demurrer it was inſiſted, that, by a gift of all his goods and chattels, a bond would paſs. And to this opinion the court inclined. 4 Mod. 156. Mich. 4 W. & M. in B. R. Cook v. Baſinger.

17. Error out of C. B. *on trover againſt ten*, wherein the plaintiff declared of a finding by ten, and a *converſion by nine*, and judgment againſt all ten; per cur. the converſion is the giſt of the action; for if a man find goods, it is lawful for him to take them, wherefore it muſt be certainly error; but if you can get it amended in the common pleas, we will get it amended here. 12 Mod. 101. Mich. 8 W. 3. B. R. Fuller v. Smith. [249]

18. In trover, the plaintiff had a verdict; and it was moved in arreſt of judgment, that the declaration was ill, becauſe the *converſion was laid on a day certain in Michaelmas term, and the declaration was general, as of that very term, without a day certain;* as memorandum, that on ſuch a day, &c. and therefore it muſt relate to the firſt day of that term; and if ſo, then this action was brought before the plaintiff had any cauſe of action, becauſe it was brought as the firſt day of the term; and the converſion, which is the foundation of the action, was laid in the declaration to be after the term began; but per Holt Ch. J. it is well enough, if the *bill was filed after the cauſe of action accrued;* for there was no action depending till that very time, and the filing the bill was on a day certain. 3 Salk. 9. Sawen v. Hulbert.

(L. 4) Declaration good. In Reſpect of the Certainty therein of Things.

1. TRover and converſion of *ten cheſts and coffers, without ſhewing how many cheſts and how many coffers.* Exception was taken for the uncertainty; but Gawdy and Fenner J. cæteris abſentibus, held them all one; but if they ſhould be ſaid to be *diſtinct things*, it would be ill. Cro. E. 818. pl. 12. Paſch. 43 Eliz. B. R. Draycot v. Piot.

2. Trover of ſuch and ſuch goods (ſpecifying them) *cum aliis implementis ad valentiam* 3*l.* without ſhewing what they were, and of other parcels (ſpecifying them particularly) *cum aliis neceſſariis*, but ſays not what; and that he was poſſeſſed *de ſuibus*, without mentioning their number. The court held it ill for the uncertainty pro implementis & neceſſariis; and gave judgment for the defendant. Cro. E. 817. pl. 7. Paſch. 43 Eliz. B. R. Wood v. Smith.

So in trover inter alia de duobus albis nodis & *aliis parvis rebus*; after verdict judgment was ſtaid for the uncertainty; it not appearing what or how many they were. 2 Lev. 85. Paſch. 25 Car. 2. B. R. Miller v. Green.

So in trover of ſeveral particular goods, & *aliis utenſilibus* Anglice implements; after verdict and intire damages, judgment was ſtaid for the uncertainty of aliis utenſilibus, quot, quanta vel qualia they are.—3 Lev. 18. Paſch. 33 Car. 2. C. B. Blackhoute v. Moore.

Trover *for ſix parcels of pewter porringers.* It was objected that the word parcel is uncertain, and that it conſiſts of many things in number, and ſo 6 parcels cannot be applied to 6 porringers; but had it been 6 pieces it had been better, though that is alſo uncertain. Roll Ch. J. inclined it was well enough; for though the words are not ſo proper, yet the deſcription is good enough. And judgment for the plaintiff, niſi, &c. Sty. 199. Mich. 1649. Graves v. Drake.

3. Trover *de una parcella piſcium Anglice lings*, but becauſe he did *not allege what parcel*, it was held to be ill. Cro. E. 865. pl. 46. Mich. 43 & 44 Eliz. in Cam. Scacc. Gramwell v. Rhobotham.

Trover *of* 20 *pieces five parcellis ligni* was held well enough, and piece or parcel are ſynonimous. Keb. 508. pl. 75. Faſch. 15 Car. 2. B. R. Shepherd v. Loyd.——But trover *of a parcel of wares* is uncertain, though *parcel of cloth* is well enough; per cur. Sid. 508. pl. 75. Paſch. 15 Car. 2. B. R. in caſe of Shepherd v. Loyd, Arg.

* Trover for 6 *parcels of lead* was held good, notwithſtanding the uncertainty, and the plaintiff had judgment. Vent. 106. Arg. cites it as 21 Car. 1. B. R. Green v. Green.——But the court held this to be a ſtrange caſe. Vent. 106.——S. C. cited Freem. Rep. 442. in pl. 598. as held naught.

Trover *de quadam parcella fili* is certain enough; per cur. Lev. 303. Mich. 22 Car. 2. B. R. Arg. ——But where it was *de quadam parcella linte a*, and verdict for the plaintiff, judgment was ſtaid for the uncertainty. 2 Lev. 176. Mich. 28 Car. 2. B. R. Hicks v. Pendarvis.——Freem. Rep. 442. pl. 598. S. C. accordingly.

Trover of a *parcel of pack-cloths, wrappers, and cloths*, was held certain enough; for the word (parcel) in this caſe only expreſſes one certain thing, and not ſeveral things at large, in which caſe it would not be good; as a *parcel of barley*, and a parcel *of culme*, has been held good, and a judgment in C. B. was affirmed. Barnard. Rep. in B. R. 65. Trin. 2 Geo. 2. Botamley v. Harriſon.

* [250]

4. In trover, the plaintiff declared that he was *poſſeſſed of* 3000 *cords of wood*, but did *not ſay ut de bonis ſuis propriis, and that* afterwards the *defendant cordas ligni præd' cepit*, &c. *without ſaying any particular quantity, or prædictas cordas ligni; nor* did he allege that the defendant *vi & armis* cepit; after judgment for the plaintiff in B. R. the ſaid omiſſions were aſſigned for error, but the judgment was affirmed in the exchequer chamber, for it ſhall be intended

Cro. E. 819. pl. 14. Paſch. 43 Eliz. B. R. Baſſet v. Maynard S. C. but S. P. does not appear.

tended all the cords of wood before mentioned; and likewiſe that theſe were his proper goods. And that in an action on the caſe for a trover, the plaintiff need not allege the taking to be vi & armis. Moor 691. pl. 955. Hill. 36 Eliz. B. R. Maynard v. Baſſet.

Noy 32. S. C. but S. P. does not appear. 5 Rep. 24. b. 25. a. S. C. in B. R. but S. P. does not appear.

5. Trover of a *library of books* was held good, without expreſſing what they were; for the ſetting them down particularly would make the record too prolix. Vent. 114. cites 7 Jac. Emery's caſe.

S. C. cited by Twiſden J. 3 Keb. 694. pl. 26. —Sty. 25. Hill. 23 Car. Anon. S. P. held good, though not mentioned of what language or on what ſubject; for books are not things of different ſpecies, be they of what language or ſubject they will. ——Trover of *books in a ſtudy*, without ſaying how many, is good enough by the addition of the ſtudy. Sid. 98. Per cur. obiter. ——Agreed per cur. that it will lie for a library of books. 7 Mod. 142. Hill. 1 Ann. B. R. ——Sty. 358. in caſe of HEATH v. UDAL, Arg. cites Trin. 10 Car. BEDINGFIELD's caſe S. P. adjudged good; and Roll Ch. J. admitted it to be ſo. ——2 Keb. 765. pl. 41. S. P. Per cur. Arg. but trover *de diverſis libris* is ill.

6. The count was *de tribus ponderibus lanæ ad valentiam* 80 *s.* After verdict it was moved that pondus ſignifies any manner of weight; and of that opinion were Doderidge and Haughton J. (abſentibus aliis) but if he had ſaid *Anglice 3 weight of wool*, this is certain; and judgment ſtaid till the plaintiff moves. 2 Roll. Rep. 369. Mich. 21 Jac. B. R. Lawrence v. Turner.

Palm. 393. S. C. in totidem verbis. —— Lat. 216. Jermin cited Mich. 18 Jac. S. P. and that the plaintiff could not have judgment, and that he was of counſel in that caſe. —S. C. cited as held naught, becauſe it was without an anglice. Arg. Sty. 214. in the caſe of ERNLEY v. ALSOP, Trin. 1650. B. R. where the count was de ducentibus ponderibus, Anglice weight, medicamenti, Anglice drugs, and judgment for the plaintiff, and that judgment affirmed. ——S. P. but the anglice of ponderibus being wanting, the judgment was reverſed, niſi, &c. Sty. 247. Hill. 1650. Powell v. Hopkins.

So trover *de duobus ponderibus caſei, Anglice 2 weighs of cheeſe*, has been held good. Cited Vent. 211.

Trover *de decem ponderibus*, Anglice *weights*. Per cur. in trover, if the jury can underſtand it, it will be well enough; for damages only are to be recovered therein; ſecus in detinue, where the thing itſelf is to be recovered. 12 Mod. 3. Mich. 2 W. & M. B. R. Hook v. Galloway.

7. It will not lie for 2 *ſheaves of corn*, becauſe of the uncertainty, for want of ſhewing what corn it was. March. 60. pl. 94. Mich. 15 Car. Hodges v. Simpſon.

Jo. 443. pl. 4. S. C. but S. P. does not appear.

8. Trover *of ſtockings*, without ſaying of what ſort, is good, for were they ſilk, or woollen, or worſted, they were but ſtockings. Adjudged. Sty. 25. Paſch. 23 Car. B. R. Anon.

9. If there *are no proper words to expreſs it by*, but it *is ſo deſcribed that the jury may know what is meant by it*, it is well enough; per Roll. Ch. J. Lat. 136. Mich. 24 Car. B. R.

[251]

10. It lies de decem arboribus, though exception was taken that arbor is properly a tree growing. Styl. 235. Mich. 1650. B. R. Popham v. White.

S. C. cited that trover of trees cannot be now intended ſuch as are growing. Keb. 508. pl. 75. Per cur.

11. Trover of 20 *beaſts, viz. ſteers, runts, and heifers*, without ſaying what number of each. Roll Ch. J. inclined, that it was certain enough, and the number may be averred, and the cattle are all of one kind. The court would adviſe; but afterwards ordered

S. C. cited accordingly by Twiſden J. Vent. 317. —Tre-

ver *de decem juvencis, Anglice bullocks and heifers*, dered judgment. Niſi, &c. Sty. 264. Paſch. 1651. B. R. Sawyer v. Ruſſel.

without ſaying how many of one and of the other; judgment was given for the plaintiff in C. B. but reverſed in B. R. Vent. 317. Mich. 29 Car. 2. B. R. Davis v. Price.——3 Keb. 693. pl. 22. Mich. 28 Car. 2. B. R. Price v. Davis, S. C. that juvenca is a proper word for both, and the anglice void; but that it was agreed that trover of ſo many *ovibus matricibus & vervicibus* is ill, for not diſtinguiſhing. And ibid. 694. pl. 26. Wild J. cites the laſt point as Trin. 24 Car. 2. Rot. 462. ——S. C. cited Vent. 317.——S. P. Per cur. 3 Keb. 253. Mich. 25 Car. 2. B. R. in pl. 83. accordingly.——S. C. cited 2 Sid. 174, 175. as held inſufficient. Trin. 1649. Stanton v. Lubcott.

Ibid. Newdigate Ch. J. admits the S. C. to be ſo

12. Trover of a *beam, ſcales, and weights*, was adjudged inſufficient, becauſe it did not appear what weights; per Nicholas J. 2 Sid. 172. cites it as Mich. 1652. Webb v. Wayſtone.

adjudged; but ſays it was upon another reaſon, and that he himſelf was counſel in it.——Sty. 360. Hill. 1652. Webb v. Waſhborn, S. C. but no judgment.——S. P. ſaid to be not good, becauſe there may be more or leſs of the weights uſed with the ſcales, and therefore all together are uncertain as to the quantities or weights of them. G. Hiſt of C. B. 99.

13. Trover *of three packs of linen cloth, and other goods*, was held certain enough. 2 Sid. 175. cited by Newdigate Ch. J. as Paſch. 1653. B. R. Harbott v. Lane.

But trover of 7 pieces of linen cloth, without ſaying how many

14. Trover for 2 *pieces of cloth*, without ſaying whether linen or woollen; this was alleged for error, but over-ruled, and judgment affirmed niſi, &c. Sty. 419. Trin. 1654. B. R. Iles v. Windſor.

yards, is uncertain and ill. 2 Show. 423. pl. 396. Paſch. 1 Jac. 2. B. R. Haws v. Randall.

So of tubs of water, or *of beer*, without ſhewing *how much they*

15. Trover *of* 6 *tons* was held void for uncertainty; for the word ſignifies ſeveral things, but it is not certain what it ſignifies here; and judgment that nil capiat per billam. Sty. 482. Trin. 1655. Clark v. Fitz-Williams.

contain, the court inclined that it was uncertain, though it ſhall be underſtood for the tub and the beer. But they all held that trover will lie *for a caſe or tub*, becauſe it is an individual thing. 7 Mod. 142. Hill. 1 Ann. B. R. in caſe of Blainfield v. Marſh.——1 Salk. 285. pl. 17. S. C. but S. P. does not appear.

16. In trover and converſion of *letters patents*, it was objected, that the *date of them is not ſpecified*; ſed non allocatur; becauſe there is ſufficient certainty without it; beſides the date is upon record. Hardr. 111. Paſch. 1658. in the exchequer. Jones v. Winckworth.

* [252] Trover for *decem paribus tegulorum & velorum, Anglice curtains and valence*,

17. Trover for 4 *curtains and vallens* was adjudged good, and ſhall be intended curtains and vallens for a bed; per Newdigate & Hill: but Nicholas e contra. 2 Sid. 174. Hill. 1659. B. R. Fecke v. Ward.

was objected to be uncertain; but it was anſwered, that it ſhall be intended 10 pair of curtains and 10 pair of valence, and ſuch as uſually are part of the furniture of a bed; and that in ſuch artificial things it is ſufficient deſcription to name them by the uſual names, without ſhewing the quantity of yards, or what ſtuff they are made of; and 3 juſtices being of that opinion, they gave judgment for the plaintiff, though Twiſden J. held totis viribus e contra, by reaſon of the caſe of Webb v. Waſhborn, where he ſaid that trover of 4 pair of hangings was adjudged uncertain. 2 Saund. 74. Paſch. 22 Car. 2. Tailor v. Wells.——Mod. 46. pl. 101. S. C. adjudged accordingly.——

Sid.

Sid. 445. pl. 3. S. C. adjudged accordingly.——2 Keb. 623. pl. 18. S. C. says the court agreed it to be uncertain according to Webb and Washborn's case; but adjornatur.——Ibid. 640. pl. 68. S. C. adjudged for the plaintiff.

18. Trover for 2 *pair of pot-hooks, &c. and hangers.* After a verdict for the plaintiff, it was moved that hangers was an equivocal word; and though it was answered, that because the pot-hooks preceded the hangers, it could not be intended any other than such on which pot-hooks generally hang, yet the court held it too uncertain; for the word does not immediately follow the word pot-hooks, but there are divers other mentioned between; and therefore judgment was staid. Raym. 2. Mich. 12 Car. 2. B. R. Seaman v. Barns.

19. Trover for the *planks of a granary*, without mentioning any certain number of them, was held certain enough, by reason of the words (of the granary) otherwise had it been of planks generally. Sid. 98. pl. 28. Mich. 14 Car. 2. B. R. Maihu v. Flower.

Lev. 99. S. C. but S. P. does not appear. Keb. 353. 421. 428. 488. S. C. but S. P. does not appear.

20. Trover for a *billiard-table, port, sticks, and balls*, cited Raym. 2. to have been adjudged good, because the port, sticks, and balls, shall be intended things appurtenant to the table.

S. C. cited Sid. 263. Trin. 17 Car. 2. in pl. 13.——S. C. cited per cur. 3 Keb. 253. Mich. 25 Car. 2. B. R. in pl. 83.

21. Trover was brought *of haynes or harnesses*, without saying what number, or whether for oxen or horses. This was moved in arrest of judgment, but the court gave judgment for the plaintiff. 2 Keb. 647. pl. 85. Pasch. 22 Car. 2. B. R. Faynt v. Waterman.

22. Trover *de tribus struibus fœni*, Anglice, *ricks of hay*. After verdict it was moved, that *struibus* is uncertain, and that it ought to be so many *cart-loads*. But the court held it certain enough, and gave judgment for the plaintiff. Lev. 301. Mich. 22 Car. 2. C. B. West v. Davis.

Mod. 239. pl. 36. Trin. 29 Car. 2. S. C. accordingly, by Rainsford and Moreton only in court.——2 Keb. 703. pl. 59. Mich. 22 Car. 2. S. C. adjudged for the plaintiff.

23. Trover of *divers garments* was held not good, because not expressed what kind of garments. Sid. 114. Pasch. 23 Car. 2. B. R. Elpick v. Acton.

2 Keb. 753. pl. 15. 765. pl. 41. Elsique v. Acton, S. C. accordingly.

24. Trover *de viginti mensuris*, without an Anglice, or saying what measures, was held ill, and judgment was stayed. 2 Lev. 11. Trin. 23 Car. 2. in the exchequer, Coleman v. Bard.

Trover of 14 *glass bottles and measures* was moved to be uncertain. Sed non allocatur; and judgment for the plaintiff. 2 Keb. 681. pl. 71. Trin. 22 Car. 2. B. R. Kenion v. Wells.

25. It was moved in arrest of judgment, that the count was *de* 32 *centenis udæ plumbi, Anglice, lead-ore*. Sed non allocatur; and

Vent. 211. Dionise v. Curtis, S. C.

held good with the Anglice, and and judgment for the plaintiff. 3 Keb. 14. pl. 21. Paſch. 24 Car. 2. B. R. Dennis & Turbell, and Curtis.

to be underſtood by the ſubject matter, though objected that centena ſignifies a hundred in a county.

3 Keb. 253. pl. 83. S. C. and held good.

* 26. Trover was brought *of a pair of boots and ſpurs*, without ſaying how many ſpurs. And, per curiam, it is well enough; for it ſhall be intended ſpurs belonging to thoſe boots, which is a pair. Freem. Rep. 357. pl. 452. Mich. 1673. Hancock v. Hodges.

27. Trover *of bottles*, without ſaying how many, was held uncertain, and judgment ſtaid after verdict. 2 Lev. 176. Mich. 28 Car. 2. B. R. Hicks v. Pendarvis.

Ibid. cites Sid. 445. Stile 360, 361. 370. and the difference is between trover and replevin; for in replevin this would be naught; and Mod. Rep. 290.

28. Trover and converſion, among other things, *de uno ſymbolo, Anglice a cornelian ring, de uno pari vittarum, Anglice a ſuit of knots;* and moved in arreſt of judgment, after a verdict for the plaintiff, that the declaration was ill for uncertainty; for a ſuit of knots may be 3 yards, or 30, &c. but after ſeveral times being ſpoken to, the plaintiff had judgment. Skin. 142. Mich. 35 Car. 2. B. R. Parkhurſt and Sheerton.

29. Trover *de uno vaſe*, Anglice *veſſel, vini Hiſpanici*, but did *not ſet forth of what wood the veſſel was* made, and ſo no meaſure for the damages. But non allocatur; for it is intended to be made of ſuch wood as wine-veſſels uſually are. 2 Vent. 67. Trin. 1 W. & M. in C. B. Bliſſe v. Froſt.

30. Trover *de una amphora ſaporis*. Exception was taken, that ſaporis ſignifies ſavour, whereof no action lies. But the court held, that they would intend the damages given for the amphora, and nothing for the ſaporis. 3 Lev. 336. Mich. 4 W. & M. in C. B. Chambers v. Warkhouſe.

3 Salk. 135. pl. 40. S. C. accordingly.

31. Trover *of whelps* was objected to be uncertain, and may be intended whelps of dogs, bears, &c. ſo that it appears not what kind they are of; and that no property lies of them. But the court ſaid, they would intend them to be dog's whelps, and trover has been maintained of a dog; and gave judgment for the plaintiff. 3 Lev. 336. Mich. 4 W. & M. in C. B. Chambers v. Warkhouſe.

Ld. Raym. Rep. 588. S. C. and Holt Ch. J. ſaid, if there had been a verdict in this caſe, judgment would be according;

32. Trover for 20 *ounces of cloves and mace*. After judgment by default, and writ of inquiry, &c. Holt Ch. J. doubted if good, without ſaying how much cloves, and how much mace, or that it was ſo many ounces mingled, but ſaid that theſe were uncertainties; yet if another action ſhould be brought for the ſame things, a recovery in this action would be a good plea in bar; and the court gave judgment for the plaintiff. 2 Salk. 654. pl. 3. Paſch. 12 W. 3. B. R. Hartford v. Jones.

but this caſe is after judgment by default; and judgment was given for the plaintiff, becauſe the court *eſteemed theſe to be things mixed.* —— S. C. cited per cur. Barnard. Rep. in B. R. 65. Trin. 2 Geo. 2

34. There

34. There is a great *difference* where the thing for which the action is brought is *one entire aggregate body, though conſiſting of different parts;* there the count in trover will be good of two things, without ſhewing how much of the one and how much of the other, or what the things are. Per Holt Ch. J. Ld. Raym. Rep. 588. Trin. 12 W. 3. in caſe of Hartfort v. Jones.

And therefore trover *for a ſhip cum armamentis* was held good; whereas if the action had been *for the guns and rigging ſeverally*, they ought to ſhew what and how much. Per Holt Ch. J. Ld. Raym. Rep. 588. cites Trin. 23 Car. 2. B. R. Boroughs v. Hall.

So trover *of a ſhip cum virgis & remis*, not ſhewing the number is good; but if it *de vergis* alone, it is ill. 3 Keb. 507. pl. 55. cites it as agreed in B. R.

So trover for *ſhip and ſails* is good, becauſe the ſails go to make up the aggregate body; but if for ſails only, without ſpecifying the number and quality, it is ill. G. Hiſt. of C. B. 98, 99.

35. The true *reaſon why certainty is ſo much required* is, becauſe a recovery in this action may be pleaded in bar if another action ſhould be brought for the ſame cauſe. Per Holt Ch. J. Ld. Raym. Rep. 518. Trin. 12 W. 3. [254]

36. Trover will lie for *a trunk of linnen.* Agreed per cur. 7 Mod. 142. Hill. 1 Ann. B. R. obiter.

If trover is brought *for a box with writings and charters or veſtments* it is good, becauſe the trover is for the trunk and for the detention of the goods therein, which are withheld by the detention of the trunk, but not for the value of the goods; and therefore anciently they allowed it only for a trunk locked, but now they admit it though the trunk be not locked, becauſe the detaining is ſtill the ſame. G. Hiſt. of C. B. 123.

37. Trover of *a caſe of ſpirits* and of 50 *gallons of hot waters*, is certain enough; and judgment for the plaintiff. 7 Mod. 141. Hill. 1 Ann. B. R. Blainfield v. March.

1 Salk. 285. pl. 17. S. C. but S. P. does not appear.

(L. 5) Trover. Plea.

1. ACTION upon the caſe, that the plaintiff was poſſeſſed of ſuch goods ut de propriis, and he loſt them and the defendant found them, and he converted them to his proper uſe. The *defendant ſaid, that the plaintiff pledged them to him for* 10 *l. by which he detained them* for the ſaid 10 l. prout ei bene licuit *abſque hoc that he converted them* to his proper uſe, prout, &c. and a good plea by ſome, but by others he ſhall plead not guilty, and give this matter in evidence for the detainer. Br. Action ſur le Caſe, pl. 113. cites 4 E. 6.

2. In trover, the plaintiff *declared that he was poſſeſſed of a chain of gold, and being ſo poſſeſſed he loſt the ſame, and it came to the hands of the defendant*, who knowing it to be the plaintiff's chain, and intending to defraud him of it, *ſold it, and converted the money to her own uſe;* the defendant *pleaded that ſhe did not ſell it modo & forma*, &c. *and demanded judgment ſi actio*, &c. Upon demurrer, the opinion was that it was no plea, and that it *ought to have concluded to the country*, and not to have averred this plea and demand judgment; becauſe this plea is no bar but a general iſſue. Bendl. 41. pl. 73. Hill. 1 & 2 P. & M. Mounteagle (Ld.) v. Worceſter (Counteſs of).

And. 20. pl. 41. S. C. adjudged accordingly — D. 121. pl. 14, &c. S. C. but no judgment appears there to be given. 2 And. 101. S. C. cited as adjudged for the plaintiff.

3. Action upon the caſe, inaſmuch as the *defendant found the goods of the plaintiff, and delivered them to perſons unknown*, there *non liberavit modo & forma is no plea without ſaying not guilty*, where the *thing reſts in feaſance*. Br. Action ſur le Caſe, pl. 109. cites 3 M. 1. & 33 H. 8.

4. *And* if the action was that *whereas the plaintiff was poſſeſſed*, &c. *ut de bonis propriis*, and the *defendant found them and converted them* to his own uſe, it is no *plea that the plaintiff was not poſſeſſed ut de propriis*, but *ſhall ſay not guilty* of the miſdemeanor, *and give in evidence, that they were not the plaintiff's goods*; and nevertheleſs it is true that not guilty as to him. Br. Action ſur le Caſe, pl. 109. cites 3 M. 1. & 33 H. 8.

5. In trover and converſion to his own uſe per venditionem quibuſdam hominibus ignotis; the defendant *pleaded that the goods were bailed to him to bail over to J. S. to whom he did deliver them, abſque hoc that he did convert* them to his own uſe *per venditionem hominibus ignotis*. It was moved that the ſale is not traverſable, quod Wray concceſſit; for the converſion to his own uſe is the cauſe and ground of the action, and not the ſelling the goods, &c. 2 Le. 13. pl. 22. 19 Eliz. B. R. Anon.

4 Le. 4. pl. 14. Strangden v. Burnet S. C. in totidem verbis. —— Ibid. 106. pl. 217. S. C. in totidem verbis.

6. In trover of goods *brought in J.* the defendant *pleaded that the goods came to his hands in D. in the ſame county, and that the plaintiff* * *gave to him all goods which came to his hands in D. abſque hoc that he is guilty of any trover or converſion in J.* This was ruled to be a good manner of pleading, by reaſon of the *ſpecial juſtification*. But where a juſtification is *general* the county is not traverſable at this day. Godb. 137. pl. 163. Mich. 27 & 28 Eliz. B. R. Strangden v. Barnell.

*[255]

7. In trover, the defendant pleaded a ſale in market overt; and upon iſſue, found for the plaintiff, though he did *not ſet forth any place of the converſion*, yet becauſe the defendant had pleaded collateral matter, and not the direct iſſue, the plaintiff had his judgment by the ſtatute of jeofails. Goldſ. 54. pl. 7. Trin. 29 Eliz. Anon.

8. In trover and converſion, the *converſion is traverſable*; ſaid by Coke to have been adjudged; for it is the ſubſtance of the action, and the tort ſuppoſed in him, and ſo may well be traverſed; for if one finds goods but does not convert them, no action lies; as where in trover and converſion of goods the defendant ſaid, he *took them damage feaſant and impounded them, abſque hoc that he converted them* to his own uſe. Cro. E. 97. pl. 15. Paſch. 30 Eliz. B. R. Staſham's caſe.

S. C. cited 2 Vent. 282. Arg. becauſe it lies all in damages.

9. *Outlawry* was held by ſome to be a good bar in trover. 3 Le. 205. pl. 261. Trin. 30 Eliz. B. R. Markham v. Pitt.

Cro. E. 146. pl. 9. S. C. and it was objected that the plea

10. In trover of corn, the defendant *pleaded that* before the converſion *he was ſeiſed of certain lands on which the corn grew, and he ſevered it, and afterwards caſually loſt it, and* that *it came to the hands of the plaintiff, who caſually loſt the ſame, and it came to the*

the hands of defendant, and ſo he converted it, &c. And upon demurrer, it was inſiſted, that the plea was not good, for the plaintiff declares of a trover of his goods ut de bonis ſuis propriis, and the defendant pleads, that he took his own goods, which is no anſwer to the plaintiff; beſides, the plea is that before the time of the converſion the defendant was ſeiſed, &c. and that after the corn was ſevered, but *not ſaid that he was ſeiſed at the time of the ſeverance*; and ſo it might be that he had ſevered the corn of the plaintiff. And this was held a material exception; and judgment for the plaintiff. Le. 178. pl. 251. Trin. 31 Eliz. Ward and Blunt's caſe.

amounted only to the general iſſue, and that if it be a plea he ought to traverſe the being the goods of the plaintiff, the plaintiff having counted that they were his proper goods, which he ought to anſwer to; and judgment for the plaintiff.

11. The plaintiff declared, that himſelf was poſſeſſed of certain goods, which by trover came to the hands of the defendant, who converted them to his own uſe. The defendant pleaded, *that before the trover ſuppoſed one A. was poſſeſſed of the ſaid goods as of his own proper goods, and ſold them to the defendant without any notice that the goods were the plaintiff's*. Plaintiff demurred. Anderſon held the plea not good; for the plaintiff may bring his action againſt the finder, or any other that gets the goods after by ſale, gift or trover. Some thought, that the defendant having the goods by ſale, might traverſe the finding; but ſee 27 H. 6. 13. a. e contra. And Windham J. held, that the defendant might traverſe the property of the goods in the plaintiff; and cites 12 E. 4. 11 Le. 189. pl. 267. Mich. 31 & 32 Eliz. C. B. Galliard v. Archer.

The plaintiff *declared on a converſion of his own goods*; the defendant *juſtified for that the property* of the goods was *in C. and he before any notice that they were the goods of the plaintiff, ſold them to the defendant*; this is no good title to juſtify the converſion *without a traverſe*; unleſs he had ſhewed that he had bought the goods in a market overt. Le. 221. pl. 304. Mich. 32 & 33 Eliz. C. B. Vandrink v. Archer.

12. Trover *of 6 oxen in London, and there converted*. The defendant *pleaded that he ſeiſed them in the manor of D. in Eſſex, as goods waived there*, and ſo juſtified, *abſque hoc that he was guilty in London*. The court held it no plea, it amounting only to the general iſſue, containing no * matter local to make the place material. Cro. E. 174. pl. 5. Hill. 32 Eliz. B. R. Bullock v. Smith.

In trover and converſion *of a gelding at T. in the county of W.* the defendant pleaded *that N. was ſeiſed of the manor of H.* in the county of M. *where he, &c. had waifs and ſtrays, and that the ſaid gelding was waived there, and he as bailiff ſeiſed it, abſque hoc that he is guilty in the county of W. &c.* Upon demurrer the court held the traverſe good, becauſe it was a local juſtification; and it is not lawful to bring an action in a foreign county. Noy 109. Trin. 2 Jac. C. B. Court v. Blackman.

In trover and converſion *of* certain *oaks in Exceſter*, the *defendant conveyed a property to the marquis of W. before the converſion ſuppoſed*, &c. *and juſtified, that by his command he took them at R. in Devon, and traverſed the converſion at Exceſter*. Upon a demurrer the plea was adjudged ill, becauſe this juſtification is not local, but this matter might have been given in evidence at Exceſter. Roll. Rep. 396. pl. 20. Trin. 14 Jac. B. R. Buſh v. Luſhborough.

*[256]

13. In trover of goods, it is no plea that the defendant *was always ready to deliver them to the plaintiff, and yet is*; for the goods are not in demand, but damages only for the converſion, and ſo is only a plea by argument, and not a good argument neither; and judgment was given for the plaintiff. Le. 221. pl. 304. Mich. 32 & 33 Eliz. C. B. Vandrink v. Archer.

D. 121. a. marg. pl. 14. cites Hill. 33 Eliz. S. P. ——So if a man *finds my horſe, and rides him, and then delivers the horſe* to me, and I bring trover and converſion, it is no plea that you have delivered

delivered the horſe to me before the action brought; for you ought to anſwer to the converſion; per Popham. Goldib. 155. pl. 83. Hill. 44 Eliz. Anon.——The abuſing the horſe is a coverſion to his own uſe; and therefore the action will lie, notwithſtanding he is ready to deliver him; per Windham J. Le. 223.

14. In trover in London, the defendant *pleaded, that long before the converſion* ſuppoſed, *J. S. was poſſeſſed of theſe goods as his own, at B. in Norfolk; and that he, before the converſion ſuppoſed, caſually loſt them, and they came to the hands of P. by trover, who gave them to the plaintiff, who loſt them in London; and the defendant found them, and afterward did convert them to his own uſe by the command of the ſaid J. S.* as it was lawful for him to do. And it was moved, that this is no plea; for it amounts to the general iſſue. But all the juſtices held it a good plea; for it confeſſeth the poſſeſſion and property in the plaintiff againſt all but the lawful owner. Cro. E. 262. pl. 50. Mich. 33 & 34 Eliz. C. B. Rookwood v. Feaſar.

15. Trover *of* 300 *ſheep*, 1 Dec. 36 Eliz. the defendant *pleaded he was ſheriff* of the county of L. and that J. S. recovered againſt the plaintiff 100 l. *and a fieri facias was delivered to him* 1 Oct. 35 Eliz. *by virtue whereof* the 20th Oct. 35 Eliz. *he took the ſheep, and* 22 Oct. 35 Eliz. *ſold* 104 of them for 40 l. parcel of the 100l. *and the* 192 *reſidue remained in his hands pro defectu emptorum*, which is the ſame converſion. *The plea* is not good. 1ſt, Becauſe he *doth not* by his plea *confeſs any converſion.* 2dly, Becauſe he juſtifies that converſion in October 35 Eliz. but *meets not with the plaintiff in the time.* And, 3dly, Becauſe he *makes no juſtification for the ſheep.* Judgment was appointed to be entered for the plaintiff, but was afterwards ſtayed for the equity of the matter. Cro. E. 433. pl. 43. Mich. 37 & 38 Eliz. B. R. Aſcue v. Sanderſon.

16. In trover of goods, the defendant *juſtified* the taking *damage feaſant, abſque hoc that he converted them aliter vel alio modo.* Adjudged that this plea is not good, becauſe he doth not confeſs any converſion; and the plea amounts to not guilty. Cro. Eliz. 435. pl. 48. Mich. 37 & 38 Eliz. B. R. Dee v. Bacon.

17. In trover *for* 9 *oxen*, the defendant *juſtified by a ſale in a market overt*, and adjudged good, *without alleging any poſſeſſion or property in the ſeller, or that toll was paid;* for that ought to come on the other ſide, to avoid the ſale. Cro. Eliz. 485. pl. 1. Mich. 38 & 39 Eliz. B. R. Comyns v. Boyer.

In trover the defendant pleaded *that J. S. was poſſeſſed of the ſaid goods, and ſold them to him in market overt.* The queſtion was, if this was a good plea, becauſe it amounts to not guilty. Curia adviſare vult. Godb. 267. pl. 369. Hill. 13 Jac. B. R. Biſſe v. Tyler.——Roll. Rep. 273. pl. 48. S. C. Crooke, Doderidge, and Haughton, ſeemed to think the plea good.

[257]

18. In trover of trees, the defendant *pleaded, that the queen was ſeiſed in fee of the manor of D. where* the trees were growing, and *granted it to the defendant in tail*, whereby he was ſeiſed; and that J. S. cut the trees, and granted them to the defendant, who loſt them; and that the defendant found them, and converted them. The plaintiff *replied de injuria ſua propria;* but held ill, where the defendant makes juſtification by claiming an intereſt

in the freehold to himſelf; but where one claims not an intereſt, but juſtifies by the command of others, it is otherwiſe. Cro. E. 539. pl. 2. Hill. 39 Eliz. B. R. Canterbury (Archbiſhop) v. Kemp.

19. Trover *for a horſe, and ſelling him, and converting the money to his own uſe*, the defendant *confeſſed that it was the plaintiff's horſe, and that J. C. found and delivered him to the defendant, to re-deliver upon requeſt, which he did before the action brought, abſque hoc that he ſold him, and converted the money* to his own uſe. Adjudged that this traverſe was ill, becauſe *the converſion of the money* to his own uſe *was* a *ſuperfluous* allegation, and the defendant having by his traverſe made ſuch ſuperfluous matter parcel of the iſſue, it is therefore ill. Cro. E. 554, 555. pl. 9. Paſch. 39 Eliz. B. R. Kynerſley v. Barnard.

S. C. cited D. 121. a. marg. pl. 14. that the defendant pleaded he diſtrained him damage feaſant, abſque hoc that he ſold him, and adjudged no plea, but ought to have pleaded the general iſſue.

20. In trover of goods, the defendant *juſtified as a ſervant to the ſheriff of Middleſex, becauſe the plaintiff had ſtolen* thoſe goods, *and carried them to D. in the county of Middleſex, at which place the defendant ſeiſed them ut bona waviata.* It was adjudged for the plaintiff; for he *ought to have alleged, that a felony was committed, and that the goods were waived by the felon*, which is not done. Cro. E. 611. pl. 18. Paſch. 40 Eliz. in C. B. Davies's caſe.

21. Trover againſt the defendant for *taking an ox;* the defendant *pleaded, that the ſame plaintiff, and another, now dead, brought treſpaſs againſt one W. for taking the ſame ox, who juſtified* the taking *in the right of the now defendant for an heriot* due to him, &c. and *that, upon a demurrer* to the plea *in that action of treſpaſs, the defendant W. had judgment, which* judgment *the now defendant pleaded in bar to this action of trover.* Upon a demurrer, Walmſley and Kingſmill held the bar good, becauſe, upon the firſt judgment on demurrer, the property of the ox was admitted in the defendant, in whoſe right the juſtification was; and therefore the plaintiff ſhall not have this action without new cauſe; and though he be a ſtranger to the record by which the plaintiffs were barred, yet he is privy to the treſpaſs, and ſo may well plead it, and take advantage thereof. And to this the other juſtices agreed, ſuppoſing it to be for one and the ſame cauſe; but Anderſon and Glanvill thought it no bar, a bar in a wrong action being no bar in a right one; and here theſe actions are of ſeveral natures, and a bar in the one cannot be a bar in the other. Walmſley agreed, that a bar in treſpaſs on not guilty pleaded, is no bar to a new action, becauſe it appears not; but the verdict was upon the miſpriſal of the nature of the action; and ſo upon demurrer. Et adjornatur. And afterwards the matter was ended by arbitrement. Cro. E. 997. pl. 24. Paſch. 41 Eliz. C. B. Ferrers v. Arden.

22. In trover, the plaintiff declared, that 8 Maii 4 Jac. he was poſſeſſed in ſuch a ward in London, of ſuch and ſuch goods; and that 1 Oct. 5 Jac. they came to the defendant's hands, who

knowing them to be the plaintiff's goods converted them, &c. The *defendant pleaded, that before the plaintiff had any thing*, &c. *W. D. was poſſeſſed* of the ſaid goods, * *as of his proper goods, and* on ſuch a day, anno 4 Jac. *for a valuable conſideration gave them to defendant, who* 1 *Maii anno* 5. *loſt them, and that* 2 *Maii anno* 5. *they came to the hands of W. D. again at London, who on the ſame day gave them to the plaintiff*, by which he was poſſeſſed, and loſt them, &c. and the defendant found and converted them. The bar was adjudged not good, becauſe it neither traverſeth, nor confeſſeth and avoideth the plaintiff's title, but gives only colour of poſſeſſion without right or property, and this upon a defeaſible gift by W. D. Yelv. 173. Hill. 7 Jac. B. R. Prieſtly v. White.

Yelv. 194. Gomerſale v. Medgate, S. C. adjudged accordingly; for the diſtreſs is but in nature of a pledge to be ſafely kept; and therefore the defendant confeſſing *an intermeddling with the goods, which is not juſtifiable*, this *is a converſion*.

23. In trover for goods, the defendant *pleaded, that he took them as bailiff of the king for diſtreſſes upon a plaint in curia manerii, and ſold them.* And it was thereupon demurred, and adjudged ill; for, upon a diſtringas, the cattle ſhall not be ſold, eſpecially in a court baron, although it were in the king's court. Cro. J. 255. pl. 13. Mich. 8 Jac. B. R. Gomerſale v. Wayts.

2 Bulſt. 250. cites S. C. and S. P. and that where the converſion is confeſſed and juſtified, there needs no traverſe.

24. In trover and converſion of 2 tun of wine, the defendant *pleaded, that the king was ſeiſed* in the right of the crown *of the priſage of all wines* imported, &c. *and* being ſo ſeiſed, *granted to ſir T. Waller the office of chief butler*, &c. for life, *who by himſelf or his deputy had uſed to take for the uſe of the king* 2 *tun* of wine out of every veſſel bringing in 20 tun, &c. *and ſo juſtifies the taking for the uſe of the king.* Upon demurrer, it was *objected, that the defendant did not traverſe the converſion ſuppoſed by the plaintiff*; for this is a converſion by the defendant himſelf, and he juſtifies a converſion to the uſe of the king, which is another converſion than what he is charged with. But reſolved per tot. cur. that he need not traverſe the converſion, nor plead otherwiſe than he has done, becauſe the intermeddling ſuppoſed by the plaintiff is confeſſed by the defendant to be to the uſe of the king, which is matter in law upon the plea in bar whereof the court is to adjudge, and matter in law ſhall never be traverſed; and if the ſeiſure ſhould be adjudged unlawful, then he himſelf is guilty of the converſion, by having confeſſed, in point of judgment, a poſſeſſion of the goods, and an intermeddling with them. Yelv. 198. Hill. 8 Jac. B. R. Kenicot v. Bogan.

And the S. P. was adjudged accordingly, Mich. 11 Jac. Bulſt. 134, 135. Holman v. Karwithy.

25. In trover, the defendant by his plea in bar *intitled himſelf to the goods by a ſale to him by, &c.* but *made no anſwer to the property and poſſeſſion alleged to be in the plaintiff*, viz. *that he was poſſeſſed of them as of his own proper goods*; and for that cauſe only it was adjudged againſt the defendant in the exchequer chamber, by all the judges. 2 Bulſt. 135. cited in the caſe of Holman v. Karwithy, as the caſe of White v. Price.

26. Trover *of a horſe.* Defendant *pleaded that he was a common hoſtler, and took the horſe to livery to rack and manger, and that the horſe*

horſe died in his cuſtody; this plea was adjudged ill, becauſe it amounts only to the general iſſue. Roll. Rep. 22. pl. 29. Paſch. 12 Jac. B. R. Whitaker v. Collet.

27. In trover, the defendant *juſtified as bell-man by force of a cuſtom;* and good, becauſe it *is more than the general iſſue.* Roll. Rep. 44. pl. 12. Trin. 12 Jac. B. R. Hill v. Hawkes.

2 Bulſt. 201. S. C. accordingly, and though the defendant juſtified at D. where the trover and converſion was laid at L. and did not traverſe the trover at L. yet that was held only an inducement to the action; for he ſhews that he has not converted the plaintiff's goods, but his own proper goods, he having conveyed to himſelf a property, and judgment for the defendant.

28. Trover was brought *in D.* The defendant *pleaded the cuſtom of London, that by ſale of goods in a ſhop there the property is altered,* and that he bought thoſe goods in a ſhop there, by force whereof he converted them at D. It was objected, that this amounted only to the general iſſue; quod fuit conceſſum, per Coke and Doderidge. Roll. Rep. 397. pl. 22. Trin. 14 Jac. B. R. Row v. Tompſon.

[259]

29. In trover and converſion *of ſo many hog ſheads of cyder in London,* the defendant *pleaded bailment* of them to him, *to deliver over to J. S. in the county of Oxford, &c. abſque hoc that he converted them at London, and alibi extra com' Oxon.* This plea in effect amounts only to the general iſſue, and therefore not good, and judgment for the plaintiff. 3 Bulſt. 209. Trin. 14 Jac. Philips v. Weekes.

Roll. Rep. 395. pl. 19. S. C. adjudged for the plaintiff.

30. Trover *of* 100 *ſheep*, and counted that 25 Mar. 19 Jac. he was poſſeſſed of and loſt them; and that 30th April the ſame year, they came to the defendant's hands, who then converted them. The defendant *as to* 11 *of them pleaded not guilty*, and *as to the reſt that plaintiff had before brought treſpaſs againſt the defendant and one J. S. for taking and carrying away* 100 *ſheep, and declared of taking ſo many* 14 *April* 19 *Jac. They pleaded a recovery in debt by the defendant againſt E. H. and that the ſaid E. H. was then poſſeſſed of the ſaid* 89 *ſheep, and that by virtue of a fi. fa. they were ſold to him, whereupon he took them into his poſſeſſion, and found for the plaintiff, and damages aſſeſſed to* 2*d. and judgment thereupon, and* 6 *l. coſts, and averred the taking and driving, for which the recovery was had, and the converſion in this action was all one, &c.* Reſolved by 3 juſtices, that the plaintiff recover; for the damages of 2d. for the 89 ſheep being ſo ſmall, the court ſhall intend it to be only for the taking and driving, and that the plaintiff had them again, and not in lieu of the value of them; for if it ſhould be taken for the value of them, then the plaintiff ſhould loſe his property in them, and the law will rather intend thoſe damages given only for the taking and driving, and that the plaintiff had them again, and loſt them after, and that the defendant found, and after converted them; and that the firſt action was for the firſt taking and chaſing, and the 2d for the converſion, ſo as both may ſtand together, which is confeſſed by the demurrer; and that the damages were given for the firſt taking, &c. and not for the converſion, and therefore the plaintiff ſhould recover. But Yelverton contra, that cepit & abcuxit

Hutt. 81. Laicon v. Bernard S. C. adjudged for the plaintiff, that the 2d. cannot be intended for the value of the ſheep, and when a treſpaſs is done, the plaintiff may retake his goods and yet have treſpaſs for the taking them, and every taking, viz. abduxit imports a chaſing, and no one will ſay that by recovery in treſpaſs, when the plaintiff has his goods, the defendant ſhall thereby have the property;

though if plaintiff recovers the value, he thereby waves the property, and cites 2 R. 3. 14.

duxit implies the defendant's having them, and ouſting the plaintiff of his poſſeſſion; and though the damages are ſmall, they ſhall be intended given for the ſheep, and ſo he cannot have action for converting them afterwards. But adjudged for the plaintiff. Cro. C. 35, 36. pl. 9. Paſch. 2 Car. C. B. Lacon v. Bernard.

4 H. 7. 5. 6 H. 7. 8. But Yelverton J. at firſt hæſitavit, though he afterwards agreed.—— S. C. cited by Roll Ch. J. Sty. 202. Hill. 1649. and ſaid it is hard to maintain this caſe; for cepit & abduxit intends that the owner has not the ſheep again; but otherwiſe it would be, if the action had been for the driving of them only.——See Winch's Ent. 99.——S. C. cited Arg. 3 Mod. 1, 2.——S. C. cited 2 Show. 211, 212.

31. In trover *of* 2 *loads of vetches*, &c. the defendant *juſtified by the command of H. to whom part of the land belonged on which the vetches did grow, and the other part to B. in right of his wife*, &c. The plaintiff demurred, becauſe he juſtified by the command of 2 generally, and he cannot juſtify upon the land of one by the command of the other, but ſhould allege ſeveral commands. But Doderidge and Whitlock, only preſent, held it well enough, that though it was a joint command, yet the parties having ſeveral intereſts, it ſhall be taken as ſeveral commands, reddendo ſingula ſingulis; but becauſe the defendant did *not ſhew particularly on whoſe lands the vetches grew*, but only that part did grow on the land of the one, and part on the land of the other, the plea was adjudged not good, becauſe it was uncertain. Poph. 208. Hill. 2 Car. B. R. Sparrow v. Sherwood.

[260] 32. Trover of *divers loads of corn*. The defendant pleaded, and *intitled himſelf to them as tithes ſevered*. The plaintiff demurred, for that the plea amounted only to the general iſſue; and though it was anſwered, that it concerns matters in the realty, viz. tythes, and title is pleaded, and as it were confeſſes the plaintiff's poſſeſſion, and as a general bar in treſpaſs, and colour given, yet non allocatur; for this action comprehends title in it, and a plea amounting only to the general iſſue is not allowable, it being ſpecially ſhewn for cauſe of demurrer. Adjudged for the plaintiff without argument. Cro. C. 157. Paſch. 4 Car. B. R. Lynner v. Wood.

There is *no plea* in trover *but a releaſe, or not guilty*, every

33. In all actions of trover *of goods, every plea ſpecial with colour amounts only to the general iſſue*; but it is *otherwiſe* if it concerns *title of land*. Lat. 185. obiter, and affirmed by Jones J.

ſpecial plea in juſtification being but tantamount; per Twiſden J. Keb. 305. pl. 16. Trin. 14 Car. 2. B. R. in caſe of Devon v. Coridon.——S. P. by the Ch. J. ſaid to have been often held. 2 Barnard. Rep. in B. R. Paſch. 7 Geo. 2. Anon.—— Holt Ch. J. ſaid he never knew but one ſpecial plea in trover good, and that is in Yelv. 198. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. in caſe of Hartfield v. Jones.

34. In trover brought by executor, the defendant *pleaded that the teſtator died inteſtate, and* that *adminiſtration was committed to A. who ſold the goods to the defendant*; to which the plaintiff demurred, as amounting but to the general iſſue, and ſo was the opinion of the court. Keb. 318. pl. 44. Trin. 14 Car. 2. B. R. Tarling v. Dealton.

35. In

35. In trover for certain goods, defendant *pleads, that the plaintiff before brought treſpaſs vi & armis for the ſame goods, and* upon not guilty pleaded, a *verdict and judgment for the defendants,* &c. Upon demurrer, it was adjudged by 3 juſtices, Dolben hæſitante, that this is no good plea, becauſe trover will in many caſes lie where treſpaſs will not, and here it may very well be preſumed that the *plaintiffs in the firſt action only miſtook their action;* for they brought treſpaſs where their evidence would not prove a wrongful taking, but only a demand and denial; and verdict paſſing againſt them in that action, they were forced to begin in this new action of trover. Raym. 472. Mich. 34 Car. 2. B. R. Putt, &c. v. Rawſterne, &c.

2 Mod. 318. PUTT v. ROSTER, S. C. ſays the juſtification in the firſt action was for a heriot, and that defendants had judgment upon a demurrer.— 3 Mod. 1. S. C. adjudged accordingly. ——2 Show. 211. pl. 219. S. C. adjudged accordingly, Dolben hæſitante. Pemberton Ch. J. ſaid he agreed, that when the original action is a tortious converſion, there either treſpaſs or trover will lie, and ſuch matter being diſcloſed, a verdict for the defendant in the one will be a bar to the other. ——Skin. 48. pl. 2. S. C. by the name of FOOT v. RASTALL, adjornatur. And Ibid. 57. S. C. mentions nothing of Dolben's doubting, but ſays the court was of opinion that it was no bar; for the plaintiff's property is not barred by the judgment for the defendant, but that he may ſeiſe them if he can get at them; ſo that the property not being barred, the plaintiff's demand and the defendant's denial of them is a converſion, though not ſuch as the court will judge a converſion, yet ſuch as the jury always judges to be ſo, and the court directs them ſo to do. Judgment niſi.——Pollexf. 634. S. C.——S. C. cited 2 Vent. 169, 170.——S. C. cited Show. 146.——2 Mod. 318. Putt v. Roſter, ſeems a miſtake in entering a caſe cited, as if it was the principal caſe; for which ſee Ferrars's caſe, ſupra pl. 21.

36. In trover for certain goods, the defendants *plead, that the plaintiff had before brought treſpaſs vi & armis,* &c. *againſt the ſame defendants, for taking and carrying away the ſame goods.* And upon not guilty, there was a ſpecial verdict, which the defendants in their plea ſet forth verbatim, *and that the court then gave judgment that the plaintiff nil capiat,* &c. and that the defendants eant inde ſine die, and avers the goods in both declarations to be the ſame, and the taking and carrying away, &c. ſuppoſed in the ſaid action, and the coming to the hands of the defendant, &c. in this declaration, and the cauſe of action, to be the ſame, &c. The court held this a good plea; but took the caſe of PUTT v. ROYSTON as a caſe of the ſame nature; for though the iſſue was general, yet in regard of the averments, which in every ſuch plea * muſt be, it appears to the court that the matter was the ſame, as well as here it does upon the ſpecial verdict; and were it not the ſame, ſo as the plaintiff was barred to the former by miſtaking the nature of his action, the averment might be traverſed; and therefore, by reaſon of that caſe, and the importunity of the plaintiff, leave was given to ſpeak further to the caſe the next term. 2 Vent. 169, 170. Paſch. 2 W. & M. in C. B. Lechmere v. Toplady.

Show. 146. Hill. 1 W. & M. in C. B. the S. C. and upon demurrer, the whole court were clear of opinion it was a good bar upon the authority of FERRARS's caſe, [which ſee ſupra pl. 21.] and that notwithſtanding the caſe of Putt v. Royſton, adjudged contra in B. R. which caſe Pollexfen Ch. J. ſaid he never was ſatisfied with, and as he remembered a writ of error was brought, and the judgment queſtioned; but afterwards agreed that he ſaw no difference between a general and a ſpecial verdict. However they all thought the judgment in the one a bar to the other, becauſe the actions were of the ſame nature; and judgment for the defendant.

*[261]

37. In trover, the defendant pleaded, *that the goods were caſt away, and he ſaved and detained them till he was paid for his pains* in the ſalvage. Upon demurrer, Holt Ch. J. held, that he might

Ld. Raym. Rep. 393. S. C. accordingly.

detain; for ſalvage is allowed by all nations; but the plea is naught; for if the detainer be lawful, he *does not confeſs a converſion*; and the rule was in the principal caſe to waive this plea, and to plead not guilty. 2 Salk. 654. pl. 2. Mich. 10 W. 3. B. R. Hartford v. Jones.

38. A *former recovery in an indebitatus aſſumpſit* may be pleaded in bar of an action of trover brought for the ſame thing; as it would have been a good plea in bar, that the defendant ſold the thing for which the trover is brought, and paid [the money] to the plaintiff in ſatisfaction; but it may be a doubt if this recovery can be pleaded before execution. 2 Ld. Raym. Rep. 1217. Per Holt Ch. J. Mich. 4 Annæ.

(M) Upon an Aſſumpſit. What Words [or Act] will make an Aſſumpſit.

Noy 11. S. C. accordingly; and it was not averred to whom the words were ſpoke; and it is not reaſonable that the defendant ſhould be bound by ſuch general words ſpoke to excite ſuitors.——See (Z) pl. 2. S. C.

[1. IF there be a *communication* between the fathers of A. and B. *as to a marriage* between the ſaid A. and the daughter of B. and B. tunc & ibidem, *affirmed* and publiſhed to the father of A. *quod daret ei qui maritaret his ſaid daughter, by his conſent* 100 *l.* and after *A. marries the daughter of B. by his conſent*; yet this affirmance and publication of B. ſhall not raiſe any promiſe whereupon an action upon an aſſumpſit may be brought; becauſe theſe words do not include any promiſe. Trin. 3 Jac. B. R. between WEEK AND TIBOLT, per curiam.]

Cro. J. 306. pl. 3. OASTE v. TAYLOR, S. C. it was alleged that the defendant accepted thereof ſecundum uſum mercatorum; but it was moved in arreſt of judgment, becauſe the defendant was not averred to be a merchant at the time of the bill accepted. [No judgment.]——See tit. Bills of Exchange.

[2. *By the cuſtom of London*, if any *merchant commorant at* Middleburrough, and trafficing between Middleburrough and London, *directs any bill of exchange to any merchant commorant in London*, and trafficing between London and Middleburrough, to be paid to any merchant or other perſon, and the *merchant to whom it is directed ſubſcribes it*, this ſhall be an aſſumpſit in law, upon which an action upon the caſe lies. Mich. 10 Jac. B. R. between HOST AND TAYLER, admitted.]

* *Drawing a bill* is an actual promiſe. 1 Salk. 128. pl. 10. Mich. 11 W. 3. B. R. Starky v. Cheeſman.——Carth. 510. S. C. & S. P. accordingly.——Ld. Raym. Rep. 538, 539. S. C. & S. P. accordingly.

* [262]

But if A. delivers a book or charter to B. but there is no expreſs promiſe to deliver it back again, an aſſumpſit will not lie. Clayt. 33. pl. 57. Per Berkley J. Aug. 21 Car. Evans v. Yeoman.

3. If A. *delivers an obligation to B. to re-bail to A.*——A. ſhall have an action on the caſe, without an expreſs aſſumpſit; per Anderſon. Le. 297. pl. 406. Hill. 28 & 29 Eliz. and ſaid, it was uſual and frequent in the king's bench.

4. Every

4. Every *contract executory implies an aſſumpſit* to pay money at the day agreed, or immediately if no time be limited; but it is not ſo of an indeb. aſſ. becauſe the cauſe does not appear. Said by Popham to be the opinion of all the juſtices of England. Mo. 667. pl. 916. Mich. 40 & 41 Eliz. Morgan v. Slade.

5. The plaintiff declared, that *T. was indebted to him, and appointed J. S. the defendant, to whom he delivered* 50*l.* *to pay it to the plaintiff in part of the ſaid debt*, whereupon the *plaintiff came to J. S. and demanded the* 50*l.* *who anſwered, that he was buſy then, but if he would come ſuch a day he would pay him.* The plaintiff came at the day, but J. S. refuſed to pay him. Per Popham Ch. J. when T. delivered the money to J. S. to deliver to the plaintiff, an agreement is included thereby to deliver it to him, which will charge him in aſſumpſit to him that ought to have the money; and Tanfield agreed, that when there is any precedent matter which cauſed the delivery, as here it was by a debt, the delivery is not countermandable; but here is another conſideration beſides the debt, viz. the coming to the defendant's houſe to fetch the money; to which Yelverton agreed; whereupon it was adjudged for the plaintiff. D. 272. a. marg. pl. 31. cites Paſch. 5 Jac. B. R. Gilbert v. Ruddeard.

6. Wherever one *acts as bailiff*, he promiſes to render account. Per Holt Ch. J. 1 Salk. 9. pl. 1. Hill. 2 W. & M. B. R. in caſe of Wilkin v. Wilkin.

7. If 2 men ſubmit to the *award* of a 3d perſon, they two do alſo thereby promiſe expreſsly to abide by the determination; for *agreeing to refer is a promiſe* in itſelf. 6 Mod. 35. Mich. 2 Ann. B. R. per Holt Ch. J. in caſe of Squire v. Grevell.

8. There is no ſuch thing as a *contract* or promiſe *in law*, though there is ſuch expreſſion in ſome of the books. Per Holt and Powell. 6 Mod. 250. Mich. 3 Ann. B. R. in caſe of Bourkmire v. Darnell.

But ſee 2 Saund. 66. Holt ſaid it was a *metaphyſical notion*; for the law makes no promiſe but where there is a promiſe of the party. Ld. Raym. Rep. 538. Hill. 11 W. 3. in caſe of Starke v. Cheeſeman —— But ſee 5 Mod. 13. Mich. 6 W. & M. where Holt Ch. J. ſaid, that holding a wager is a promiſe in law to deliver it if won.

9. An *officer* (as regiſter in chancery, &c.) *receives his fee for doing the duty of his office* (as to make entries, &c.) and neglects the doing it, ſuch acceptance of his fee amounts, by implication of law, to a promiſe and agreement, and if the party or ſuitor pay coſts for irregularity, an action lies; except where ſuch officer is an officer in the chancery (as in the principal caſe) the court of chancery will not ſuffer this matter to be examined by any other court, but will determine it itſelf, as in all like caſes in a ſummary way; arg. and ſo held by Ld. C. King. 2 Wms.'s Rep. (657) Mich. 1731. James v. Philips.

(N) In what Caſes an Action upon the Caſe lies, where Debt lies. What ſhall be an Aſſumpſit in Law to have an Action.

[1. IF a man accounts, and *upon* the *account* is found *in arrear to a certain ſum, and preſently in conſideratione inde, aſſumes to pay the debt at a day;* an action upon the caſe lies for this after the day, for the aſſumpſit *commences with the certainty of the debt.* 14 Jac. * JANSON AGAINST COLOMORE, 11 Jac. JESSON AND BRIER adjudged. Trin. 12 Jac. B. R. this was ſo adjudged alſo.]

* Roll. Rep. 399. pl. 21. S. C. adjudged for the plaintiff. But by Doderidge J. (and Crooke ſeemed of the ſame opinion) if the action had been brought merely on a contract, and not upon ſuch a finding in arrearages, there an indeb. aſſ. generally had not been good. ——— 3 Bulſt. 208. S. C. adjudged that the conſideratione inde is good without ſhewing any conſideration of forbearance, becauſe it was not an original debt but is reduced unto a debt by the finding him ſo much in arrears. ——— Mo. 854. pl. 1169. adjudged Colimore v. Janſon S. C. ——— See (Q) pl. 17. S. C.

Mo. 854. pl. 1168. Babington v. Lambert S. C. adjudged for the plaintiff.

[2. If a man *delivers money to B. to my uſe*, I may have an action upon the caſe againſt B. for this money, becauſe I may have an action of debt againſt him. Trin. 14 Jac. B. R. BECKINGHAM AND LAMBERT AGAINST VAUGHAN, adjudged.]

——— Roll. Rep. 391. pl. 11. S. C. adjudged for the plaintiff. ——— See (M. c) pl. 9. S. C. ——— See (U) pl. 51. and (Z) pl. 5. 7. 13.

Award upon parol ſubmiſſion was, that defendant ſhould pay 50 l. and upon payment thereof the

[3. If *two ſubmit* themſelves *to the award of J. S.* and *he awards a collateral matter* to be done, *and not any money* to be given, no action upon the caſe lies for not performing thereof, nor any action of debt, inaſmuch as there is not any money [awarded]. Mich. 10 Jac. B. between PENRUDDOCK AND THE LORD MONTEGLE. Reſolved per curiam.]

the plaintiff ſhould deliver the defendant certain writings and make a releaſe to him, After verdict judgment was ſtayed and given for the defendant, becauſe the award is void, the defendant having no remedy for the writings and releaſe; for it implies not a promiſe to perform it. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French. ——— Keb. 599, 600. pl. 72. S. C. and by Hide and the court, the mutual ſubmiſſion is no promiſe in itſelf, but only an evidence of it. ——— Ibid. 635. pl. 124. S. C. the court held that no action of debt or action on the caſe would lie, but only an action on the caſe upon mutual aſſumpſit; and by conſent a nil capiat per billam was awarded againſt the plaintiff. ——— Sid. 160. pl. 14. S. C. and it was ſaid, that when Manwood Ch. B. made parol awards, wherein he awarded money to be paid on the one part and a releaſe to be made (as here) on the other part, he awarded further, that if the releaſe be not made by ſuch a day, then the party that ſhould make it ſhould pay ſo much money; and his reaſon was, that though there was no remedy upon the parol award for the releaſe, yet there was for the money. And it was ſaid by Twiſden J. and agreed, that if the plaintiff in the principal caſe had *brought debt for the money generally without ſhewing the award of both parts* it had been good, and the plaintiff would have his judgment, and that it had been ſo adjudged.

S. C. cited by Powel J. 2 Vent. 175.

4. Indebitatus aſſumpſit lies for a *fine pro licentia concordandi*, though it was objected, that this action would not lie, becauſe it was a real fine given by law, and no contract between the parties; but per Gawdy J. the action lies, becauſe it is not any caſual profit; and therefore debt lies for it, *though it be an inheritance.*

ritance. And Wray thought this action lay, becauſe he did not ſee that there was *any other remedy.* 2 Le. 179. pl. 219. Trin. 30 Eliz. B. R. Lord North's caſe.

5. Aſſumpſit, in conſideration that the plaintiff *venderet & deliberaret to D. his factor,* at the inſtance of defendant, 200 hog-lambs *to the uſe of defendant,* that defendant would pay ſo much money as ſhould be agreed between the plaintiff and D. After judgment for the plaintiff, it was aſſigned for error, that the contract was the contract of the defendant himſelf, ſo that the action ſhould have been debt, and not aſſumpſit. But all the juſtices e contra; for the count was, that he ſold to D. to the uſe of B. the defendant, whereas the uſe is only a confidence, which gives no property to the defendant in law; ſo that debt lay not againſt the defendant but aſſumpſit. Mo. 701. pl. 975. Hill. 36 Eliz. in the exchequer-chamber, Hinſon v. Burridge. S. C. cited 2 Ld. Raym. Rep. 842. [264]

6. Aſſumpſit, *in conſideration the plaintiff would* ſell and *deliver* to the defendant *pannos laneos pro funeralibus of a clerk, he promiſed to pay him* for them *cum inde requiſitus eſſet;* and alleged he ſold and delivered divers cloths to him, viz. 31 yards of black cloth for 19l. and ſo recited other parcels, amounting to 160l. Upon non aſſumpſit found for the plaintiff, error was brought in the exchequer chamber, and the judgment reverſed, becauſe debt properly lay, and not aſſumpſit, *this matter proving a perfect ſale and contract.* Mo. 711. pl. 697. Trin. 40 Eliz. Rot. 280. B. R. Maybard v. Keſter.

7. Action upon the caſe upon aſſumpſit lies *upon every contract executory,* as well as an action of debt. Adjudged. Mo. 667. pl. 916. Mich. 40 & 41 Eliz. Morgan v. Slade. 4 Rep. 94. a. b. S. C. & S. P. reſolved; for ſuch contract imports an aſſumpſit; when one agrees to pay money or to deliver any thing, this includes a promiſe to pay or deliver it, and therefore when one ſells goods and agrees to deliver them at a day to come, and the other in conſideration thereof agrees to pay ſo much at ſuch a day, both parties may have action of debt or aſſumpſit; for the mutual executory agreement of both parties import as well a reciprocal action upon the caſe as of debt, and with this accords the judgment in Read and Norwood's caſe, Pl. C. 128.—Yelv. 20. Slade v. Morley, S. C.—Mod. 163. pl. 1. Vaughan Ch. J. calls this a ſtrange judgment.

It is an error to think, that every *contract which obliges one to pay money* does raiſe a debt; as if A. promiſe C. to pay him a debt due to C. from B. and it be for good conſideration A. is thereby bound to pay it, but yet it is not a debt upon him; and if he after had come, and in conſideration that I am bound to pay you the debt of B. I promiſe to pay you, an indebitatus would not lie thereupon; per Holt Ch. J. 6 Mod. 129. Paſch. 3 Ann. B. R. in caſe of Queen v. Lane.

8. Aſſumpſit, for that the *plaintiff and defendant accounted together for monies received by the defendant,* who was *found in arrears* 10*l. and in conſideratione inde promiſed to pay* it the 19th March following, &c. It was aſſigned for error, that here is no conſideration; for the being found in arrears is not any cauſe to make a ſpecial promiſe, nor is any thing done on the plaintiff's part whereon this promiſe ſhould be grounded, viz. forbearing the ſuit, &c. Sed non allocatur; for *the debt itſelf,* without other ſpecial cauſe, *is ſufficient* to ground the action. Cro. J. 69. pl. 11. Paſch. 3 Jac. B. R. Egles v. Vale. Yelv. 70. Vales v. Egles S. C. held accordingly.

9. It lies for monies received by him of a coal-meter as lord mayor, which was due to the chamberlain; and adjudged that if

if I *pay money* in ſatisfaction of a duty, and as a duty, and *he to whom it is paid has no title to receive it*, and ſo the duty is not ſatisfied, he to whom it is paid is indebted to me, and I ſhall maintain action. 2 Sid. 4. Mich. 1647. B. R. Bonnel v. Foulk.

Had the ſale been alleged to the daughter, the court would not intend it a debt in the father, but now being for the daughter, it ſhall be intended they were ſold to the father. Keb. 439. pl. 29. S. C. adjudged.

10. Indebitatus aſſumpſit *for phyſic, wares, &c. provided and delivered for the daughter of defendant at his requeſt*, adjudged for the plaintiff, for it is for wares, &c. delivered *(for)* not *(to)* the daughter; and ſo being after verdict, ſhall be intended delivered to the defendant for the daughter. And debt lies for this; as if the father deſires one to find phyſic for his daughter, debt lies againſt the father, and ſo an indebitatus aſſumpſit. Raym. 67. Hill. 14 & 15 Car. 2. B. R. Stonehouſe v. Bodvil.

11. An agreement was *to pay 5 s. per combe for corn, or as much as the plaintiff ſhould ſell any of his other corn for at the next market.* [265] It was found that the plaintiff ſold his other corn at the next market at C. for 5s. 4d. per combe. The plaintiff had judgment; for after the agreement aſcertained by ſale at the next market, the plaintiff has election to bring a general indebitatus aſſumpſit, or a ſpecial action on the caſe; but before ſuch certainty, it muſt be ſpecial. 2 Keb. 240. pl. 17. Trin. 19 Car. 2. B. R. Beckingham v. Scott.

12. Indebitatus aſſumpſit was brought by the plaintiff *pro naulo*. Upon non aſſumpſit, the plaintiff had judgment; and it was aſſigned for error, that freight was uſually contracted by a charter-party; and if ſo, a general indebitatus aſſumpſit would not lie for a debt by ſpecialty. But judgment was affirmed; for it doth *not appear that there was any deed* in the caſe, and it ſhall not be intended that there was. Vent. 100. Mich. 22 Car. 2. B. R. Prior v. Shears.

13. If A. *ſells a horſe to B. for* 10 *l. and there being divers other dealings between them, they come to an account upon the whole*, and B. is found in arrear 5 l. A. may bring his inſimul computaſſet, for he can never recover upon an indebitatus aſſumpſit: per tot. cur. 2 Mod. 44. Trin. 27 Car. 2. C. B.

14. A. promiſed B. that *in conſideration he would marry his kinſwoman he would give her* 100 *l.* Adjudged, that an indebitatus aſſumpſit will not lie; for it is not a debt, but a collateral promiſe. Vent. 268. Paſch. 27 Car. 2. B. R. Anon.

15. Exception was taken, that an indebitatus aſſumpſit lies not *on ſale of copyhold lands*. Sed non allocatur, it lying as well as on a bargain and ſale of [other] land. Contra *on aſſignment of a judgment*, &c. 3 Keb. 625. pl. 7. Paſch. 28 Car. 2. B. R. Danwood v. Godſchall.

2 Lev. 142. Trin. 27 Car. 2. B. R. the S. C. but S. P. does not appear.

16. In indebitatus aſſumpſit for *ſcavage duty*, plaintiff declared *upon the cuſtom of London*, that all perſons expoſing foreign goods to ſale, which had been entered at the cuſtom-houſe, ſhall pay ſo much for ſhewing them. It was moved in arreſt of judgment, that there ought to be a contract either expreſſed or implied, to maintain

maintain an aſſumpſit, and therefore it would not lie for this duty; and that the cuſtoms of the city being confirmed by parliament, this is a duty by record. Sed non allocatur; for there are multitudes of precedents in ſuch like caſes. Vent. 298. Mich. 28 Car. 2. B. R. London City v. Goree. ——2 Lev. 174. Trin. 28 Car. 2. B. R. the S. C. reſolved that the action lies without expreſs promiſe; and judgment for the plaintiff.——S. C. cited 2 Lev. 252. per cur. as adjudged.——S. C. cited Show. 35. Arg.

So where an indebitatus aſſumpſit was brought *for* 20 *l. forfeited by the conſtitutions* and ordinances *of a company in* London, *for not ſerving in the office of ſteward* of the company, *according to a by-law* for that purpoſe made and declared, on a promiſe to pay it. And judgment for the plaintiff. 2 Lev. 252. Paſch. 31 Car. 2. B. R. London Barber Surgeons v. Pelſon.

17. Indebitatus aſſumpſit, for that the defendant being indebted to him in a certain ſum *for wares ſold and delivered to a ſtranger at the defendant's requeſt*, the *defendant did promiſe to pay*, &c. After a verdict for the plaintiff, it was moved, that this was only a collateral promiſe, and that an indebitatus aſſumpſit would not lie; for the debt was from him to whom the goods were ſold. Wilde and Jones held, that the action lay, but Rainsford Ch. J. contra. But the plaintiff had judgment. Vent. 311. Trin. 29 Car. 2. B. R. Kent v. Derby. 3 Keb. 756. pl. 38. Kent v. D'aubeny, S. C. Judgment for the plaintiff niſi, &c.—2 Vent. 36. Trin. 33 Car. 2. C. B. Rozer v. Rozer, S. P.

and it was moved in arreſt, that ſuch promiſe being collateral, did not make a debt, but ſhould have been brought as an action on the caſe; and thereupon judgment was ſtayed.

18. An indebitatus aſſumpſit will lie *for meat and drink for a baſtard child;* per Pemberton Ch. J. 2 Show. 184. pl. 186. Hill. 33 & 34 Car. 2. B. R. Anon.

18. It was ſaid to be lord Hale's opinion, that where there was *common charity, and a charge*, it would lie, and undoubtedly a ſpecial promiſe would reach it; but then that would be within the ſtatute of frauds, &c. as a collateral promiſe. 2 Show. 184. pl. 180. Hill. 33 & 34 Car. 2. B. R. Anon. [266]

18. Indebitatus aſſumpſit lies not againſt a man where he has received money of the plaintiff *to lay out to a particular purpoſe*, and he has laid out part thereof accordingly; for then he ought to be called to account for the ſame by action of *account;* but if none were laid out, there an *indebitatus aſſumpſit* lies to recover back the money again. So if it were expended to another purpoſe; for there the ſum is certain, and may be demanded as a debt. 2 Show. 301. pl. 304. Paſch. 35 Car. 2. B. R. Per Jones J. at a trial. Hartup v. Wardlove.

19. A. promiſes B. that when *A. receives* 100*l. which C. owes A. that he will pay B.* 20*l.* indebitatus aſſumpſit lies not. Otherwiſe if the money had been *originally the money of B.* Skin. 196. pl. 11. Trin. 36 Car. 2. C. B. Anon.

20. Indebitatus aſſumpſit lies for a *cuſtomary fine ſuper mortem domini.* Show. 35. Per 3 J. contra Holt Ch. J. Trin. 1 W. & M. Shuttleworth v. Garret. 3 Mod. 239. Per 3 Juſt. contra Holt, S. C.—— Carth. 90.

S. C. ——7 Mod. 12. Holt Ch. J. ſaid he never could be reconciled to this opinion.—For it was to leave matter of law to a jury; per Holt Ch. J. 12 Mod. 324.

21. Indebitatus

21. Indebitatus aſſumpſit lies *upon a perſonal contract* for a ſum in groſs, as *pro rebus venditis;* per Holt Ch. J. Show. 36. Trin. 1 W. & M.

Carth. 95. S. C. adjudged accordingly.——Comb. 163. S. C. adjudged accordingly; and Holt Ch. J. ſaid that it was ſo adjudged lately in C. B.——The reporter adds a nota, that it was alleged that Gerard was made a knight voluntarily.

22. Indebitatus aſſumpſit lies for *fees for being knighted.* Show. 78. Mich. 1 W. & M. in B. R. Duppa v. Gerard.

25. Indebitatus aſſumpſit lies for money *paid by miſtake,* on an account or *deceit;* but not for money paid *knowingly on illegal conſideration,* as an uſurious bond. 1 Salk. 22. pl. 2. Hill. 5 W. 3. at niſi prius in London, coram Treby Ch. J. Tomkins v. Bernett.

It lies not for money won at play on a wager; per Holt Ch. J. who ſaid it had been held ſo, though contrary to the caſe of Egleſton v. Lewin. 5 Mod. 13. Mich. 6 W. & M. Walker v. Walker.——Comb. 303. S. C. & S. P. held accordingly by Holt Ch. J.——12 Mod. 69, 70. S. C. and the court inclined ſtrongly to that opinion.——See tit. Gaming (C) pl. 4. and the notes.

26. Indebitatus aſſumpſit will lie *in no caſe but where debt lies,* therefore it lies not on a *wager,* nor upon a *mutual aſſumpſit,* nor againſt the *acceptor of a bill of exchange;* for his acceptance is but a collateral engagement: but it lies againſt the *drawer* himſelf; for he was really a debtor by the receipt of the money. 1 Salk. 23. pl. 3. Hill. 8 W. 3. B. R. Hard's caſe.

Comb. 473. S. C. accordingly.—Carth. 446. S. C. and the ſame diverſity taken by Holt Ch. J. and judgment was arreſted.

27. Indebitatus aſſumpſit lies not on *collateral engagements.* See the caſe above; and 1 Salk. 23. BUTCHER v. ANDREWS, which was an indebitatus aſſumpſit againſt the father, *for money lent the ſon at the father's requeſt,* and ſo judgment was arreſted; for this was a collateral promiſe. But per Holt Ch. J. had it been *for ſo much money paid by the plaintiff at the requeſt of the defendant the father to the ſon,* it might have been good; for then it would be the father's debt, and not the ſon's. Carth. 446. Paſch. 10 W. 3. B. R. S. C.

28. Payment of money *due to the wife as executrix,* is not evidence to maintain action for money received to the huſband's uſe. 1 Salk. 282. pl. 10. Paſch. 8 W. 3. B. R. Anon.

[267]

29. Holt Ch. J. ſaid, that Keeling would allow an indebitatus againſt a *receiver or factor,* but Hale would not; and that by his conſent it ſhould go as far as it had gone, but not a ſtep farther. 12 Mod. 324. Mich. 11 W. 3. B. R. in caſe of Huſſey v. Fiddal.

Ld. Raym. Rep. 502. S. C. but Rokeby J. ſeemed of opinion that the action would lie. Et adjornatur.——The reporter adds, that a day or two after Holt repeated this caſe to Treby Ch. J. as a new attempt to extend indebitatus aſſumpſits, which had

30. Indeb. aſſump. *for a fine impoſed by a corporation,* for not holding the office of ſheriff in the city of York. It was objected, that the action does not lie; for no privity or aſſent can be implied when a fine is impoſed on a man againſt his will, nor is there any precedent conſideration; neither do they ſhew any right to this fine, nor who impoſed, &c. Holt Ch. J. thought it time to have theſe actions redreſſed, and that it was hard that cuſtoms, by-laws, and rights to impoſe fines, ſhould be left to a jury. Et adjornatur. 5 Mod. 444. Trin. 11 W. 3. York (city) v. Toun.

had been too much encouraged already; and that Treby ſeemed to be of the ſame opinion with Holt.

31. Indeb. aſſump. by an *under-officer againſt his colonel for his pay;* and here proof was admitted of the hand of a perſon proved beyond ſea; and per Holt Ch. J. if one *receives money for the uſe of another*, an indeb. is a proper remedy for it; but if in this caſe there were any *legal deduction* to be made by the colonel, the remedy had been *account;* for where one receives money, and has no way to diſcharge himſelf of it but payment over, an indeb. will lie. 12 Mod. 521. Paſch. 13 W. 3. Key v. Gordon.

32. A *goldſmith's bill for* 450 *l. payable to A.* was *brought to the bank by G. who deſired M. the caſhier to give him a ſpecie bank-note, payable to A. for the ſaid bill.* M. refuſed, unleſs A. would promiſe to pay the 450l. to the bank in caſe S. the goldſmith did not; which A. agreeing to, *M. gave G. a bank-bill for that ſum.* G. gave the bank-note to C. for a debt he owed him, and C. received the money at the bank. S. refuſed to pay his bill. Holt Ch. J. held, that the plaintiffs might have a ſpecial action, but not a general indeb. aſſump. For this was not money lent, nor laid out for defendant's uſe, but it was a buying of the bill of S. with a warranty of it from the defendant; and the plaintiffs were nonſuit. 2 Ld. Raym. Rep. 753. Hill. 1 Ann. the Bank England v. Glover.

33. Indeb. aſſump. for that the defendant was *indebted* to him in 20*l. for nouriſhing E. L. an infant*, by the plaintiff, *at the requeſt of the defendant*, he promiſed to pay. It was objected, that this will not raiſe a debt, and ſo indeb. aſſump. will not lie. But per tot. cur. contra, and judgment for the plaintiff. 2 Ld. Raym. Rep. 841, 842. Mich. 1 Ann. B. R. Hart v. Langſitt.

7 Mod. 148. Hart v. Longfield, S. C. adjudged accordingly.

34. Indeb. aſſump. *for meat, drink, and lodging, found for a 3d perſon;* and moved in arreſt of judgment that it would not lie, but a ſpecial action upon the caſe; but per cur. *it lies* againſt him *upon the contract*, and the plaintiff had judgment. 6 Mod. 77. Mich. 2 Ann. B. R. Jordan v. Tomkins.

2 Ld. Raym. Rep. 982. S. C. accordingly.—*As if A. deſires B. to cure the horſe of C. and* that *he (A) will pay him* ſo much, an indebitatus will lie againſt A. and only againſt him. Ibid.

35. Plaintiff can maintain no action here *on a judgment in France*, but an indebitatus aſſumpſit, or an inſimul computaſſet, &c. for the debt is to be conſidered here only as a debt by ſimple contract. 2 Vern. 540. pl. 484. Hill. 1705. Duplein v. De Roven.

36. Where *money is over-paid*, this action will lie for *the ſurplus*. Arg. 11 Mod. 147. pl. 3. Hill. 6 Ann. B. R. in caſe of Aſher v. Wallis.

37. Indeb. aſſump. lies *by a prothonotary againſt an attorney*, for fees for work done for defendant as attorney. Holt's Rep. 20. Trin. 5 Ann. Spearman v. Moreland.

[268]

38. An action for the *intereſt of money* as well as the principal, vitiates the whole. Arg. 10 Mod. 312. cites 2 Roll. Rep. 47. a. *proſt promiſe to pay intereſt* will ſupport an action. 10 Mod. 312. Paſch. 1 Geo. 1. B. R. Stafford and Forcer.

But per Parker Ch. J. an ex-

39. An

39. An indebitatus aſſumpſit will not lie *on a ſpecial agreement*, till *the terms of it are performed*; but when that is done, it raiſes a duty for which a general indebitatus aſſumpſit will lie. Gibb. 303. pl. 7. Trin. 5 Geo. 2. B. R. per 3 juſtices, contra Holt Ch. J. Gordon v. Martin.

(N. 2) For Monies received to a Man's Uſe.

1. THE *king granted the office of comptroller of the cuſtoms, &c. to S. and T. durante beneplacito. T. dies.* Afterwards the king granted the ſaid office to A. and B. and yet S. under pretence of ſurvivorſhip exerciſed the ſaid office, and received the profits thereof. A. and B. brought an indebitatus aſſumpſit for 200l. had and received to their uſe. And the court gave judgment for the plaintiff. 2 Mod. 360. Trin. 29 Car. 2. in the exchequer, Arris v. Stukely.

S. C. cited 2 Show. 52.—*So* indebitatus aſſumpſit was brought *for the fees and profits of an office of a ſtewardſhip of a court leet and court baron againſt a ſtranger* that took the fees and profits thereof, and adjudged that the action lies. But Scroggs Ch. J. who delivered the opinion of the court, ſaid, if ſuch action were brought againſt one *claiming a right*, they were agreed it would by no means lie if now it were an original caſe, but becauſe judgments have been upon it, and that upon ſolemn arguments they were willing to go the ſame way, eſpecially there being no great inconvenience in it ſince the title muſt be given in evidence, and on that account they judged the action did well lie. 2 Show. 21. pl. 14. Mich. 30 Car. 2. B. R. Howard v. Wood. ——2 Lev. 245. S. C. and the court thought that had this been the firſt caſe of the kind it would be hard to maintain it, but ſaid, that it had been maintained 2 or 3 times before; and cited a caſe between BRADSHAW AND PORTER of Gray's Inn, *for money received by one as judge of the ſheriff's court of London* to have been ſo adjudged; ſo that it would now be hard to adjudge the contrary; but upon importunity adjornatur.——2 Jo. 126. Hill. 31 & 32 Car. 2. B. R. the S. C. accordingly, and reſolved per tot. cur. that in reſpect of the former judgments the action lies; and judgment was given for the plaintiff.——Freem. Rep. 473. pl. 648. S. C. argued, but adjornatur. ——Ibid. 478. pl. 656. S. C. ſays the Ch. J. inclined againſt it; for he ſaid a man may as well bring an indebitatus aſſumpſit where another takes money by force from his perſon, or where he takes away my horſe, &c. but the other 3 juſtices inclined to allow it. Curia adviſare vult.——S. C. cited Show. 35.

2. *Wherever an account will lie, an indebitatus aſſumpſit will lie*; per cur. 2 Mod. 263. Trin. 29 Car. 2.

And therefore it will lie for *rent received by one who pretends a title*, becauſe in ſuch caſe an account will lie. 2 Mod. 263.—2 Sid. 4. Mich. 1675. B. R. the S. P. Per cur. Arg.

3. If a man pays money in part of ſatisfaction, and *afterwards the whole value of the goods is recovered againſt him at law*, the money ſo paid on that account, becomes money received for the uſe of him that paid it, and he may recover it in an action at law; per North K. Vern. 176. pl. 169. Trin. 1683. Barebone v. Brent.

If a man *pays money upon a policy of aſſurance, ſuppoſing a loſs where there was not any* loſs, that in ſuch caſe this ſhall be money received to the uſe of the payer, becauſe here the money was paid *upon a miſtake*; the ſame law if it was upon a *fraud in the receiver*; per Holt Ch. J. Skin. 411, 412. pl. 7. Hill. 5 W. & M. Tomkins v. Barnet.

4. Indebitatus aſſumpſit by J. S. for *money received* to the uſe of J. S. named in a *policy* for money *paid by W. R.* as a premium on a void policy, and held good; per Holt Ch. J. Show. 136. Paſch. 2 W. & M. Martin v. Sitwell.

* [269]

But where money was paid *in pur-*

5. If *money* be *paid by an order of ſeſſions* for coſts, on removal of a poor man, and that order is afterwards *reverſed in B. R.* an indebitatus

indebitatus aſſumpſit will not lie for the money againſt thoſe who received it. Ld. Raym. Rep. 742. ſays, it was ſo held by Tracy J. at Lent aſſizes 1700, at Chelmsford. Mead v. Death and Pollard.

ſuance of a void authority, as where the court ordering it was deemed illegal, an indebitatus aſſumpſit will lie for it; *as where N. had a donative*, which he gave to D. and afterwards he *removed D. and put in J. S.* D. cited N. in the time of James 2. before *the high commiſſioners*, and there N. had *ſentence againſt him, to reſtore D. and to pay him all the arrears* that he had received. N. *paid it accordingly*. And after the revolution N. brought indebitatus aſſumpſit againſt D. for his money, as received to his uſe. Ld. Raym. Rep. 742. ex relatione m'ri Place, ſays it was ſo reſolved 4 & 5 W. & M. by Treby Ch. J. at niſi prius in Middleſex, Sir Richard Newdigate v. Davy.

6. Where one *pays money on a miſtake in an account, or under, or by, a mere deceit*, it is reaſonable he ſhould have his money again; *but* where one pays money *knowingly, on an illegal conſideration*, the party that receives it, ought to be puniſhed for his offence, and he that pays it, is particeps criminis; and there is no reaſon he ſhould have it again; for he parted with it freely, & volenti non fit injuria. By Treby Ch. J. at niſi prius in London. 1 Salk. 22. pl. 2. Hill. 5 W. 3. agreed, in caſe of Tomkins v. Bernet.

7. A. put his ſon apprentice to B. the defendant, and *gave* him 30 *l. to teach him the trade of a goldſmith, and make him free of London;* but the *defendant himſelf being a foreigner*, the ſon was bound alſo to a freeman for that end; but *by the cuſtom* of London *he cannot have his freedom without actual ſervice with* ſuch *freeman*. It was ruled by Holt, that an indebitatus lieth not for A. for the 30 l. the defendant hath cheated the plaintiff of his money, and the plaintiff hath no remedy, unleſs by ſpecial action of the caſe for not making him a freeman. Comb. 341. Trin. 7 W. 3. B. R. Dewberry v. Chapman.

8. Indebitatus aſſumpſit for money *had and received by the defendant for the plaintiff to the uſe of the defendant*. The plaintiff had a verdict, and upon a motion in arreſt of judgment, the court held, that thoſe words (to the uſe of the defendant) ſhall be rejected, becauſe they are inſenſible and repugnant; and then the promiſe is for money had and received by the defendant for the plaintiff. 1 Salk. 24. pl. 7. Paſch. 13 W. 3. Palmer v. Stavely.

12 Mod. 510. S. C. adjudged niſi for the plaintiff.—Ld. Raym. Rep. 669. S. C. adjudged for the plaintiff niſi, &c.——Comyns's Rep. 115. pl. 79. S. C. And per cur. after a verdict for the plaintiff the words (ad uſum defendentis) ſhall be rejected, becauſe a verdict could not have been found for the plaintiff, if evidence had not been given that the monies had been received for his uſe; beſides, the declaration further ſays that the money was received for the plaintiff.

9. If *A. gives money to B. to pay to C. upon C.'s giving writings, &c. and C. will not do it*, an indebitatus aſſumpſit will lie for A. againſt B. for ſo much money received to his uſe; and many ſuch actions have been maintained for earneſts in bargains, when the bargainor would not perform; and for *præmiums for inſurance when the ſhip*, &c. *did not go the voyage*. But it has been held, it would not lie for money paid upon *uſurious contract*, becauſe there it was not intended it ſhould be repaid, or any thing done for it; per Holt Ch. J. 6 Mod. 161. Paſch. 3 Ann. B. R. in caſe of Holmes v. Hall.

10. A *trooper brought his own horſe into the troop*, and in croſſing the ſea *the horſe was killed in a ſtorm*, together with ſeveral others. The *queen allowed* 15 *l.* per horſe *for every horſe* that was *loſt to remount the troopers*, and accordingly ſeveral horſes were bought and ſent over to the defendant to ſupply the loſs in his troop, but *before the horſes got over, the* * *trooper (the plaintiff) was broke, and ſo never remounted.* In action for money received to the plaintiff's uſe, Holt Ch. J. at the ſittings in Middleſex, held that this evidence maintained the action; for though the captain did not actually receive the 15 l. in money, yet he received a ſatisfaction which was monies-worth, and the plaintiff cannot bring trover becauſe he cannot claim any one of the horſes in particular, no one having ever been delivered to him. But at the counſel's requeſt, it was made a caſe for his further conſideration. 2 Ld. Raym. 1007. Hill. 2 Ann. Norris v. Napper.

11. A man *having a wife* in England, goes to Jamaica, and there *marries a rich woman*, and lets her lands, reſerving rent to himſelf, and received the ſame divers years: but after ſome time they both coming into England, ſhe perceived he had *another wife living*; and thereupon brings an indebitatus aſſumpſit againſt him for the ſaid rents, as ſo much money received by him to her uſe. And at the trial at the Guildhall, London, this point was ſaved to be argued by counſel, whether an indebitatus aſſumpſit would lie in this caſe. And by the whole court it was agreed, that an indebitatus aſſumpſit would well lie; but Holt Ch. J. ſaid, that trover would not lie in this caſe, becauſe ſhe was never poſſeſſed of the money; and when ſhe married the defendant, ſhe conſented that he ſhould manage her eſtate; and judgment for the plaintiff. 11 Mod. 146, 147. pl. 3. Hill. 6 Ann. B. R. Aſher v. Wallis.

Holt's Rep. 36. S. C. by the name of Aſſer v. Wilks.—S. P. And A. being viſibly a huſband, the tenant was diſcharged, at leaſt the recovery againſt A. in this action would diſcharge the tenant; for this would be a ſatisfaction to the leſſor. 1 Salk. 28. Haſſar v. Wallis S. C.——S. P. Agreed per Holt Ch. J. Arg. but ſaid it was hard. 12 Mod. 324.

12. Indebitatus aſſumpſit for money received by the defendant to the plaintiff's uſe. Upon evidence, the caſe came out thus, the *plaintiff and another laid a wager*; the *defendant held ſtakes*; the plaintiff brought *evidence that he had won* the wager. Blencowe, that tried the cauſe, being of opinion that the plaintiff had miſtaken his action, becauſe this money could not at the time of the action brought, be ſaid to be money received to the plaintiff's uſe, ſince the defendant was not to pay the money until the wager was proved to be won, the plaintiff was nonſuit. The plaintiff now moved to ſet aſide his own nonſuit; becauſe occaſioned by the judges miſtaking the law. Per cur. action was well brought; for upon the wager won, the money was actually the plaintiff's, though he could not receive it before the fact was made appear. Sed adjornatur. 10 Mod. 315. Paſch. 1 Geo. 1. B. R. Temple v. Welds.

S. P. Per Holt Ch. J. Holt's Rep. 37. cites 2 Sid. 4.—— Holt Ch. J. cited S. P. adjudged per Wadham Windham J. Holt's Rep. 25. pl. 1.—S. P. cited accordingly by Holt Ch. J. Show. 157.

Indebitatus aſſumpſit brought *againſt a ſtake-holder* for monies had and received for plaintiff's uſe. The judge of aſſiſe, who tried the cauſe, was of opinion that the action would not lie; and therefore nonſuited the plaintiff upon the opening his caſe, without hearing any evidence. Plaintiff, upon affidavits of this matter moved the court to ſet aſide the nonſuit; but the court refuſed to make any rule. It was alleged from the bar, that the court of B. R. had made a rule in the like caſe, but no ſuch was produced. Barnes's notes in C. B. 229. Mich. 7 Geo. 2. Lovev. Day.

(O) Upon an Aſſumpſit in Nature of Debt. It lies not where the Thing is real.

[1. IF a man *leaſes for years rendering rent*, he *cannot have* an action upon the caſe upon *aſſumpſit* for this rent, *during the term*, becauſe it ſavours of the realty. Mich. 15 Jac. B. R. between NECK AND GUBB, per curiam admitted, Mich. 12 Jac. B. * between WHITE AND SHORT, admitted per curiam. Mich. 17 Jac. B. per curiam.]

Indebitatus aſſumpſit *for rent reſerved on a leaſe for years.* After a verdict for the plaintiff, upon non aſſumpſit it wasadjudged that this action did not lie for rent, but an action of debt. Allen 29. Mich. 23 Car. B. R. Munday v. Baily.——Sty. 53. Anon. ſeems to be S. C. and judgment againſt the plaintiff niſi, &c.

[2. *So* the leſſor cannot have an action upon the caſe for the rent *after the term* ended, becauſe it ſavours of the realty. Mich. 15 Jac. B. R. between NECK AND GUBB, agreed per totam curiam, Mich. 12 Jac. B. between WHITE AND SHORT, per curiam.]

[3. [*But*] if a man brings an action upon the caſe, and *declares that in conſideration* that *he promiſed to make a leaſe for two years* to the defendant, *and to repair the land during the term*, the *defendant promiſed pro inde to pay him* 20 *s. at every quarter*, &c. and *avers that he made the leaſe* accordingly, *and repaired the land* during the term, but that the defendant had not paid to him the ſeveral ſums at the ſaid quarters, this action is well maintainable, though the *term is not ended*; for it cannot appear upon this declaration that this was a rent, but *only a ſum in groſs*; for no rent was reſerved upon the making of the leaſe, and the aſſumpſit is not to pay it out of the land, but as a ſum in groſs. Mich. 15 Jac. B. R. between NECK AND GUBB adjudged, this matter being moved in arreſt of judgment; but Houghton gave this reaſon, becauſe the leſſor promiſed to repair the land as well as to leaſe it.]

[4. *But* if the *declaration* be, *that the plaintiff agreed* with the defendant *that he ſhould hold certain lands for certain years; and that the defendant proinde did promiſe to pay to him* 20*s. at every quarter*, &c. and for a certain ſum arrear, at certain quarters after the term ended, he brought his action. This action is not maintainable; for it appears apparently upon the whole matter to be a rent, inaſmuch as he promiſed to pay it proinde, at the ſame time that the other leaſed to him the land. Mich. 12 Jac. B. between WHITE AND SHORT, adjudged in arreſt of judgment. Contra Mich. 3 Car. B. R. between Sir MILES HUBBARD AND BOWELL, adjudged; this being moved in arreſt of judgment, the which intratur Trin. 3 Car. Rot. 1267.]

If the leſſee *promiſed at the time the leaſe was made* to pay the rent, an action lies upon this promiſe; but in the action brought, this promiſe *muſt be expreſsly averred to be ſo*; per Roll Ch. J. Sty. 400. Hill. 1653. Anon.

[5. † If *rent upon a leaſe for years* be *arrear*, *and* after the *leſſee promiſes the leſſor to pay* the rent, without conſideration of forbear-

† Fol. 8.

ance, or other consideration, no action lies upon this promise, because he may have an action of debt upon the real contract. Mich. 17 Jac. between HARRINGTON AND GREEN, per curiam, resolved Hill. 8 Car. B. R. between MANTEL AND BRET, in a writ of error upon a judgment in Canterbury held, quod vide Hub. Rep. 397. [*But there is no such page.*]

Hob. 284. pl. 366. Green v. Harrington, S. C. the court would be advised. —Hutt. 34. S. C. and the court were of opinion that no action lies; and said that this was ruled in ALBANIE's case case of Lincoln's Inn, in B. R. —— Brownl. 14. S. C. and judgment was given against the plaintiff.— S. C. of Albany cited by Warburton J. by the name of Ablaine's case of Lincoln's Inn, as adjudged accordingly. Win. 15. Trin. 19 Jac.

A feme sole seised of a *rent charge for life*, took husband. The rent was arrear. The wife died. The *tertenant*, in consideration that the rent was behind, &c. *promised to pay it.* An action on the case on assumpsit was brought for the rent, and adjudged per tot. cur. that it lies, because the husband here *had remedy by the statute of* 32 *H.* 8. and then the consideration is sufficient. Le. 293. pl. 401. Mich. 26 & 27 Eliz. B. R. Anon.

An *indebitatus assumpsit* will not lie for *arrears of rent*, where *there is no other promise*; but it must be an action of debt. By the justices. Cro. E. 242. pl. 5. Trin. 33 Eliz. B. R. Read v. Johnson.— Le. 155. pl. 217. Trin. 32 Eliz. C. B. the S. C. accordingly. —— S. P. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. B. R. held accordingly, by all the justices except Gawdy. —— In the case of SLACK v. BOWSAL, S. P. of promise to pay rent arrear, appears, but though exceptions were taken to the pleadings, no * exception was taken to this point, and so the plaintiff had judgment, which being observed there in a note of the reporter, he says, that in such case this action lies not without some other special promise.

If a man makes a lease for years rendering rent, and the lessee promises to pay the rent, an assumpsit will lie, if the *promise was made at the same time with the lease*; for that must be expressly averred; per Roll. Sty. 400. Mich. 1653. Anon.

There is a *diversity* between a *general enjoyment of land without contract*, and *enjoyment upon such actual contract or assumpsit*; for if he did not actually promise to pay if he enjoys, there action on the case will not lie; but the plaintiff shall have remedy upon the reservation by debt only; per cur. And it was said that this difference had been often adjudged good. Sid. 279. pl. 6. Pasch. 18 Car. 2. B. R. in case of How v. Norton.

* [272]

[6. The *same* law is *of a promise of payment* of money *upon an obligation*, without a new consideration, as for forbearance or such like, by which he might have an action upon the collateral promise. Mich. 17 Jac. B. Per curiam.]

Where an obligation is forfeited, no action lies on a promise to pay the money, because the debt is due upon the obligation. Agreed per cur. Hutt. 35. ——But Cro. E. 240. pl. 12. Trin. 33 Eliz. B. R. says it was agreed by all the justices, that if one be bound in an obligation, and afterwards promises to pay the money, assumpsit lies upon this promise. Ashbrooke v. Snape. ——It will not lie for that money, unless there is a collateral promise. Brownl. 14. —— Le. 293. pl. 401. S. P. Arg. ——Cro. J. 668. in pl. 5. S. P. admitted there in a note of the reporter. —— S. P. per cur. Cro. J. 598. Mich. 18 Jac. B. R. in pl. 21.

In case of *rent*, or debt by specialty, assumpsit will not lie, unless it be *for forbearance of the payment after it is due*; per Holt Ch. J. 12 Mod. 511. Pasch. 13 W. 3.

The plaintiff leased land to the defendant for a year, and in consideration thereof the defendant *promised to pay pro firma terræ prædicta, at the end of the year* 20 *l.* All the

[7. In an action upon the *case* upon a promise, if the plaintiff *declares that the defendant*, 22 Martii 6 Car. *in consideration* that *the plaintiff, at the request of the defendant, would permit the defendant to have and enjoy certain lands*, &c. from the 25th of March after for one year, the *defendant* in consideration thereof, *did assume to pay* to the plaintiff 5 *l. at Michaelmas after*, and avers, that the defendant did enjoy it for one year, yet the defendant had not paid the 5*l.* according to his promise; in this case the action lies; for though this be an agreement, and may amount to a lease, yet when an *express promise* is laid, the action lies; and it may be shewn in evidence, that this was reserved upon a lease upon non-assumpsit pleaded. P. 9 Car. B. R. between POTTER AND FLETCHER,

ER, adjudged upon a demurrer. Intratur Hill. 8 Car. Rot. 42.]

court (abſente Popham) held that aſſumpſit lies; for it is not a rent, but a ſum in groſs; and judgment for the plaintiff; but afterwards the judgment was reverſed. Cro. E. 786. pl. 25. Mich. 42 & 43 Eliz. Symcock v. Payn. ——S. C. cited Win. 15. to have been reverſed in the exchequer chamber, and that it was there ſaid to be a rent, ſo that debt lies, and not an action on the caſe.

In *caſe*, upon a promiſe to pay 10 l. in conſideration that the plaintiff had licenſed and *permitted the defendant to enjoy ſuch lands*, it was moved in arreſt of judgment that the licenſe and permiſſion here amount to a demiſe, and therefore debt ought to have been brought, and not caſe. Per Hale Ch. B. this licenſe and permiſſion does *amount to a leaſe*, upon which an action upon the caſe does not lie without expreſs promiſe; but upon an expreſs promiſe to pay rent, caſe will well lie; and ſo it has been adjudged; for it may be the promiſe was the ground of the leaſe and reſervation. And here we are after a verdict which has found the promiſe, ſo that we are to preſume there was an expreſs promiſe to pay ſo much money, in conſideration that the plaintiff would admit him to enjoy the land. Sed adjornatur.—Hard. 366. Paſch. 16 Car. 2. in the exchequer. Sir John Trevor v. Roberts.

In an action upon the caſe, in conſideration the plaintiff *permitteret the defendant to occupy and enjoy lands until a future day, to pay* 15 *l.* It was moved in arreſt of judgment that this is a leaſe, and not a bare promiſe, and the defendant had been nonſuited twice upon this point. Sed non allocatur; for it ſhall now be *intended an actual promiſe*, and therefore though indeb. will not lie on ſuch permiſſion, yet on an actual promiſe aſſumpſit will; ſo judgment for the plaintiff, niſi. 3 Keb. 357. pl. 26. Mich. 26 Car. 2. B. R. Stroud v. Hopkins.

[8. In an action upon the *caſe upon a promiſe*, if the *plaintiff declares that J. S.* was poſſeſſed of land, &c. and by indenture *demiſed* it *to the defendant* from 25 of March *for five years, rendering* 22 *l. rent* per annum at the four uſual feaſts; *and after the end* of the five years, he [*J. S.*] *being dead*, and *the plaintiff his executor*, viz. 1 May *after the end of the leaſe*, which was at Lady-day before, *there was a diſcourſe between the plaintiff and defendant as to the enjoying it for a year longer*, from Lady-day before; *and* thereupon, *in conſideration* that *the plaintiff would* deduct, and *defalk to the defendant* 5 *l.* 10 *s. of the rent* of 22 l. for a quarter of a year for the premiſes, *and would agree* with the defendant *that the defendant ſhould have the premiſes for a year from the Lady-day* before, as in the ſaid indenture was expreſſed, the *defendant did promiſe to pay* (deducting and defalking 5 l. 10 s. of the ſaid rent of 22 l.) *the reſidue of the ſaid rent* of 22 l. This action upon the caſe lies, though this is called a rent, and the reſidue of the ſaid rent of 22 l. and refers to the indenture; for this is an *expreſs promiſe*, and if it was only a promiſe in law upon the agreement, this might be ſhewn in evidence. Paſch. 9 Car. B. R. between ROWNCEVAL AND LANE, adjudged; this being moved by myſelf in arreſt of judgment, after verdict for the plaintiff.] [273]

[9. In an action upon the *caſe*, if the *plaintiff declares that* whereas the *defendant was indebted to him in* 9 *l.* 10 *s. for rent* of certain land, the *defendant* in conſideration thereof *did promiſe to pay it*; in this caſe the action does not lie, becauſe it *appears that this is for rent*, and there was no other promiſe than what the real contract amounted to upon the making of the leaſe, and it does not appear whether the *rent* was for life in fee, or for years; ſo that it might be *in fee, or for life*, for which no action of *debt lies*. Hill. 9 Car. B. R. between * BRET AND READ, adjudged per curiam; this being moved in arreſt of judgment after a verdict

* Jo. 329. pl. 1. S. C. adjudged per cur. that upon a real contract, as leaſe for years, action on the caſe does not lie; but if there be a *ſpecial af-*

for the plaintiff. Intr. Trin. 9 Car. Rot. 644. Hub. Rep. caſe 365. between † GREEN AND HARRINGTON.]

ſumpſit for the rent, it ſeems otherwiſe. ——

Cro. C. 343. pl. 7. S. C. and per tot. cur. the action does not lie upon the general promiſe; but if he had alleged that in conſideration he ſhould *forbear the payment till ſuch a day, or upon ſuch ſpecial conſideration*, then the action would lie; and adjudged for the defendant. —— Where there is an *aſſumpſit in fact beſides the perſonal contract upon the leaſe*, action upon the caſe on ſuch aſſumpſit is maintainable; per Jones & Berkley J. Jo. 365. Mich. 9 Car. B. R. in pl. 1.

† See pl. 5.

*[274]

Cro. C. 414. pl. 2. S. C. the defendant *pleaded a ſurrender* of the ſaid (*) Fol. 9. lands *before any of the feaſts for which the breach was aſſigned*, and that the plaintiff accepted thereof; but upon iſſue it was found for the plaintiff; and upon motion that the action lies not, it being grounded upon a perſonal promiſe in a real contract, which real contract being executed, the aſſumpſit being merely perſonal, is determined; and the rent being real, this action lies not for the non-payment thereof. But 3 juſtices conceived the action lies, becauſe it is a collateral and *abſolute promiſe*; but if it had been an *implied* promiſe, (*as upon a ſale of goods, &c.*) then this action would not lie; but here is an expreſs and direct promiſe alleged, which is in a manner confeſſed by the defendant by his plea in bar, and therefore the action lies; but Crooke J. doubted thereof, becauſe it is a perſonal contract, which is determined by the

[10. In an action upon the *caſe*, if the plaintiff declares that the 25 Martii, *in conſideration* that the *plaintiff*, at the inſtance and requeſt of the defendant, *demitteret to the defendant* certain lands for three years then next enſuing, and *for the* yearly *rent of* 25 *l. per ann.* to be paid at Michaelmas and Lady-day by equal portions. The *defendant did aſſume* and promiſe *to pay the ſaid* (*) *yearly rent* during the term at the ſaid feaſts for the ſaid land, *and avers* in fact *that he* afterwards, viz. the ſaid 25 Martii, *did demiſe* the ſaid land to the defendant in forma prædicta, *and that* the *defendant did enjoy* the ſaid land for all the ſaid term, and yet the defendant had not paid the ſaid 25 l. yearly at the ſaid feaſts for the ſaid lands, amounting in toto to 75 l. for which he brought his action; to which the defendant pleads, that before this leaſe was made, one W. L. was ſeiſed of the premiſes in fee, and derives an eſtate for life from him to A. who married with the plaintiff; and that the plaintiff being ſeiſed in the right of A. his wife for life, ſurrendered to him in the reverſion before the action brought; and thereupon the plaintiff traverſes the ſurrender, and this found by the jury againſt the defendant; and though it was moved in arreſt of judgment that the action did not lie, becauſe it is grounded upon a real contract, yet it was adjudged that the action did lie, becauſe it *appears* upon the whole declaration, that it was *intended* by the parties *that a leaſe ſhould be made, and a rent reſerved, and* for the better ſecurity of the payment thereof according to the reſervation, *that the* * *leſſor ſhould have* his remedy for it by *action of debt upon the reſervation, or action upon this collateral promiſe at his election*; and this being the original intent, *the making of this leaſe*, though real, *will not take away this collateral promiſe, as* a man may *covenant to accept a leaſe under a certain rent, and to pay the rent according to the reſervation*, for they *are two things*; and ſo here the promiſe of payment is a thing collateral to the reſervation, the which will continue though the leſſee aſſigns over, and the leſſor accepts the rent from the aſſignee being collateral. Mich. 11 Car. B. R. between ACTON AND SYMONS, per tot. curiam, præter Crook, adjudged; this being moved in arreſt of judgment, I myſelf being de concilio querentis, intrat. Mich. 10 Car. Rot. 83.]

the making the leaſe; for it is in vain to have an aſſumpſit where he may bring debt on the leaſe, and thereby recover debt and damages for the forbearance; becauſe ley gager lies not in this action, and then there is no cauſe to have it. ——— Jo. 364. pl. 1. S. C. accordingly, and that judgment was given for the plaintiff; but Crooke continued ſtrongly in his former opinion. ——— S. C. cited Arg. 3 Mod. 73.

[11. In an action upon the caſe, if the plaintiff declares, that he and the defendant *accounted together for the arrears of a certain rent*, reſerved upon a leaſe of certain land, and upon this account, the *defendant was found in arrear* 10 *l.* *and* thereupon *did promiſe to pay it*, and for non-payment the action is brought, this action lies; for this lies in account, *and upon the account this is made a perſonal debt*, and a man may make an expreſs promiſe for payment of a rent, and yet ſhall have an action of debt for the rent alſo. Paſch. 14 Car. B. R. between LUTHER AND MALYN, per curiam; though it was ſaid, that it had been adjudged contra twice in B. in the ſame term, and it had been adjudged in B. R. e contra afterwards, ſcil. that the action does not lie.]

On an *account made between landlord and tenant*, it appeared that 40 *l.* *was in arrear*, which the *tenant promiſed to pay*. The *landlord brought action on the caſe on this promiſe*, and had a verdict. On motion in arreſt of judgment, the court ſaid, that caſe lies not for rent alone due upon a real contract, but for rent with other things it lies; but ſtayed judgment, no new conſideration appearing to ground this promiſe upon, but only the old *conſideration of law for payment of the rent*, on which caſe lies not, becauſe it is in the realty. Sty. 131. Mich. 24 Car. B. R. Ayre v. Sils.

12. A. was poſſeſſed of a *leaſe for years of land* on which a rent was reſerved, (the inheritance whereof was in the plaintiff's wife.) B. the defendant, *in conſideration* the *plaintiff would procure A. to aſſign* the leaſe to him, promiſed to pay the rent to the plaintiff for the reſidue of the term. It was objected, that in this caſe the action did not lie, becauſe the plaintiff might have a higher remedy for the rent, either by action of debt, or by diſtreſs; but adjudged that the action lay, becauſe *by this promiſe an action is given to the huſband alone in his own right*, whereas the rent in its nature is due to him in right of his wife, and to be paid for the land; but upon this, aſſumpſit is payable to the perſon of the huſband. Le. 43. pl. 55. Mich. 28 & 29 Eliz. C. B. Carter's caſe.

13. Aſſumpſit, in conſideration that the defendant *might have and enjoy quietly ſuch a park for* 3 *years*, he promiſed to pay 100 l. Adjudged that the action well lay, becauſe it *was but in nature of rent*. Cro. C. 343. pl. 7. cited arg. as 17 Jac. SIR GEORGE MANSELL'S CASE; and the court ſaid, that the caſe cited may be good law; for it is a ſpecial promiſe to permit him to enjoy.

14. Aſſumpſit, for that the plaintiff had let *to the defendant a warehouſe* in the pariſh of D. the *defendant promiſed to pay him, every week he occupied it*, 8 *s.* and alleged, he occupied it 27 weeks. The whole court agreed that, for rent reſerved upon a leaſe, aſſumption lies not; but *this is not a leaſe, but a promiſe* that as long as he permitted him to occupy the warehouſe, he would pay for it; ſo that the action lies, and judgment for the plaintiff. Cro. J. 598. pl. 21. Mich. 18 Jac. B. R. Dartnoll v. Morgan.

[275]

15. Aſſumpſit, in conſideration the plaintiff would *permit* the defendant *to enjoy ſuch lands, to pay him quantum meruit*; and counted

Sid. 279. pl. 6. S. C. but does not

state it on a promise to pay quantum meruit, but that he promised to pay so much [viz. a certain rent.] —2 Keb.

counted that he permitted him to enjoy 3 years, and that it was worth 10l. per ann. After verdict for the plaintiff, it was moved in arrest of judgment, first, that it does *not appear that plaintiff had title* to the land. 2dly, If he has, debt lies, and not this action. But curia contra in both, and gave judgment for the plaintiff. Lev. 179. Pasch. 18 Car. 2. B. R. Grubham How v. Norton.

S. S. C. according to Lev. and held that an actual promise in such case is sufficient cause of action; and judgment for the plaintiff, nisi, &c.

Sid. 323. pl. 1. S. C. and judgment for the plaintiff. —2 Keb. 182. pl. 10. S.C. adjudged for the plaintiff, nisi, &c.

16. A. promised B. that *if B. would permit A. to enjoy a house as J. S.* (the former tenant, under whom A. pretended title to it) *did, to become his tenant as J. S. was, and to pay the arrears.* This is an express promise, and assumpsit lies upon it to pay the growing rent. Lev. 204. Hill. 18 & 19 Car. 2. B. R. Chapman v. Southwick.

——If one grants his land for a year, and the other agrees to pay so much for it, this is a sum in gross, for which an indebitatus lies. Show. 36. said, in Trin. 1 W. & M.

S. P. as to the difference between a special promise and a promise in law. Sty. 463. Mich 1655. B. R. Lance v. Blackmore.

17. In action sur le case, on promise by the defendant *to pay rent* in consideration that the plaintiff would demise a house to him, and for rent arrear the plaintiff brought this action; to which the defendant demurred, because he may distrain, or have debt. But, per cur. this being an *express* and mutual *promise*, an action well lieth; contra of a *promise in law* on the implied contract; and judgment pro plaintiff. 2 Keb. 291. pl. 72. Mich. 19 Car. 2. B. R. Freeman v. Bowman.

18. Indeb. assump. *for tithes sold.* Baldwin moved in arrest of judgment, that this sounds in the realty, and so an action of the case will not lie. But per curiam, it is well enough; for this shall *not be intended a lease* of tithes, *but a sale of tithes.* Freem. Rep. 234. pl. 242. Mich. 1677. Anon.

3 Mod. 73. Mason v. Beldham, S. C. adjudged for the plaintiff.

19. Assumpsit, in consideration the defendant had *surrendered a copyhold* estate to the plaintiff, *and* that the *plaintiff would permit him to enjoy it from* 10 *Aug. &c. to the 1st of May* following, *he promised to pay* to the plaintiff 50l. The defendant demurred, for that this is a term, and a rent, for which debt lies, and not assumpsit. But adjudged per tot. cur. after time taken to consider of it, that the action lies; for this shall be intended an express promise, and not a promise in law, arising upon the contract; and if non assumpsit had been pleaded, instead of demurring to it, the plaintiff must have proved an express promise; which being collateral, and quasi a special agreement to pay the rent, and of the same effect as an express covenant in deed. 3 Lev. 150. Trin. 34 Car. 2. C. B. Johnson v. May.

3 Mod. 73. Mason v. Beldham, S. C. adjudged for the plaintiff.

20. In action sur *case*, in which the plaintiff declared, that in *consideration* that he would *permit defendant to occupy land of the plaintiff's* for one year, that *he would give* him for it *as much as it was worth.* Per cur. where a thing savours of the realty, as

where

where a thing in certain is reſerved, the law will not permit an action *quite perſonal* to be brought, but will reſtrain the perſon to his proper action, without confounding of them; but here, if this action does not lie, the party ſhall be without remedy, which the law will not permit, for an action of *debt does not lie, becauſe it is uncertain, and ſo there can be no diſtreſs, becauſe there is no rent;* wherefore this action is well brought; and judgment was granted for the plaintiff, una voce. Skin. 238. 242. Mich. 1 Jac. 2. B. R. Maſon and Welland.

21. In a ſpecial aſſumpſit the plaintiff declared, that *whereas D. had a rent-charge* iſſuing *out of the defendant's lands*, the defendant, *in conſideration he would ſave him harmleſs from all moleſtation by D. promiſed to pay* the plaintiff ſo much. Upon non aſſumpſit pleaded, the plaintiff had a verdict, but judgment was arreſted, becauſe the rent-charge was granted to D. and not to the plaintiff, and that there was *no room to imagine an aſſignment, or that the rent did not continue in D.* and if ſo, then the defendant was to pay the plaintiff for not doing that which he had no right to do, which is *nudum pactum*, and no conſideration. 1 Salk. 364. pl. 4. Mich. 4 Ann. B. R. Courtney v. Strong.

6 Mod. 265. STRONG v. COURTNEY, S. C. accordingly; and the court ſaid the verdict did not cure the want of conſideration; but *otherwiſe* it had been *if it had appeared that the rent had been aſſigned to C.* 2 Ld. Raym. Rep. 1217. S. C. accordingly.

(P) Upon an Aſſumpſit. In what Caſe it lies.

[1. IF one promiſe *to build a mill* or houſe for me, *within a certain time*, if he does not do it, no action lies for it, *unleſs a conſideration be alleged* for it; otherwiſe *it ſounds merely in covenant*, and is nudum pactum. 2 H. 4. 34. 11 H. 4. 33. 19 H. 6. 49. 20 H. 6. 34. contra 14 H. 7. Action ſur le Caſe 45. * 21 H. 7. 41. contra † 3 H. 6. 36. ‡ 14 H. 6. 18. b.]

* Br. Action ſur le Caſe, pl. 72. cites S. C. by Fineux Ch. J.—† Br. Action ſur le Caſe, pl. 7. cites S. C.—Br. Contract, pl. 5. cites S. C.—‡ S. P. Br. Action ſur le Caſe, pl. 69. cites S. C. that action on the caſe lies; per June Ch. J. and Paſton J.—S. P. Br. Action ſur le Caſe, pl. 26. cites 2 H. 4. 3 & 4. But contra at another day and in the time of H. 7. upon aſſumpſit.—S. P. Br. Action ſur le Caſe, pl. 40. cites 11 H. 4. 33. And Brooke ſays it ſeems to be good law at this day; for the *action* upon the caſe which ſhall be brought upon aſſumpſit, *ſhall be* brought, *that for ſuch a ſum of money to him paid*, &c. *the defendant promiſed*, &c. and in this caſe there is ſuppoſed no ſum of money; therefore it is *nudum pactum*, &c.——But Ibid. pl. 31. cites 3 H. 4. 3. contra, that of *covenant by parol*, action upon the caſe lies for the non-feaſance.——So Ibid. pl. 69. cites 14 H. 6. 11.—So Br. Diſceit, pl. 2. cites 20 H. 6. 34. if he *has not ſpecialty* to have action of covenant.——Br. Action ſur le Caſe, pl. 10. cites S. C.

Keilw. 50. a. pl. 4. Paſch. 18 H. 7. Anon. S. P. without mentioning any thing of a conſideration; and ſays that it ſounds only in covenant.——Keilw. 78. in pl. 25. Mich. 21 H. 7. that if I had paid the workman 20 l. for doing his work, I may have action on the caſe, though it ſounds only in covenant, and that without payment of money there is no remedy; per Frowike Ch. J. in pl. 25.

[2. If a carpenter promiſes *to repair my houſe before a certain day*, if he does not do it, by which my *houſe falls*, I ſhall have an action upon the caſe. 19 H. 6. 49. b.]

[3. If a carpenter undertakes *to build a houſe* for me, *if he does it ill*, an action upon the caſe lies againſt him.]

S. P. Br. Action ſur le Caſe, pl. 69. cites 14 H. 6. 18.——Of *covenant not done*, a man ſhall not have action upon the caſe, but of covenant *ill done* action upon the caſe lies, per Martin; but per Babb. and Cockein, it is all one; and *if there be no ſpecialty* action upon the caſe lies in the one caſe and the other clearly; and ſo it is uſed at

at this day in B. R. and in London. Br. Action ſur le Caſe, pl. 7. cites 3 H. 6. 36.——Kelw. 78. Mich. 21 H. 7. in pl. 26. S. P. accordingly by Frowike Ch. J.

[4. If there be a bargain between two, that the one *ſhall marry the daughter* of the other, *and that the other ſhall infeoff him and the daughter*, if he *marries his daughter to another*, no action upon the caſe lies for *want of conſideration*. 7 H. 6. 1.]

Fol. 10.

See (P. b.) pl. 16. S. C.

[5. If a farrier takes upon him *to cure my horſe* that is gravelled in his feet, *and* after *ita negligenter & improvide heals* the ſaid horſe *that he dies*, an action upon the *caſe lies* upon this matter, *without alleging* any *conſideration*; for his negligence is the cauſe of the action, and not the aſſumpſit. Trin. 39 Eliz. B. R. between Powtuary and Walton.]

S. P. Br. Action ſur le Caſe, pl. 69. cites 14 H. 6. 18. Per Paſton.

[6. If I *retain* a man of the law to be of my *counſel* at Guildhall in London ſuch a day, at which day *he does not come*, by which *my cauſe is loſt*, I ſhall have a writ of *diſceit* againſt him. 20 H. 6. 34. b.]

——See (P. b) pl. 11. S. C.

S. P. Br. Action ſur le Caſe, pl. 108. cites 11 H. 6. 18. And *contra if he ſhews his evidence to him, and does not retain him*, and he diſcovers ut ſupra. And if he does his endeavour, and cannot purchaſe, then action upon the caſe does not lie.——See (P. b) pl. 9. S. C.

[7. If a man of the law for a certain ſum promiſes *to be of* the *counſel* of another, *and to obtain ſuch a manor* for him, if he voluntarily breaks his aſſumpſit, viz. *by diſcovering his counſel* to another, by which *he does not obtain the manor*, this action lies againſt him. 11 H. 6. 18. 24. 55.]

Aſſumpſit, &c. in which the plaintiff declared, that in conſideration, &c. he (the defendant) *promiſed to purchaſe ſuch lands at the beſt rate he could*, and aſſigned the breach that he had not purchaſed the lands. Upon a demurrer to this declaration, it was held *an abſolute promiſe*; but Foſter Ch. J. *e contra*. The plaintiff had judgment. Lev. 3. Mich. 12 Car. 2. B. R. Day v. Webb.

S. P. Br. Action ſur le Caſe, pl. 108. cites 11 H. 6. 18.

[8. The law would be the *ſame, if he had done his endeavours* to obtain it, *becauſe* he had *expreſsly bound himſelf* to obtain it. 11 H. 6. 18. 56.]

S. P. Br. Action ſur le Caſe, pl. 69. cites S. C. accingly, by June Ch. J. and Paſton J.

[9. If a man bargains and *ſells lands* for a certain ſum, *and promiſes to procure* certain men to *releaſe* to him, if he does not perform it, an action upon the caſe lies againſt him. 14 H. 6. 18. b.]

Br. Diſceit, pl. 2. cites S. C. it ſeems by the argument that action upon the caſe will lie upon this aſſumpſit, if he *has not ſpecialty* to have action of covenant.——Br. Action ſur le Caſe, pl. 10. cites S. C. but ſays this caſe is not adjudged.

[10. [*But*] if a man ſells lands to another for a certain ſum, and *promiſes to infeoff him* of the land *within a certain time*, if he does not infeoff him, but *infeoffs another*, an action upon the caſe lies againſt him for the diſceit. 20 H. 6. 34.]

S. P. Br. Action ſur le Caſe, pl. 10. cites S. C. but Brook ſays that the caſe is not adjudged.——Br. Diſceit, pl. 2. cites S. C.

[11. *So if* in this caſe the vendor *infeoffs a ſtranger, and* after *diſſeiſes him, and infeoffs the vendee*, and the *diſſeiſee enters* upon him, he ſhall have *diſceit* againſt him. 20 H. 6. 34. b.]

[12. So

[12. *So* if he had *taken back an eſtate tail* from the feoffee, *and* had *enfeoffed the vendee*, yet he ſhould have had a writ of deceit. 20 H. 6. 34. b.]

*[13. *So* if after the bargain he had *acknowledged a ſtatute*, and after enfeoffed the bargainee, the bargainee ſhould have had a writ of deceit againſt him. 20 H. 6. 35.]

Br. Action ſur le Caſe, pl. 10. cites S. C. that diſceit lies and not action upon the caſe.

[14. *So* if he had *granted a rent-charge* out of the land *before the feoffment*. Contra 20 H. 6. 34. b.]

Br. Action ſur le Caſe, pl. 10. cites S. C. that deceit lies againſt him, but not an action on the caſe. But Brooke ſays that this caſe is not adjudged.——Br. Diſceit, pl. 2. cites S. C.——See (G. c) pl. 14.

[15. [*So*] if a man ſells certain lands for a certain ſum, and *promiſes to enfeoff him*, if he does not enfeoff him, *though he does not enfeoff any other* but keeps it himſelf, yet deceit lies againſt him. 21 H. 7. 41. per Fineux. Contra 20 H. 6. 34.]

[16. If a man be *retained* with me of my counſel *to buy the manor* of D. from J. S. and he *falſely purchaſes the manor to himſelf*, an action upon the caſe lies againſt him. 16 H. 6. Action ſur le Caſe 44.]

[17. If a man for a certain ſum undertakes *to labour for me with J.* [*to get*] *a leaſe* for years of certain lands, *and he labours* with J. for a leaſe *for himſelf*, an action upon the caſe lies againſt him for this deceit. 3 H. 7. 14. curia.]

Br. Action ſur le Caſe, pl. 28. cites S. C.

[18. If a man undertakes *to carry my pack-horſe over the river Humber* ſafely, but he *ſurcharges his boat* with other goods, by which means my *pack-horſe periſhes*; I ſhall have an action upon the caſe, though this ſounds in covenant. 22 Aſſ. 41. adjudged.]

S. P. Br. Action ſur le Caſe, pl. 78. cites S. C. and ſee here that he did not count *that for ſuch a ſum of money the defendant promiſed*, &c. For it ſeems that if he took the pack-horſe into the boat de ſon tort demeſne and ſurcharged, by which the pack-horſe periſhed, action upon the *caſe lies*, and alſo the ferry wages is certain.——See (Z. b) pl. 11. S. C.

[19. If a man *ſells* certain cocks of *hay in a* certain *meadow* to another for a certain ſum, and the *vendee promiſes to carry them away by a certain time*, and notwithſtanding the vendee *ſuffers the* cock not carried away *to lie there to rot the ſoil* of the vendor, ſo that he loſes the profit of his herbage for a time, he may have an action upon the caſe againſt the vendee. 13 H. 4. Action ſur le Caſe 48. admitted by iſſue.]

Fol. 11.

[20. If a man for a good conſideration *promiſes by* his *deed not to do a certain thing*, *no* action upon the *caſe lies* upon this promiſe, *but* a writ of *covenant*. Mich. 16 Jac. B. R. between BEMISH AND HILDERSLY, adjudged.]

See covenant (A) pl. 3. S. C.

[21. If *A. recovers* a debt *againſt B.* and *B. pays* him *the condemnation*, whereupon *A. releaſes* all actions, executions, &c. to B. *by his deed, and by the ſame deed promiſes that he will* withdraw and *diſcharge all writs of execution* againſt B. upon the ſaid judgment; yet no action upon the caſe lies upon this promiſe, becauſe it is made by deed, and ſo he ought to have a writ of covenant. Mich. 16 Jac. B. R. between BEMISH AND HILDERSLEY, adjudged.]

Cro. J. 505. pl. 17. Bennus v. Guildley S. C. adjudged per tot. cur. for the defendant.

22. A promiſe againſt a promiſe will maintain an action upon the caſe, as in conſideration that *you give me* 10 *l. ſuch a day, I promiſe to give you* 10 *l. ſuch a day after.* 4 Le. 3. pl. 9. 31 Eliz. B. R. Strangborough v. Warner.

23. If one is *bound in an obligation, and afterwards promiſes to pay the money*, aſſumpſit lies upon this promiſe. Cro. E. 240. pl. 12. Trin. 33 Eliz. B. R. Aſhbrooke v. Snape.

* 24. A. promiſed B. the *moiety of the gain of a voyage* to be taken by A.'s ſhip, and B. promiſed A. in conſideration thereof to be at the charge of the moiety of the loſſes. Aſſumpſit lies for A. againſt B. on this promiſe; and judgment for the plaintiff. Bulſt. 202. Paſch. 10 Jac. Dockley v. Bury.

25. Where *expreſs promiſe* is, aſſumpſit lies as well as *account*. 1 Salk. 9. pl. 1. Hill. 2 W. & M. B. R. Wilken v. Wilken.

(Q) Conſideration. What ſhall be a good Conſideration. Conſideration executed. [At what Time the Promiſe muſt be made to make it good.]

[1. A Conſideration altogether paſt is not good. If a man *diſburſes* ſeveral ſums of *money about my buſineſs without my requeſt*, and after I ſay to him in conſideration that he has diſburſed the ſaid ſums for him [me,] I promiſe to pay to him 20 l. this is not a good conſideration, becauſe it was executed before. Paſch. 11 Jac. B. R. between West and West.]

D. 272. a. pl. 31. * Paſch. 10 Eliz. Hunt v. Bate.—S. C. cited by Periam J. 2 Le. 225. in pl. 286.

[2. If the *ſervant of A.* be *arreſted* in London for a treſpaſs, and *J. S. who knows A. bails him, and after A. promiſes him* for his friendſhip *to ſave him harmleſs* of damage and coſts, &c. and after J. S. is charged, yet this is not a good conſideration of an aſſumpſit, becauſe the bailing, which was the conſideration, was paſt and executed before. Dyer, 10 Eliz. 272.]

——Ow. 144. cites S. C. though the page there is miſprinted.——S. C. cited 2 Bulſt. 73.——Cro. C. 409. pl. 2. cites S. C.——S. C. cited Godb. 32. in pl. 40.——S. C. cited 2 Le. 225. in pl. 286.

See pl. 2.—S. C. & S. P. cited Yelv. 41.—

[3. *But otherwiſe* it is if the *maſter had requeſted him before to be bail* for his ſervant, and the bailing had been after. Dyer, 10 Eliz. 272.]

For it being done at the maſter's requeſt, the continuance of the benefit will make the conſideration good, and ſo the caſe in 10 Eliz. D. 272. imports. Per Jones and Crooke J. Cro. C. 409. Trin. 11 Car. B. R. in pl. 2.——S. C. cited Palm. 442.——Hob. 106. in pl. 129. ſays it was agreed that a *mere voluntary courteſy* will not have a conſideration to uphold an aſſumpſit. But if that courteſy were *moved by a ſuit or requeſt of the party that gives the aſſumpſit*, it will bind; for the promiſe, though it follows, is not naked; but couples itſelf with the ſuit before and the merits of the party procured by that ſuit, which is the difference. Paſch. 10 Eliz. D. 272. taken in the caſe of Hunt v. Bates.

Cro. E. 42. pl. 1. Sidnam v.

[4. If A. comes to B. and intreats him to be *bound in an obligation* for one of his friends, and B. is contented at his requeſt to be bound, and becomes bound accordingly; and after B. comes to

to A. and ſays to him, I was content at your requeſt to be bound to ſuch a one, &c. I hope you will ſave me harmleſs, and A. ſays that he will, this is a good conſideration to maintain an action, though he was bound before, inaſmuch as it was *at his requeſt*. WORTHINGTON's caſe cited Paſch. 42 Eliz. B. R. to be adjudged.] Worthington, Mich. 27 & 28 Eliz. C. B. S. C. and on the firſt motion Windham and Anderſon held that the action did not lie; but afterwards all the court held it a good conſideration by reaſon of the requeſt precedent; and the plaintiff had judgment. ——2 Le. 224. pl. 286. Sidenham v. Worlington S. C. adjudged accordingly. ——Godb. 31. pl. 40. S. C. accordingly, and after good deliberation adjudged for the plaintiff. ——S. C. cited Ow. 144.

* [5. But where a man *requeſts another to do* a thing, there after the thing is performed it will be a *good conſideration that he has done* the thing *upon his requeſt*, [therefore] *he promiſed*, &c. Trin. 14 Jac. BRAITHWAIT'S CASE AND LAMP, my Reports.] Mo. 866. pl. 1197. Lampleigh v. Braithwait S. C. held by Nichols, Winch and Hobart, that the action well lies. ——Hob. 105. pl. 129. S. C. adjudged for the plaintiff. Brownl. 7. S. C. adjudged for the plaintiff.

[6. *As* if a man requeſts another *to labour for his pardon*, &c. and after he does his endeavour, if the other *ſays in conſideration that he has laboured for his pardon* at his own coſts, *he promiſes to pay him ſo much*, &c. this is a good conſideration. Trin. 14 Jac. BRAITHWAIT's caſe adjudged.] See pl. 5. and the references there.

[7. If A. in conſideration that B. *has married his daughter at his requeſt*, promiſed to pay him 20 l. this is a good conſideration. Dyer, 10 Eliz. 272.] S. P. adjudged, but reverſed in error in the exchequer-chamber. D. 272. marg. pl. 32. cites Hill. 2 Jac. B. R. Rot. 511. Sandhill v. Jenny. ——Adjudged a good conſideration, there having been a communication of the marriage, at the requeſt of the defendant; for the father's natural affection continues, and her advancement is ſufficient cauſe of the promiſe. Cro. E. 59. pl. 1. Trin. 29 Eliz. B. R. Marſh v. Kavenford. ——2 Le. 111. pl. 146. Marſh v. Rainsford, S. C. ſays, that upon the communication the plaintiff and defendant could not agree on the days of payment; after which the plaintiff ſtole away the daughter, and married her without the defendant's knowledge; but afterwards he agreed to it, and in conſideration of the ſaid marriage promiſed to give him 100l. and judgment for the plaintiff. ——S. C. cited D. 272. b. marg. pl. 32. as adjudged for the plaintiff.

[8. If A. in conſideration that B. had bargained and *ſold to him certain tuns of* ſtrong beer, *at the requeſt of A. aſſumed* and promiſed *to B. to pay to him* 4 *l. for every tun upon delivery of* 30 *tuns* of ſtrong beer; this is a good conſideration, though paſt, becauſe the ſale was at the requeſt of him who made the promiſe. Mich. 12 Jac. (*) in the exchequer-chamber between FIELD AND DALE adjudged. Quod vide Mich. 12 Jac. B.] (*) Fol. 12.

[9. If *A. ſeiſed of a ſhop, bargains with B. to leaſe it to him* for 5 years, *rendering* 40*s. rent; and* 12*d. of both ſides is given for the performance* of this agreement; *and after, in conſideration that A. will make the leaſe according to the ſaid promiſe, B. promiſes to pay him* 30*l.* whereupon *A. leaſes* the ſhop accordingly, *this is a good conſideration* to have action *for the* 30 *l.* though there was a perfect bargain before this promiſe made, *inaſmuch as the leaſe was not made* according to the promiſe [bargain] *before this promiſe* was made. Paſch. 11. B. R. between JONES AND CLARK, adjudged.] All this was done upon one and the ſame day, and ſo was but one intire agreement, and the promiſe goes to the whole. 2 Bulſt. 73. S. C.

[10. If

Roll. Rep. 381. pl. 2. S. C. adjudged accordingly.—3 Bulſt. 187. S. C. adjudged for the plaintiff.

[10. If I [one] *requeſts a man to board another for one year, as he had boarded him before*, to which *the other agrees*; and *before the year ended, he that made the requeſt promiſes in conſideration that he will board him throughout the year, he will pay him for the whole*; if he boards him accordingly, this is a good conſideration for the board of the whole year, though part of the conſideration be paſſed; for perhaps he would not have boarded him throughout the year, if it had not been for the promiſe. My Rep. 14 Jac. COTTON AGAINST WESTCOT.]

S. P. by Doderidge J. quod fuit conceſſum, by Coke Ch. J. accordingly,

[11. If I *become bail for J. S. at the requeſt of J. D.* if *before the action determined, J. D. promiſes*, in conſideration thereof, *to diſcharge* [him] this is good. My Rep. 14 Jac.]

becauſe the action was continuing. 2 Roll. Rep. 382. in pl. 2.——3 Bulſt. 187. S. P. by Coke and Doderidge in S. C.

[281]

Cro. E. 700. pl. 15. S. C. it was objected that to deliver that which he ſold, is no more than the law appoints, the property whereof is in the ſon by the ſale.

[12. If the *ſon contracts with B. for* 20 weigh of *cheeſe for* 20 *l.* whereof 10*l.* was *paid before-hand, and the reſidue* [*was to be paid*] *at Michaelmas* next, and after the *ſon comes to B.* for the cheeſe, *which he refuſes to deliver*, and after the father of the ſon comes to [B.] *and requeſts him to deliver it to his ſon, and promiſes him that if his ſon does not pay* the ſaid 10l. at the day, that *he himſelf will*, whereupon B. delivers the cheeſe; B. may have an action upon the caſe, upon this aſſumpſit, againſt the father, if the ſon does not pay the money; for this is a good conſideration. Mich. 41 & 42 Eliz. B. R. between SHERWOOD AND WOODWARD.]

But Gawdy and Fenner held it a good conſideration, as it is an eaſe to the bargainee to have them without ſuit, which perhaps he could not otherwiſe have had; and though the bargainee may take them in this caſe, yet the bargainor is not bound to deliver them. And there is a new act done by him upon this agreement, and it is an eaſe to the vendee; and that 12 H. 7. is that to deliver goods at another place is a good accord; wherefore, cæteris juſticiariis abſentibus they judged it for the plaintiff.

[13. If A. in conſideration that B. *had ſold to him* ſuch a day ſuch a thing *adtunc & ibidem promiſed to pay him* 10*l.* this *conſideration* is good; and *continued* [is all one as if it was made] *at the time of the promiſe.* Paſch. 8 Jac. ANDREW's caſe.]

Roll. Rep. 413. pl. 1. S. C. and agreed that it is a good conſideration; and Houghton ſaid, that the uſual way of declaring is in this manner, and is good; and judgment was given for the plaintiff.——3 Bulſt. 222. S. C. and judgment for the plaintiff accordingly.——But Roll. Rep. 413. the reporter makes a quære of this caſe, becauſe it ſeems there is no conſideration of a new promiſe, inaſmuch as no forbearance is promiſed; for it has been held that a conſideration to forbear per paululum temporis is not good, becauſe he may ſue him notwithſtanding, and conſequently he may do the ſame in this caſe; and in this caſe it lies not as upon a future contract, the contract being executed before, and this does not make a new contract.

[14. If a man be *indebted to* another *for goods ſold, & poſtea eodem die, promiſes in conſideration thereof to pay it* at a day to come, this is a good conſideration to make an aſſumpſit; for the *continuance of the debt is a conſideration continuing.* My Rep. 14 Jac. HODGE AND VAVISOR.]

[15. So if he makes ſuch *aſſumpſit at a day after the contract* made, *and before payment*; for the * continuance of the debt is a good conſideration continuing. My Rep. 14 Jac. HODGE AND VAVISOR, adjudged.]

* See pl. 21.

[16. Sa

[16. *So* if the defendant 30 *Junii was indebted* to the plaintiff in 20l. *for money lent by the plaintiff* to him; and the defendant *being ſo indebted* afterwards, ſcil. the 30 *July after promiſes to pay* it at a day to come; this is good; for this is a conſideration continuing. Mich. 15 Car. B. R. between BARTON AND SHURLY, adjudged in a writ of error. Intrat' Hill. 14 Rot. 913.]

[17. If *A. and B. account* together, and *B. is found* 9l. *in arrears*, upon which *B. in conſideration* thereof *promiſes to pay* it at a day; this is a good conſideration not executed before, inaſmuch as it is made upon the account, and the debt is uncertain before the account, inaſmuch as allowances ought to be made. Mich. 11 Jac. B. R. between JESSON AND BRIER, per curiam adjudged. Trin. 12 Jac. B. R. alſo per curiam, 14 Jac. B. R. between JANSON AND COLOMORE.] See (N) pl. 1. and the notes there.

[18. If A. in conſideration that B. *had, at his requeſt, ſolicited ſeveral ſuits* for him, *and* had *done divers buſineſſes for him*, aſſumes and *promiſes to convey to him his manor of D. or to give him as much as the* * *manor is worth*, this is a good conſideration, though paſſed, becauſe it was *done at his requeſt*. Mich. 10 Car. B. between HENNE plaintiff, and ROLPH and others, executors of one Smith defendants adjudged, this being moved in arreſt of judgment. Mich. 22 Car. between † LEACH AND BROMSEL, per curiam, in conſideration that before, at the requeſt of the defendant, ille habuiſſet magnam curiam de negotiis defendentis in lege & preſervaſſet defendentem a multis periculis, &c.] * Fol. 13. † See tit. Bar (B) pl. 1. S. C. [282]

[19. In an action upon a promiſe, if the *plaintiff declares, that* whereas 60l. was given to him for *a legacy*, and that all this, *except* 7l. *was paid* to him *by the* defendant, who was *executor* in the right of his wife, and ſo bound to pay it, *and that* 23*d September* the *plaintiff at the requeſt of the defendant, releaſed the ſaid* 7l. *and* after 28*th September*, *the defendant, in conſideration of the ſaid releaſe, promiſed to pay the ſaid* 7l. at the death of his wife, if [ſhe] does not pay it, though the releaſe, which was the conſideration, was paſſed, viz. 5 days before the promiſe was made, yet inaſmuch as this was made at the requeſt of the defendant, this is a good conſideration. Dubitatur. Trin. 11 Car. B. R. between TOWNSEND AND HUNT. Intratur Hill. 10 Car. Rot. 774. But Mich. 11 Car. the caſe was argued at bar and bench, & per totam curiam adjudged that the action lies; for the *requeſt made the act, which was done to be meritorious*, and to deſerve a good turn of the other part; and then Croke ſaid that 28 Eliz. in ‡ RAINSFORD'S CASE, B. R. and in 44 Eliz. B. R. in § RIGG'S CASE, this was adjudged accordingly, and affirmed on a writ of error Mich. 14 Car. B. R. between KEENE AND PEARSON, adjudged in conſideration that the *plaintiff upon an agreement before made, concerning the melting of certain bells*, &c. and caſting them at the requeſt of the defendant, *had made certain moulds to make them, the defendant did promiſe to pay him for the making of them*, and for his labour and expences about them, this is a good promiſe, though upon a conſideration paſt, becauſe it was *done at the requeſt of the defendant*. ‡ Cro. C. 408. pl. 2. S. C. accordingly, and adjudged for the plaintiff. —Jo. 365. pl. 2. S. C. adjudged accordingly.— † This ſeems to be the caſe of MARSH AND KAVENFORD, Cro. E. 59. pl. 1. Trin. 29 Eliz. argued by Egerton ſolicitor general, and Foſter, that the conſideration was not good; but adjudged for the plaintiff. —2 Le. 111. pl. 146. Trin. 30 Eliz.

B.R. March v. Rainſford, S. C. adjudged for the plaintiff. Adjudged, this being moved in arreſt of judgment. Intratur Trin. 14 Car. Rot. 506. —— See pl. 7. § See pl. 41. Riggs v. Bullingham, S. C.

This plea is the S. C. as the latter part of pl. 19. next above.

[23. If A. in conſideration that B. according to an agreement before made between A. and B. touching the caſting de novo of certain bells of the church of S. had before, at the requeſt and inſtance of A. and coſts of B. made certain moulds for this purpoſe, promiſes B. to pay him for the ſaid moulds, and for his pains in making them when he ſhould be required, this is a good conſideration for B. to maintain an action againſt A. for though the conſideration be paſt, yet inaſmuch as it was done at the requeſt of A. the action lies, for the *conſideration continues*. Paſch. 15 Car. B. R. between PEARSON AND KEENE. Adjudged per curiam, this being moved in arreſt of judgment. Intratur Trin. 14 Car. B. R. Rot. 506.]

[21. In an action upon the caſe upon a promiſe, if the plaintiff declares, that whereas the defendant *was indebted to him for* divers ſums of *money at ſeveral times ante tunc accommodat'* to him *by A. S. adtunc & adhuc his wife, & adtunc due and unpaid*, the *defendant did promiſe to become bound with a ſurety* in an obligation, for the payment thereof at a certain time, this is a good conſideration, * See pl. 15. though paſt, becauſe *the debt is* * *a continuing conſideration*, and therefore good without any other conſideration of forbearance to proſecute any ſuit for it, or any other new conſideration. Trin. 1650, between COGDON AND HAM. Adjudged per curiam. Intratur Hill 1649. Rot. 170.]

21. The count was, that *in conſideration J. S. had granted a term to J. D. and that afterwards, at the requeſt of J. S. the ſaid J. D. did make an eſtate to W. for* 4 *years*, *J. S. did promiſe*, &c. [283] After verdict it was moved, that this was no conſideration, and a *difference* taken where the *promiſe was upon the grant, and* where *after*; that if it was before the conſideration it was good, but if afterwards it was not good. And adjudged quod querens nil capiat, &c. Godb. 13. pl. 19. Paſch. 24 Eliz. B. R. Anon.

S. P. Per Rhodes J. Cro. E. 42. in pl. 1. S. C.—— S. P. per Rhodes J. and Periam J. agreed to the difference; and it was not denied by the other juſtices.

23. If *one ſerves me for a year, and has nothing for his ſervice*, and afterwards, *at the end of the year, I promiſe him for his good and faithful ſervice ended*, 20 *l.* he may maintain an action on ſuch promiſe; for it is a good conſideration; per Rhodes J. 2 Le. 225. Paſch. 27 Eliz. C. B. in pl. 285. and to this all the juſtices agreed.

24. *But if* a ſervant *has wages* given him, and his maſter ex abundanti promiſes him 10 l. more after his ſervice ended, he ſhall not maintain an action for the 10l. upon the ſaid promiſe; per Rhodes J. and this difference was agreed by all the juſtices. 2 Le. 225. Paſch. 27 Eliz. in pl. 286.

And. 137. pl. 187. MOON v.

25. Leſſee for years, reverſion to one M. the *leſſee* having ſpent money, and *being at charges in ejectment brought againſt him*, *in*

in defence of the title, acquainted M. with it, and deſired him to contribute towards his charges, or to make him ſome other recompence; whereupon M. *promiſed*, that for the conſideration aforeſaid, he *would grant him ſuch a leaſe*, at the expiration of his term, as he now has; which he afterwards refuſing to do, the plaintiff brought an action of aſſumpſit, &c. but adjudged that it would not lie, becauſe the conſideration was *executed* before the promiſe made. Mo. 220. pl. 357. Mich. 27 & 28 Eliz. Moor v. Williams.

WILLIAMS, S. C. in an ejectment brought by M. againſt the leſſee, the court adjudged it for the plaintiff, becauſe very clear that it is only a promiſe, and no leaſe.

26. *Marriage* is always a preſent conſideration, per Anderſon, to which Windham agreed. 2 Le. 224, 225. Paſch. 27 Eliz. C. B. in pl. 286.

S. P. accordingly, Godb. 31. in pl. 40. S. C.——

An aſſumpſit, in conſideration that you have married my daughter, to give you 40l. is good; for the affection and conſideration always continues, per Walmſley. Cro. E. 741. Hill. 42 Eliz. C. B. in pl. 16.——S. P. And ſo of his couſin; per Barkley J. Cro. C. 409. Trin. 11 Car. B. R. in pl. 2.

27. Note a diverſity, in *aſſumpſit* it is not neceſſary that the *contract* be *eodem inſtante*, but it is enough if there be *ſufficient inducement to the promiſe*; and though it is *precedent* it is not material. But in *debt* it is requiſite that *benefit comes to the party*, otherwiſe debt lies not for want of quid pro quo. D. 271. b. pl. 29. marg. cites it as adjudged 29 & 30 Eliz. C. B. Sydenham v. Worthington.

28. Aſſumpſit, *for that the defendant leaſed lands to the plaintiff rendering rent, and after ſome years of the term expired, promiſed*, that *in conſideration the plaintiff had occupied* the land, *and paid his rent, to ſave him harmleſs againſt all perſons for the occupation for the time paſt and to come*; and that afterwards H. diſtrained the plaintiff's cattle on the land. It was objected, that the payment of the rent could be no conſideration, becauſe he occupied the land for it, and alſo the conſideration was paſt. But the plaintiff had judgment to recover his damages. Le. 102. pl. 134. Paſch. 30 Eliz. B. R. Pearle v. Edwards.

Before the time of the promiſe the plaintiff's beaſts were taken damage feaſant. Adjudged for the plaintiff; for the conſideration that he was in poſſeſſion, and had paid his rent, and was to pay his rent, is ſufficient to cauſe the other to defend his poſſeſſion for the time paſt and to come. Cro. E. 94. pl. 5. S. C. by the name of Pearle v. Unger.

[284]

29. If one comes to a *ſerjeant at law* for his counſel, and the ſerjeant *adviſes* him, and *afterwards the client, in conſideration of ſuch counſel, promiſes to pay him* 20 l. an action lies for it; per Wray Ch. J. and ſo Popham ſaid it had been adjudged in the exchequer. 2 Le. 111. pl. 146. Trin. 30 Eliz. B. R. Obiter.

S. P. ſaid by Popham, Daniel, and Coke, to have been adjudged accordingly in the exchequer. Cro. E. 59. pl. 1.

30. If a *phyſician*, who is my friend, *hearing that my ſon is ſick, goes to him in my abſence*, and helps *and recovers him, and I* being informed thereof, *promiſe him, in conſideration as above, to give him* 20 *l.* an action will lie for the money. 2 Le. 111. pl. 146. cited by Popham 30 Eliz. as lately adjudged in caſe of Style v. Smith.

31. Aſſumpſit, *in conſideration he had bought of the defendant* 3 *parcels of land upon the* 10*th of December*, the *defendant afterwards, viz.* 19*th December, promiſed to make him ſuch ſufficient aſſurance* thereof before ſuch a day. It was moved after verdict, that the conſideration was executed; but adjudged for the plaintiff, for the aſſurance was the ſubſtance of the ſale. Cro. E. 138. pl. 21. Trin. 31 Eliz. B. R. Warcop v. Morſe.

3 Le. 236. pl. 256. S. C. that the goods were delivered to the plaintiff's wife to keep till the next court; this was held no conſideration, ſuch delivery being againſt law, and alſo the conſideration was a thing executed before the promiſe; and judgment againſt the plaintiff.

32. A precept iſſued to a bailiff to *attach goods* of J. S. which he did, and *delivered them to the then plaintiff*, to deliver at the next court, and B. the *defendant*, in conſideration thereof, *aſſumed to ſave him harmleſs*. This conſideration was a thing executed before the promiſe, and ſo not good. See 3 Le. 326. pl. 325. Mich. 32 & 33 Eliz. B. R. Mead v. Bigot.

But where the conſideration was that *the plaintiff, by the defendant's appointment, and for his debt, had ſhortly before paid to R. S.* 60 *l.* the defendant promiſed to repay it on requeſt, &c. judgment was ſtaid, becauſe the payment being a conſideration paſt, was not ſufficient. Cro. E. 741. pl. 16. Hill. 42 Eliz. C. B. Barker v. Halifax.——2 Barnard. Rep. in B. R. 141. The Ch. J. ſaid he could not agree this caſe to be law. See 49 or 50. the reaſons thereof.

34. Aſſumpſit, in conſideration *that N. the plaintiff had paid for B. the defendant, and at his requeſt*, 10 *l.* at ſuch a day, (which was *a year before*) he promiſed to repay it, cum inde requiſitus eſſet. It was objected that this conſideration was for a thing paſt, and therefore not good. Sed non allocatur; for the payment being laid to be at his requeſt the conſideration continues, and ſo is the common courſe. Cro. E. 282. pl. 3. Trin. 34 Eliz. B. R. Beaucamp v. Neggin.

35. Aſſumpſit, in *conſideration that the plaintiff had ſubmitted himſelf to the award of J. S.* the *defendant, adtunc & ibidem, promiſed to pay the plaintiff* 10 *l.* The defendant demurred, becauſe the conſideration was executed; but adjudged for the plaintiff, becauſe *adtunc & ibidem* make the ſubmiſſion intendible at the time of the promiſe. Mo. 367. pl. 505. Mich. 36 & 37 Eliz. Sheffield v. Rice.

36. Aſſumpſit, &c. in *conſideration the plaintiff had delivered to the defendant* 20 *ſheep, he promiſed to pay him* 5 *l. at the time of his marriage*, and alleged in fact that he was married, &c. The whole court held, that becauſe the conſideration was in the preter tenſe, (deliberaſſet) and ſo the conſideration paſt, it is no cauſe of action; and therefore judgment was ſtayed. Cro. Eliz. 442. pl. 5. Mich. 37 & 38 Eliz. C. B. Jeremy v. Goochman.

37. Aſſumpſit, in conſideration *that he had given certain money*, is ill, becauſe it might be that he had given it before the promiſe. Palm. 560. Arg. cites Trin. 37 Eliz. Baggott's caſe.

[285]

S. C. cited by Jones and Crooke J. Cro. C. 409. Trin. 11 Car. B. R. in pl. 2.

38. Aſſumpſit, in conſideration that he, at the defendant's requeſt, by deed *dedit & conceſſit to the defendant the next avoidance of the church of D. the defendant promiſed to pay the plaintiff* 100 *l.* Reſolved, that the grant being at his requeſt it was a ſufficient conſideration, though it was divers years paſt, eſpecially it being to the defendant himſelf; otherwiſe peradventure if it had been to a ſtranger.

ſtranger. Cro. E. 715. pl. 38. Mich. 41 & 42 Eliz. B. R. Riggs v. Bullingham.

39. A. *put his ſon to board with* J. S. *the plaintiff for* 3 *years, at* 8 *l. a year, and died within the year.* M. his *widow, in conſideration of natural affection to her ſon, and* in conſideration *that the ſon ſhould continue during the reſidue of the* 3 *years with the plaintiff, promiſed to pay him* 6 *l.* 13 *s.* 4 *d. for the boarding the ſon for the time paſt, and* 8 *l. for every year after* of his continuance with the plaintiff. The court agreed that natural affection of itſelf is not ſufficient to ground an aſſumpſit, without an expreſs quid pro quo; but that is good here, becauſe it is not only in conſideration of affection, but that her ſon ſhould afterwards continue at his table, which is good as well for the money due before, as for what ſhould afterwards become due. Cro. E. 755, 756. pl. 20. Paſch. 42 Eliz. C. B. Brett v. J. S.

40. The defendant, in conſideration *that the plaintiff had lent him* 30 *l. before at his requeſt, promiſed to lend the plaintiff* 30 *l. for a year, or give him* 40 *s.* But this being a conſideration paſt and executed, it was adjudged for the defendant. Cro. E. 885. pl. 25. Paſch. 44 Eliz. C. B. Dogget v. Voyell.

Ow. 144. Dogget v. Dowell, S. C. adjudged accordingly by all the juſtices, præter Warburton. —— Mo. 643. pl. 886. Dogget v. Vowell, S. C. adjudged accordingly; but in the ſtate of the caſe there, it is not ſaid that the loan was at the defendant's requeſt. —— S. C. cited Palm. 560. —— 2 Bulſt. 73. S. C. cited.

40. Aſſumpſit, *for that the defendant requeſted the plaintiff to give his credit for one R. to F. for* 2 *tun of wine, value* 50 *l.* and the *plaintiff gave bond to F. of* 100 *l. for the payment thereof*; upon which he was ſued, *and forced to pay* 70 *l.* at ſuch a day; *in conſideration whereof the defendant promiſed to pay the* 70 *l. ſuch a day*, &c. It was objected that this was upon a conſideration paſt, and ſo not good; but becauſe R. had credit given him by F. at the defendant's requeſt, upon the plaintiff's undertaking, and the plaintiff was damnified by reaſon thereof, the court held the conſideration to be ſufficient, and not paſt, and gave judgment for the plaintiff. Cro. J. 18. pl. 3. Mich. 1 Jac. B. R. Boſden v. Sir John Thynn.

Yelv. 40. S. C. and *though the original requeſt was only to give credit for* 50 *l. yet when R. would take no ſecurity but by bond of* 100 *l. for payment of the* 50 *l. and all this is ſignified afterwards to the defendant, and agreed to by him, and promiſes to pay the* 70 *l.* this ſhall charge him; becauſe it has its eſſence and commencement from the firſt requeſt made by the defendant; and judgment for the plaintiff by 3 juſtices; but Yelverton contra clearly.

41. A. ſold a horſe to B. for 5l. and C. the defendant being preſent ſaid that in conſiderrtion of the ſale, if B. did not pay him, he would ſee him paid. It was moved in arreſt of judgment, that it was *not expreſsly alleged that the ſale was made at C.'s requeſt, and this promiſe is laid to be after the ſale made*, and therefore per tot. cur. judgment was given againſt the plaintiff. Bulſt. 120. Paſch. 9 Jac. Thorner v. Field.

42. An *exchange* was made between two of ſo much French money for ſo much Engliſh, in conſideration whereof one promiſed the other to pay him ſo much. In action upon this promiſe it was ruled, that the conſideration was good; but becauſe the *promiſe was made after the exchange was paſt* and executed, the

judgment was reverſed in the exchequer chamber. 2 Bulſt. 73. Paſch. 11 Jac. cites it Arg. as the caſe of Feak v. Cotton.

* 43. *Gale requeſted Clobery to deliver to J. S. 600 l. worth of wine*, which he delivered accordingly. Afterwards Clare [*Gale*] *promiſed* Gale [*Clobery*] *in conſideration that he at his requeſt had delivered ſo much to J. S. that he would pay him if J. S. did not.* J. S. paid only 300 l. And adjudged by all the juſtices of England, that action lies by G. [Cl.] againſt Cl. [G.] Palm. 442. cites it as the caſe of GALE v. CLOBERY, in error. [But it ſeems much miſprinted, and it ſhould be as in the crotches, or otherwiſe it muſt be that Clare was a 4th perſon, and promiſed Clobery in conſideration of his delivering the wine at Gale's requeſt, and that action lay againſt Clare.]

44. In aſſumpſit *by a ſervant*, ſhe counted that having ſerved the defendant and his wife faithfully, he after his wife's death, *in conſideration of the ſervice done to him and his wife, promiſed to pay her* 13 *s.* 4 *d.* It was objected that the conſideration is not good, becauſe it is not alleged that ſhe at his requeſt ſerved him, and alſo that the promiſe was after the ſervice performed; but judgment was for the plaintiff. Hutt. 84. Mich. 2 Car. Franklin v. Bradell.

45. Aſſumpſit, &c. The plaintiff declared that on ſuch a day, &c. he *ſold ſo much barley to the defendant, part whereof he delivered immediately, and the reſt by agreement he was to deliver afterwards, and afterwards on the ſame day the defendant promiſed to pay* ſo much by ſuch a day. It was objected that the promiſe was after the ſale, and ſo being made upon a conſideration executed, it is not good; but per cur. it is good enough, being made on the ſame day, and no diviſion ſhall be made thereof in this caſe. Lat. 150. Trin. 2 Car. Howlet's caſe.

46. Caſe, for that *in conſideration the father would ſurrender a copyhold to the defendant, he promiſed to give to M. and S. his 2 daughters 20 l. a-piece. M. alone brought action for 20 l.* It was moved in arreſt of judgment, that the plaintiff had declared upon a joint promiſe which concerned both, and the action was brought by M. alone, whereas S. ought to be joined; but adjudged that they had diſtinct intereſts, and by conſequence the action is well brought by one of them. Sty. 461. Mich. 1655. Thomas's caſe.

47. In aſſumpſit the plaintiff declared, that whereas the plaintiff at his own charges *had buried the defendant's child, the defendant promiſed to pay him his charges*; and though no requeſt was laid, judgment was given for the plaintiff. Raym. 260. cited by Mountague Ch. B. and Atkins B. as a caſe in 1656. in B. R. Church v. Church.

48. In *caſe* the plaintiff *counted*, that *for* ſuch *conſideration* (which was not executory, but) *executed, the defendant aſſumed*, &c. The defendant *traverſed the conſideration executed.* Upon demurrer it was agreed per cur. that a conſideration executed cannot be traverſed, and judgment was given for the plaintiff, none coming for the

the defendant. Roll. Rep. 401. pl. 29. Trin. 14 Jac. B. R. Harris v. Ewer.

49. The count was *for work and labour done for the defendant*, but did *not ſay that it was done at the defendant's requeſt*. The plaintiff had judgment by nil dicit; but upon error brought, this matter was aſſigned; but adjornatur. 2 Barnard. Rep. in B. R. pl. 55. Mich. 5 Geo. 2. Hayes v. Warren.

Ibid. 71. S.C. argued again, and the Ch. J. and Page J. obſerved that the preſent action is not *for goods ſold and delivered*, which would have been a much more favourable caſe for the plaintiff, becauſe by acceptance of the goods there ſeems to be an agreement to pay for them; but here the defendant might be no ways privy to the work at the time of doing it, and therefore thought the plaintiff could hardly recover; ſed adjornatur.——Ibid. 140. Paſch. 5 Geo. 2. S. C. argued again, and the court declared they took the rule of law to be, that no paſt conſideration is ſufficient to ſupport a ſubſequent promiſe, unleſs there was either a requeſt of the party expreſs or implied at the time of performing the conſideration. Some acts, they ſaid, were of ſuch a nature as that the law would imply a requeſt, as the being * bail for one, curing one's child of a ſudden ſickneſs, performing the part of a ſervant, &c. and therefore in thoſe caſes they did allow that a ſubſequent promiſe might be well founded upon ſuch paſt conſideration. They did agree likewiſe, that where there was an expreſs requeſt at the time of the paſt conſideration's being performed, that might in all caſes be § ſufficient to ſupport a ſubſquent promiſe. And therefore the Ch. J. ſaid, he could not agree the caſe cited out of † 3 Cro. 741. to be law; but in the preſent caſe the act done by the defendant was by no means of ſuch a nature as to be ſufficient for the law to create a requeſt upon it; and therefore an expreſs requeſt was neceſſary to have been laid. They ſaid then that they thought there was by no means an expreſs requeſt laid in this caſe, and however this declaration might be ſufficient after a verdict by the common law, they were of opinion that this was by no means ſo ſtrong a caſe upon a judgment by nil dicit. They ſaid likewiſe that they thought this conſideration muſt be a paſt one as laid in the declaration, by reaſon of the word (poſtea.) Accordingly they reverſed the judgment, unleſs cauſe.

§ [287]

* See pl. 11. † Barker v. Hallifax. See pl. 24.

(R) Upon an Aſſumpſit. In what Caſes Action lies upon a *collateral Promiſe*.

[1. AN action upon the *caſe* lies *againſt the executor*, upon a promiſe *in nature of a debt*. Mich. 4 Jac. B. R. between Sir Moyle * Finch and Richardson. Reſolved per curiam, Paſch. 8 Jac. 1. in the exchequer chamber, between Meane and Peacher. Mich. 11 Jac. B. R. between † Cock and Thoroughgood, per curiam.]

* Cro. J. 47. pl. 16. Mich. 2 Jac. B. R. Fiſher v. Richardſon, S. P. adjudged, and ſeems to be S. C. ——— Yelv. 55. Fiſh v. Richardſon, ſeems to be S. C.

† See tit. Court, (C) pl. 6. S. C.

[2. [So] An action upon the caſe lies againſt an executor or adminiſtrator, *as well upon a collateral promiſe as where* the promiſe is *for a debt*. Hill. 14 Jac. B. R. * Small and Boyer, adjudged. My Rep. 14 Jac. † Beresford and Goodrouse, adjudged. Paſch. 16 Car. B. between ‡ Bidwell and Cotton, per curiam. Paſch. 15 Car. B. R. between Mason and Thursby, adjudged. Contra Mich. 4 Jac. B. R. Sir Moyle || Finch and Richardson. Contra Hob. Rep. c. 278.]

* This was an action brought againſt executor on an aſſumpſit of the teſtator, that if he married his daughter, he promiſed to give ſo much with her as he had given to any one of his daughters. The plaintiff counted that he had given ſo much to one, and ſo much to another of his daughters, and that the marriage was had in his life-time, and requeſted payment. The court was clear of opinion that the action well lies. 3 Bulſt. 248. Mich. 14 Jac. S. C.

† This likewiſe was upon a promiſe to give ſo much in marriage with a couſin, and the plaintiff in action brought by him againſt the executor, averred that he married her in the life of the teſtator; and adjudged for the plaintiff. Roll. Rep. 433. pl. 29. Mich. 14 Jac. S. C.——Cro. J. 404. pl. 3. Trin.

Trin. 14 Jac. S. C. adjudged for the plaintiff; and upon error brought this judgment was affirmed.—3 Bulſt. 235. S. C. adjudged for the plaintiff.———See tit. Condition. (A. d) pl. 3. S. C.

‡ Hob. 216. pl. 279. Bidwell v. Catton, agreed that on a promiſe by teſtator to do a collateral act, as to build a houſe, &c. an aſſumpſit will not lie againſt the executor.

‖ See pl. 1.

[3. *As if* man promiſes another, in conſideration that *he will marry his daughter, to give him as much as he* hath given or *ſhould give with any of his other daughters*, if after he gives ſuch a ſum with another of his daughters, and dies, an action upon this aſſumpſit lies againſt the adminiſtrator, notwithſtanding it be collateral. Hill. 14 Jac. B. R. per curiam, for coſts after nonſuit of the plaintiff. But Mich. 15 Jac. it was adjudged.]

Roll. Rep. 193. pl. 33. S. C. adjornatur.——Ibid. 266. pl. 39. S. C. adjudged; and ſays that the judgment was affirmed in the exchequer chamber, though it was objected that it * was a collateral promiſe; and therefore not maintainable againſt the executor. But the court held that there was no difference between a collateral promiſe and another promiſe.———Cro. J. 417. pl. 7. S. C. in the exchequer chamber, and ſays that all the juſtices and barons (beſides Tanfield Ch. B. who doubted thereof) held that the action well lies againſt the executor, as well for this collateral promiſe as for a debt. But Tanfield ſaid, that it had often been adjudged, that upon ſuch a collateral promiſe the executor is not chargeable. [At the end of the report there is a] note [added, that] Hoxwell clerk of the errors ſaid, that once they were all of an opinion to reverſe the ſaid judgment.——— Roll. Rep. 433. pl. 29. Arg. Mich. 14 Jac. cites S. C. and ſays it was adjudged in B. R. that the action lay againſt the executors, but in error in the exchequer it was the opinion of all the court, that it does not lie againſt the executor; but it is not yet reverſed.———2 Bulſt. 236. Arg. cites S. C. and ſays, that a certificate of the clerks was ſhewed, that the opinion of the judges in the exchequer chamber was contrary to the judgment given in B. R. but that the ſame judgment was not reverſed. Cro. J. 405. pl. 3. cites S. C. and ſays that no judgment was given in the exchequer chamber, becauſe the party died.———Jenk. 336. pl. 80. S. C. ſays it was adjudged and affirmed in error, but that this judgment is againſt former opinions for a collateral promiſe not broke in the life of the teſtator.

[4. *So* if the promiſe be in conſideration [&c.] *to leave ſo much to him at his death*, as he ſhould leave to his wife, or any of his children. My Rep. 13 Jac. SAUNDERS AND EASTERBY, adjudged; and Hill. 14 Jac. affirmed in the exchequer.]

* [288]

Roll. Rep. 355. pl. 7. Paſch. 14 Jac. S. C. but S. P. does not appear.———S. C. & S. P. Ibid. 433. pl. 29. adjudged.———Cro. J. 404. pl. 3. Berisford v. Woodroff, S. C. but S. P. does not appear as to the marriage-dinner, or payment at his death.——3 Bulſt. 235. S. C. as to the marriage-portion, adjudged accordingly.

[5. *So* if the promiſe be in conſideration of marriage, *to pay ſo much at the marriage, and ſo much for the marriage-dinner, and ſo much at his death.* My Rep. 14 Jac. BERISFORD AND GOODROUSE, adjudged.]

[6. If *A. buys goods* of B. and becauſe B. diſtruſts the payment of A. *J. S. promiſes that if A. does not pay him at ſuch a day, he* himſelf *will* pay it. J. S. dies, and the money is not paid at the day; the executors of J. S. may be charged in an action upon the promiſe, though it be collateral. Hill. 38 Eliz. between SAYMOND AND GENT, adjudged.]

Hob. 216. pl. 279. S. C. adjudged accordingly.—See (U) pl. 6. S. C. not S. P.

[7. In an action upon the caſe *againſt an executor*, if he *declares that* whereas *he had ſued* an action againſt B. *the teſtator* of the defendant, *B. in conſideration that the defendant would forbear to proſecute* the ſaid writ further againſt him, *did promiſe to pay 50 l. to the plaintiff*, the action lies againſt the executor upon his promiſe, becauſe this *is not collateral*, for that an action of debt would have lain againſt the teſtator upon this promiſe. Hob. Rep. c. 278. between BEDWELL AND COTTON, adjudged.]

8. If an *executor promiſes to pay* a debt when he *has not aſſets*, no action on the caſe lies againſt him upon ſuch promiſe; but contrary if he has aſſets. Note, it was ſo ſaid by the juſtices. 3 Le. 67. pl. 101. Hill. 19 Eliz. B. R. in caſe of Hodgſon v. Maynard.

It was ſaid by Serjeant Goodfellow, Freem. Rep. 125. that if a *ſtranger promiſed, in conſideration a creditor would forbear the executor, that he would pay*, it ought to appear in ſuch caſe, that the executor had aſſets. But the reporter ſays quære. ——— Aſſumpſit, *in conſideration toe teſtator was indebted to him, the executor promiſed to pay.* Reſolved, it was no good conſideration, without *averment of aſſets, or that he was commencing a ſuit*, &c. for if this action would lie, it would charge him out of his own eſtate. Freem. Rep. 409. pl. 537. Trin. 1675. Browne's caſe.

9. But it was held, that if an *heir has nothing by deſcent*, an action on the caſe will not lie againſt him upon ſuch a promiſe. 3 Le. 67. pl. 101. Hill. 19 Eliz. in caſe of Hodgſon v. Maynard.

See Freem. Rep. 125. pl. 147. Mich. 1673. Porter v. Bille.

10. Aſſumpſit, upon a *promiſe made to the feme dum ſola*, on a communication between J. B. the plaintiff's father and the defendant, couſin of R. the plaintiff, and the ſaid feme when ſole, of a marriage between the plaintiffs; and that the ſaid J. B. promiſed the feme, if the marriage did take effect, he would aſſure to them ſuch lands; and the defendant then promiſed her, that if J. B. did not perform his promiſe, he would give her 100 l. After verdict for the plaintiff, it was moved, that the conſideration was not ſufficient; for that the feme was a mere * ſtranger to the defendant. But adjudged for the plaintiff, and affirmed in error. Cro. E. 63. pl. 9. Mich. 29 & 30 Eliz. Brown v. Garborough.

Goldſb. 94. pl. 9. S. C. and per cur. the words of the declaration being in conſideratione præmiſſorum, is to be intended in conſideration of the marriage, as well as of the refuſal of the father.

* [289]

11. The plaintiff declared, that the defendant, *in conſideration that the plaintiff's father had employed his ſervice about the buſineſs of the defendant's teſtator, to the teſtator's great profit, and in conſideration of love and affection that the teſtator bore to the plaintiff, promiſed to give him* 100 *l.* Per cur. the conſideration here was paſt and executed before the promiſe made, and nothing is done by the ſon. Judgment againſt the plaintiff. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. Harford v. Gardiner.

12. Aſſumpſit, *in conſideration that the plaintiff gave to J. S.* 3 *s. for every hog well maſted.* The *defendant promiſed they ſhould be well fatted, and re-delivered;* and ſays, that he delivered 150 hogs to J. S. but 50 of them were not re-delivered. Wray and Clench held, that the promiſe being at the time of the communication, it was a good conſideration, though the defendant had no benefit by the promiſe; but Gawdy e contra. Cro. E. 137. pl. 11. Trin. 31 Eliz. B. R. Kirkby v. Cole.

Le. 186. pl. 261. Kirby v. Eccles, S. C. held accordingly, and reported in much the ſame words.

13. Aſſumpſit, for that *the ſon being indebted by obligation to the plaintiff, the father, in conſideration that he would give him a longer day, promiſed to pay* the money. This was held a good conſideration, and the plaintiff had judgment. Cro. E. 283. pl. 5. Trin. 34 Eliz. B. R. But it is added, nota, this judgment was reverſed in the exchequer chamber, for that it was no conſideration. Trin. 37 Eliz. Pyers v. Turner.

14. The plaintiff declares, that one L. was indebted in ſuch a ſum, and for the payment thereof hath delivered to the plaintiff diverſe goods of the ſaid L. The defendant, in conſideration that the plaintiff would deliver to the defendant the ſaid goods, promiſes to pay the plaintiff the money due from L. And exception was taken to the declaration, for that the certainty of the goods were not expreſſed, and for that the conſideration was but collateral. Another exception, for that the plaintiff might grant the goods over; but the court held the contrary; and judgment for the plaintiff. Brownl. 3. Mich. 6 Jac. Rot. 308. Morſe v. Canham.

9 Rep. 86. b. PINCHON'S caſe, S. C. and judgment affirmed accordingly. —2 Brownl. 137. PUNCTON v. LEGATE, S. C. adjudged, and affirmed in error accordingly. —— Jenk. 290. pl. 28. S. C. —— S. C. cited by the Ch. J. as adjudged 10 Rep. 77. a. b. ——— See Palm. 522. Paſch. 4 Car. B. R. Spade v. Barker.

15. An executor brought an action upon the caſe *againſt an executor* upon a *promiſe made by the teſtator* of the defendant *to pay a debt owing by him.* Adjudged the action was maintainable, becauſe the teſtator in that action could not wage his law. Reſolved, that the plaintiff needs not aver that the defendant had aſſets to pay legacies. Cro. J. 293. pl. 13. Mich. 9 Jac. in the exchequer chamber. And judgment given in B. R. was affirmed. Legatt v. Pinchon.

16. The defendant ſaid to the plaintiff, *marry Jane S. and I will give you* 100*l.* It was objected, that this is no conſideration, becauſe the *defendant has no benefit* by it; but by Coke Ch. J. though he has no benefit, *yet* if the *plaintiff has prejudice*, it is good; and perhaps the plaintiff might have married another with a greater portion. Judgment for the plaintiff. Roll. Rep. 61. pl. 4. Mich. 12 Jac. B. R. Freeman v. Freeman.

Roll. Rep. 61. S. P. by Coke Ch. J. in S. C.

17. The defendant, in conſideration that M. *would take the plaintiff to huſband, promiſed to make a jointure of ſuch land upon her for her life.* Per tot. cur. this is a good conſideration to raiſe the promiſe. 2 Bulſt. 269. Mich. 12 Jac. Freeman v. Freeman.

[290]

18. A. the *huſband was indebted to H.* in 8 l. 10 s. *for beer, and died.* H. demanded the money of M. the *widow*, who *in conſideration that H. would ſerve her with beer, promiſed payment* of the 8 l. 10 s. and for the reſt of the beer at ſuch a day. H. did deliver beer to her, &c. The whole court held this a good aſſumpſit and conſideration; for they ſaid the forbearance would be a good conſideration of itſelf. Godb. 202. pl. 290. Mich. 11 Jac. C. B. Hatch v. Capel.

S. C. cited Arg. Show. 299.

19. An aſſumpſit *to the ſervant for the maſter*, is good to the maſter; per Dodderidge J. Godb. 261. Trin. 21 Jac. in pl. 453.

20. In caſe *againſt an executor*, the count was *of a promiſe by teſtator to deliver certain goods in his poſſeſſion to the plaintiff upon requeſt.* It was objected, that the teſtator's promiſe was, that himſelf would deliver the goods, and not that his executor ſhould, and that he would do it on requeſt; but no requeſt appears to have been made to the teſtator. But per Roll Ch. J. an execu-

tor

tor may be charged on a collateral promiſe, if there was a *breach* of it *in teſtator's life-time*, and the requeſt here is good, and goes to all. And judgment for the plaintiff, niſi, &c. Sty. 158. Mich. 1649. Chriſtopher v. How.

21. F. indebted to the *plaintiff*, *appointed the defendant*, *who was then his receiver*, *to pay* it *out of his rents due at Martin-maſs next*. The *defendant promiſed*, *that if the plaintiff would give him time he would pay it within a month after Martin-maſs*. It was moved in arreſt of judgment, that it did not appear that the defendant had received any rent due at Martin-maſs, and that the appointment was to pay it out of the rents due at that time. But the court held, that after promiſe to pay it upon forbearance, it ſhall be intended; and gave judgment for the plaintiff. 2 Lev. 20. Mich. 23 Car. 2. B. R. Daviſon v. Heſlop.

Raym. 211. Daviſon v. Hanſlop, S. C. adjudged for the plaintiff; for being alleged that he was adtunc receptor, it ſhall be intended after a verdict, that he had effects.——S. C. cited Freem. Rep. 464. in pl. 635.

22. The defendant being an *executor*, *in conſideration the plaintiff would account with him*, *promiſed to pay him what ſhould be found owing* to him from the teſtator. This was held a good conſideration, though he had no aſſets, becauſe here was *an act done*, viz. accounting at the plaintiff's [defendant's] requeſt. Freem. Rep. 464. in pl. 635. cites Trin. 24 Car. 2. Smith v. Hawkins.

3 Keb. 336. pl. 41. Trin. 26 Car. 2. B. R. Smith v. Hawes, S. C. and judgment for the defendant, niſi.——3 Keb. 417. pl. 8. Hill. 26 Car. 2. B. R. S. C. and becauſe it was after verdict, judgment in C. B. was affirmed in error.

23. Defendant being *executor* to a debtor of the plaintiff, *promiſed that if he took upon him the adminiſtration*, *he would pay him his debt*; this was held no conſideration. Freem. Rep. 434. Mich. 1676. B. R. Day v. Cawdry.

3 Keb. 710. pl. 48. Day v. Garely, S. C. adjudged againſt the plaintiff.

24. The plaintiff counted, that *in conſideration he*, *at the requeſt of the defendant*, *would let a certain gelding of his to hire to J. S. he*, the defendant, *did undertake that the ſaid J. S. ſhould re-deliver him to the plaintiff*; and that he let him his gelding accordingly, but that J. S. never did re-deliver the ſame. Adjudged that this was a collateral undertaking for the act of another; and therefore void by the ſtatute of frauds, by its not being in writing, as the ſtatute requires. 3 Salk. 15. Mich. 3 Ann. Bourkmire v. Darnell.

1 Salk. 27. pl. 15. S. C. —6 Mod. 248. S. C. ſays, that upon conference with the other judges, they had great debate, and there was great variety of opinions; and many thought it out of the ſtatute, becauſe the horſe was let out wholly upon the credit of the defendant; but the judges of B. R. were unanimouſly agreed, that it was within the ſtatute; for it is an undertaking for the act, and to make good the default of another.

(S) What ſhall be a good Aſſumpſit for *Default of Certainty*. [And Pleadings.] [291]

[1. IF a man promiſes another, *in conſideration that he will aſſign* to him *a certain term to pay him* 10*l.* this is a good aſſumpſit, *though the time* of the aſſignment and the payment *be not appointed*;

(U) pl. 39. S. C. but S. P. does not appear.

pointed; for the 10l. ſhall be paid in a convenient time after the aſſignment, which alſo muſt be made in convenient time; and he ſhall not have time during his life. Mich. 14 Jac. at Serjeant's inn, between BARNARD * AND SIMON adjudged, and the judgment affirmed contra to the opinion of Altham.]

* Fol. 15.

See (U) pl. 49. S. C.

[2. *If A. be indebted to B.* for certain things to him ſold, *and C.* comes to B. and *promiſes* him, that *if A. would not pay* him the money, that then *he himſelf would* pay it, an action upon the caſe lies for B. againſt C. upon this promiſe, if A. does not pay the money within a convenient time; for ſo ſhall the promiſe be taken, viz. if A. does not pay it in a convenient time, that then he will pay it. Mich. 42 & 43 Eliz. B. R. between SADLER AND HAWKES adjudged; and that the *declaration ſo generally laid*, was good alſo.]

2 Roll. Rep. 488. GARDINER v. . . . . S. C. but ſtates it as indebted for joiner's work; and held, that the ſparing ſhall be intended ſecundum

[3. If a man declares upon a promiſe againſt an adminiſtrator, that the *teſtator was indebted* to him in 10 l. by obligation, and died, and the defendant being his *adminiſtrator in conſideratione præmiſſorum, and that the plaintiff would ſpare him till* ſuch a certain time after, *he would pay him* the debt; and *avers that he ſpared him till* the time, and the defendant had not paid him, &c. though he did *not ſay that he would ſpare him the debt, or to ſue him*, yet it ſhall be ſo intended; and therefore the conſideration is good. Hill. 22 Jac. B. R. between GARDINER, AND FENNER and his wife, adminiſtrators of one Baud, per curiam.]

ſubjectam materiam, and cannot be otherwiſe intended than of the debt. Another exception was, that he averred that he ſpared, but did not ſhew how; ſed non allocatur, becauſe a negative; and by Doderidge J. iſſue ſhall not be taken whether he ſpared or not, but the defendant muſt ſhew how he has ſued.

So where the declaration was, that the defendant was indebted to him in ſo much, which the aforeſaid A. (who was the plaintiff) promiſed to

[4. In an action upon the caſe upon a promiſe by A. againſt B. if the plaintiff declares, that *in conſideration* that *he ſold and delivered* to the defendant *a ſteer for* 53 *s.* 4 *d.* the *defendant ſuper ſe aſſumpſit, and to the ſaid B. faithfully promiſed to pay* the ſaid 53 s. 4 d. upon requeſt, though by the words B. aſſumes and *promiſes to himſelf*, and not to the plaintiff, yet this is a good promiſe to the plaintiff. Hill. 8 Car. B. R. between LODYMAN AND SAUNDERS, per curiam. Adjudged in writ of error, this being moved for error. Intratur Paſch. 8 Car. B. R. Rot. 245. and the judgment given in B. affirmed.]

pay; and ſo it is that the plaintiff aſſumed to pay the plaintiff. The court ſaid, that it being after verdict, they would amend the name, he having well declared, that the defendant was indebted to him. Sid. 306. pl. 15. Mich. 18 Car. 2. B. R. Bedford v. Uffington.

* [292]

S. P. for depaſturing of ſheep ſeems to be admitted, that action lies, exceptions being taken to the pleadings only.

[5. If A. promiſes B. in conſideration B. will *permit him to have certain ſheep at foldage* in certain land, that *he will pay* to B. *as much as he ſhould deſerve*, and *avers, that he deſerved ſo much*, this is not good to have as much as he ſhould deſerve for ſuch things, becauſe it is but in nature of a treſpaſs, and not like a taylor, or * ſuch like. Trin. 10 Car. B. R. between MUTTON AND BOUGHTON. Adjudged per curiam, in a writ of error upon a judgment in an inferior court in the town of Northampton; and the judgment

ment there given, reverſed accordingly; which ſeems not to be law.] 2 Roll. Rep. 435. Trin. 21 Jac.

B. R. King v. Stephens.—S. P. admitted Hob. 5. in pl. 9.

[6. If *A. is indebted to B.* in 10 l. and thereupon C. promiſes B. in conſideration that *he will forbear A. till* ſuch a day, *if A. does not pay him the ſaid day he himſelf will* pay him the ſame day, this is a good promiſe, upon which B. may have an action againſt C. for though A. had the whole day to pay it, and ſo impoſſible for C. to pay it the ſame day, if he did not pay it, yet the *ſubſtance* of the promiſe *is to pay, and the time limited being impoſſible, is void, and* then it *ought to be paid upon requeſt.* Mich. 10 Car. B. R. between ROWLANDSON AND SIMPSON. Adjudged per curiam, in a writ of error upon a judgment in Durham, and the judgment affirmed accordingly. Intratur Hill. 9 Car. Rot. 201.]

7. If the plaintiff declares that the defendant, in *conſideration that he was indebted to the plaintiff in divers ſums of money, promiſed to pay him* 100*l.* it is not good for the uncertainty; per Wray. 2 Le. 30. Trin. 30 Eliz. B. R. in pl. 35.

8. Aſſumpſit, to pay *ſo much as would content him*, and held good. Le. 123. pl. 167. Paſch. 30 Eliz. B. R. Dellaby v. Haſſels.

9. Aſſumpſit, &c. *in conſideration the plaintiff would make the defendant a leaſe of ſuch lands, he promiſed to pay* 20 *l.* and alleged in facto, that *he* had *made him a leaſe for* 5 *years.* It was moved in arreſt of judgment, that the plaintiff had not performed the conſideration; for he being to make a leaſe, &c. it ſhall be intended a leaſe for life, which he had not made; but per cur. the promiſe being general to make a leaſe, it *may as well be intended a leaſe at will as for life*, which leaſe he might determine as ſoon as he made it, and it is no conſideration to ground an action upon; and judgment was ſtayed. Cro. Eliz. 566. pl. 30. Paſch. 39 Eliz. C. B. Fereby v. Lurkin. Noy 65. Feerby v. Lorkings, S. C. that Beamond and Walmſley held, that it ought to be a leaſe for life; but Anderſon e contra.

10. Aſſumpſit; whereas the plaintiff was *in treaty* with the defendant *to buy* 2 *fat oxen, and promiſed to pay* for them *infra breve tempus* 17 *l.* The defendant thereupon promiſed to deliver them to him, and *alleged, that within* 14 *days he paid him* 9 *l. and was ready to have paid the reſidue, and that the defendant delivered him one of the oxen, but would not deliver the other.* The whole court held the promiſe to pay infra breve tempus uncertain, and no conſideration at all; and the defendant is not bound to keep his oxen for him, and his offering to pay within 14 days is not material; and judgment for the defendant. Cro. J. 250. Mich. 8 Jac. B. R. Toulhurſt v. Brickenden. Bulſt. 91. Brickendell's caſe, S. C. adjudged accordingly.

10. Aſſumpſit, *in conſideration the plaintiff would marry his daughter, he promiſed to give her a child's part, and as much at his death as to any of his children, excepting his eldeſt ſon:* and ſhewed that a younger ſon had 100 l. Reſolved, that the promiſe of a child's part was uncertain, but it being as much as to any of his children, and then ſhewing his younger ſon had 100l. this was 2 Roll. Rep. 104. Anon. S. C. reſolved accordingly. And per Mountague Ch. J. if a

citizen of London promiſes his daughter's huſband to give her a *child's portion*, it is good; for by the cuſtom of London the evidence between the wife and the children is certain enough, and known how much every child ſhall have.

was certain enough. And judgment for the plaintiff. Poph. 148. Trin. 17 Jac. B. R. Silveſter's caſe.

12. The defendant, in conſideration that plaintiff would marry daughter, *promiſed to pay him* 20 *French pieces* towards the wedding-dinner. The plaintiff counted, that the 20 French pieces amounted to * 6 l. Engliſh money. Exception was taken that this is not 20 French crowns; for there may be other pieces. Sed non allocatur; for French crowns are the common coin of France, and known here, and it ſhall be intended according to our uſual ſpeech. Cro. C. 194. pl. 5. Trin. 6 Car. B. R. Poynter v. Poynter.

13. The defendant promiſed the plaintiff *to give her* 100 *l. on the day of her marriage, and intereſt for it in the mean time.* After a verdict, it was objected, that it is uncertain what was meant by the word *(intereſt)*. It is true, ſome ſtatutes mention intereſt, but none approve it; but per tot. cur. the plaintiff had judgment. 2 Sid. 116. Mich. 1658. B. R. Cook v. Oliver.

Keb. 56. pl. 17. and 65. pl. 34. Walcot v. Tappin, S. P. exactly.

14. Aſſumpſit, &c. *in conſideration of* 20 *s.* the *defendant promiſed to pay the plaintiff* 20 *l. if Cha. Stuart ſhould be king of England within* 12 *months* next following (he being then in exile). It was moved, that here was no conſideration, becauſe at the time of the promiſe Cha. Stuart was king of England. But the court held the conſideration good; for the words are to be taken according to the ſubject matter, the king being at that time out of poſſeſſion; and the promiſe muſt be intended to pay, &c. if he be in poſſeſſion within the 12 months. 1 Lev. 33. Paſch. 13 Car. 2. B. R. Andrews v. Herne.

Keb. 776. pl. 15. Mich. 16 Car. 2. B. R. Palfry v. Plees, S. C. ſays, the court held, that the defendant ought to have given a bond, and the ſum may be reduced to a certainty, according to the value of the book [bark] and ſhould not have pleaded non aſſumpſit.

15. Plaintiff declared of a *communication* between the plaintiff and defendant, *concerning the bark of certain wood; and that* thereupon *it was agreed, that the defendant ſhould give to the plaintiff* 2 *s. per ſeame* for all the bark of ſuch woods as the plaintiffs ſhould cut, *and that* thereupon *the defendant promiſed to have ready ſuch a day articles purporting the agreement, and an obligation for performance* thereof, *without ſaying in what ſum*, &c. The declaration is not good for that reaſon, and a certain ſum cannot be intended, becauſe the number of ſeams are altogether uncertain; but the juſtices held, that this being after verdict upon general iſſue, was cured, but if it had been upon demurrer or ſpecial iſſue, it had been naught. Sid. 270. pl. 25. Trin. 17 Car. 2. B. R. Pleaſe v. Palfry.

(T) What will be a good Conſideration to maintain an Action [*againſt Law.*] [*And what ſhall be ſaid againſt Law.*]

[1. IF the conſideration of an aſſumpſit *to the attorney of the plaintiff* in an action *after judgment*, when his warrant of attorney is determined, be that *he ſhall acknowledge ſatisfaction* of the judgment, this is not ſufficient to maintain an action upon the caſe, becauſe it is againſt law for him to acknowledge ſatisfaction after the warrant determined, without the conſent of the plaintiff himſelf. My Rep. 14 Jac. PAYN AGAINST CHUTE.]

Roll. Rep. 365. pl. 19. S. C. but not adjudged. ——See tit. Attorney (M) pl. 4, 5. S. C. and the notes there.

[2. If a man *for money given promiſes to ſerve certain proceſs*, this is not a good conſideration, becauſe it is againſt law; for it is extortion. My Rep. 13 Jac. SHERLY AGAINST PARKER. Adjudged, for this is *extortion* in the ſheriff to take it; and therefore unlawful in * the giver of it. Contra Hill. 10 Jac. B. between BOOTHBY AND ALPORT.]

Roll. Rep. 313. pl. 24. Sherley v. Parker, S. C. adjudged accordingly; for by Coke Ch. J. it is contrary to the ſtatute of W. 1. [3 E. 1. cap. 26.] for the ſheriff to take money for ſerving proceſs; and by Dodderidge, if it be unlawful in the ſheriff to take the money, it is unlawful in the plaintiff to give it to him. ——S. C. cited Co. Litt. 368. b.

*[294]

[3. If an *executor ſues* execution by *elegit*, and B. *a ſtranger*, as a friend to the executor, *in conſideration that the ſheriff would execute the ſaid elegit* forthwith, *and of* 6*d. to him paid by the ſheriff*, *promiſes to pay him* 60*l.* upon which the ſheriff executes the writ; yet no action lies, becauſe the conſideration is againſt the law; for the ſheriff ought to do his duty without reward, and *this* 60*l. is not any diſcharge of the fees due to the ſheriff* by the ſtatute, being given by a ſtranger, and not expreſſed for them. Mich. 3 Jac. B. between BRIDGE AND CAGE. Adjudged.]

Cro. J. 103. pl. 38. S. C. and by Warburton J. the giving of 6 d. is no ſufficient conſideration, being joined with the other which is unlawful. Wherefore it was adjudged for the defendant. ——Noy 111. S. C. and judgment that the plaintiff nil capiat per breve by the ſtatute 32 [23] H. 6. which avoids it.

[4. If a man *brings a capias*, which he has againſt A. *to the ſheriff*, *and prays* him that *he will make J. S. his ſpecial bailiff*, *and* promiſes him, if he will make him his ſpecial bailiff, that if J. S. [*A.*] *eſcapes* from the bailiff, that *he will bring no action* for the eſcape againſt him, this is an aſſumpſit upon which an action lies, if he brings any action for the eſcape againſt the ſheriff. Paſch. 32 Eliz. B. R. between PAUMER AND SMALBROOKE, adjudged; and 34 Eliz. the ſame caſe affirmed in a writ of error; and there in 32 Eliz. ſaid, that it was ſo adjudged Trin. 32 Eliz. B. R. between SHOOLBROOKE AND SELMAN.]

Le. 132. pl. 180. Trin. 30 Eliz. B. R. Palmer v. Smalbrooke, S. C. adjudged for the plaintiff. ——9 Le. 227. pl. 305. Hill. 31 Eliz. B. R. the S. C. in totidem verbis. ——Ow. 97. S. C. by the name of DABRIDGECOURT v. SMALLBROOKE, adjudged for the plaintiff. ——Cro. E. 178. pl. 9. S. C. Paſch. 32 Eliz. B. R. adjudged for the plaintiff. ——Cro. E. 271. pl. 2. [14.] Hill. 34 Eliz. in the exchequer-chamber, S. C. and the judgment was affirmed.

[5. If

Noy 76. Bagſhaw v. Salter, S. C. that it is void by the 43 [23] H. 6. and judgment accordingly. —— Jo. 65. pl. 1. Badow v. Salter, S. C. adjudged accordingly; for a promiſe to the ſheriff or his officers to give what was not a due fee was extortion. —— Lat. 54. Batho v. Salter, S. C. adjudged for the plaintiff. —— *But* an aſſumpſit made *to a ſtranger to go and help the ſheriff* to make execution, is good, and an aſſumpſit lies. Noy 76. cites it as vouched and agreed in one Audley's caſe. —— Lat. 56. S. P. agreed by Jones and Doderidge J. but Crew Ch. J. doubted.

[5. If *A.* be *outlawed at the ſuit of B.* upon a proceſs for debt, and *promiſes, in conſideration that C. a ſtranger, will arreſt A. upon a capias utlagatum* upon this outlawry, that *he will pay him* 40 *s.* this is no good conſideration to have an action, though he ſhews in his declaration that he *was after made a ſpecial bailiff* to the ſheriff to arreſt him thereupon, by a warrant to him directed; for *this is extortion*, and the ſheriff might by ſuch means extort from the ſubject great fees for the doing his duty. Mich. 22 Jac. B. R. between FALDOE AND SALTER, per curiam, in arreſt; and after Paſch. 1 Car. this being moved again, it was adjudged per totam curiam againſt the plaintiff, becauſe the bailiff is the officer of the ſheriff and his ſervant. This is entered, Trin. 22 Jac. B. R. Rot.]

§ [295]

* S.P. ſo being *for a certain time*, but not to uſe a trade *generally*, is not good. 2 Bulſt. 136. Mich. 11.

(†) Fol. 9.

Jac. Rogers v. Parry. —Cro. J. 326. S. C. but not S.P. —S. C. cited by Ld. Ch. J. Parker, who ſaid, that

[6. If *A. keeps a mercer's ſhop* in a town, and *B. comes* there, and will ſet up ſhop, *and takes all the braided ware* of A. at a certain price, and *in conſideration thereof A. promiſes B. not to keep any mercer's ſhop* after *within the ſaid town*, this is a good conſideration to maintain an action upon the caſe, if he after keeps a ſhop there: for the reſtraint of his trade is but in * *one place*, and every § man may for a conſideration ſell the liberty that the law gives him; but otherwiſe it is where the reſtraint is by compulſion, as *by by-laws*, (as it ſeems † it was 2 H. 5.) Mich. 18 Jac. B. R between ‡ JOLLIFFE AND BROAD, adjudged per curiam, contra to the opinion of Haughton. Mich. 19 Jac. This judgment was affirmed upon a writ of error in the exchequer-chamber. Trin. 24 Car. B. R. between ‖ GOSSE AND PRAGNEL, adjudged in a writ of error upon a judgment in bank, where it was ſo adjudged *alſo*, where the promiſe was *in conſideration of a marriage of the plaintiff with the daughter of the defendant*, who made the promiſe. Intratur Paſch. 24 Car. Rot. 217.]

he had cauſed the roll to be ſearched, and the caſe is wrong reported in Bulſt. 136. For that the reſolution of the judges was not grounded upon its being a particular reſtraint, but upon *its being a particular reſtraint with a conſideration*, and that the ſtreſs lies on thoſe words, though as they ſtand in the book they do not ſeem material. Wms.'s Rep. 186. Hill. 1711. B. R. Mitchel v. Reynolds.

‡ S. C. adjudged; but if the reſtraint had been general, or upon a coerſion, or without a conſideration, it would be otherwiſe. Noy 98. by the name of Jelliet v. Broad. —— Affirmed in error by all the juſtices, except Tanfield, who ſaid nothing againſt it. Jo. 13. S. C. —— Affirmed in the exchequer by all the juſtices, Mich. 19 Jac. Cro. J. 597. S. C. —— S. C. adjudged by all the juſtices, but Haughton contra. 2 Roll 203. Jollie v. Broad.

Maſter takes obligation of an *apprentice not to exerciſe his craft within the ſame town in* 4 *years*. Action lies not for uſing the craft within the 4 years. Mo. 115. pl. 259. Paſch. 20 Eliz. Anon. —— S. P. Mich. 43 & 44 Eliz. C. B. Ow. 143. Claygate v. Batchelor. —— S. P. as to uſing his trade in the ſame place, and the bond adjudged void; but a *difference* taken between a *bond and a promiſe*. Mar. 191. Paſch. 18 Car. B. R. Barrow v. Wood. —— Same difference taken Mich. 1 Jac. 2. C. B. 3 Lev. 241. Clerk v. the Taylors of Exeter. —— S. P. Mich. 29 Eliz. Mo. 242. pl. 379. Anon. —— 3 Le. 217. pl. 288. Mich. 30 Eliz. S. C. by the name of the Blackſmith's caſe.

‖ A general reſtraint makes the bond void; and ſo as to a particular place, unleſs there be a *conſideration*; but a conſideration will make it good. Allen. 67. Trin. 24 Car. B. R. Prugnell v. Goſſe. —— And cites it as adjudged in Froward's caſe. —— S. P. by Roll Ch. J. Sty. 111. Trin. 24 Car. Prugnell v. Goff.

S. P.

S. P. mar. 77. Trin. 16 Car. C. B. but if one be bound *that he will not uſe his trade*, it is no good bond. Anon.———See tit. Trade (F) per totum.

[7. If A. and B. *play at tables*, and thereupon in conſideration the *plaintiff promiſes to give his mare to the defendant, if he wins five games* at tables, the *defendant promiſes to pay* 5 *l. to the plaintiff if he wins* five games, this is a good conſideration, by reaſon of the *hazard*, though this is no lawful game for every perſon. Mich. 9 Car. B. R. between SUTTON AND JONES, per curiam. Intratur Mich. 9 Rot.]

[8. In an action upon the caſe, if the *plaintiff* declares that whereas he, at the *requeſt* of the defendant, *ſolicited* and proſecuted a *ſuit* in B. R. in treſpaſs, *in which the defendant was plaintiff againſt* B. the *defendant promiſed to pay the now plaintiff* 100 *l.* this is a good conſideration, and not againſt the law; for it is lawful for a man to be a ſolicitor upon a ſpecial retainer, if it be not for maintenance. Hob. Rep. 93. between WORTHINGTON AND GARSTON, Mich. 22 & 23 Eliz. Rot. 378.] Hob. 67. pl. 73. S. C. agreed per cur. (abſente Wray.)

[9. If A. makes a leaſe to *B.* and the *leſſee covenants to pay quit-rents, and to repair*, and *B. together with C.* at the requeſt of B. *enter into an obligation of* 1000 *l. jointly and ſeverally*, to A. *for the performance* of the covenant, and after the *quit-rents are behind*, and the houſe is not repaired, whereupon *A. arreſts C.* upon the obligation, and *thereupon C. pays all the arrears*, ſcil. 33 l. and promiſes to repair the houſe before a certain day after, and *in conſideration thereof A. promiſes to C. to ſue B.* upon the ſaid obligation, *and to pay to him ſo much as he ſhould recover* upon the ſaid obligation, *or ſhould have by compoſition with B. and* after ſues B. and *compounds* for 34 l. an action upon the caſe lies for C. againſt A. upon this * promiſe; for it is not maintenance in C. for all that he did and paid ought to have been performed by B. himſelf, who was the principal. Trin. 19 Jac. B. R. between MORRIS AND BADGER, adjudged; this being moved in arreſt of judgment.] Palm. 168. S. C. adjornatur.—Ibid. 189. S. C. held by 3 judges, (abſente Doderidge,) to be a good conſideration and promiſe to maintain an aſſumpſit; and judgment was given for the plaintiff.

*[296]

[10. *If* A. promiſes *B. an attorney of B.* that in conſideration that he *will ſolicit a ſuit* which J. S. has *in chancery*, that *he will give him* 3 *s.* 4 *d. every term*, this conſideration is not againſt law; for an attorney in one court may be a particular ſolicitor in another court; but not a general one. Mich. 12 Jac. between LEACH AND PENTON, per curiam.] S. C. cited Het. 129. in caſe of Wilſon v. Peck, S. P. —Cro. C. 159, 160. pl. 8. Paſch. 5 Car.

B. R. THURSBY v. WARREN. All the court conceived that an attorney may very well be a ſolicitor for his client in other courts, as well as in the court where he is attorney, and a promiſe to pay him for it is lawful. But if a perſon of ſuperior rank ſhould do it, it would be maintenance.——Jo. 208. pl. 3. Trin. 4 Car. B. R. S. C. adjudged.——Mar. 78. pl. 123. Paſch. 15 Car. S. P. cited per cur. to have been adjudged in B. R. in one Kelway's caſe.

[11. If *A. ſolicits a ſuit* for B. *in chancery* at his requeſt, and after they reckon inſimul, *and upon* the *reckoning the fees of the ſolicitor, and the money laid out by him comes to* 6 *l.* and upon this B. ſays, *in conſideration that A. will ſue for him a latitat out of the king's bench againſt J. S.* he *promiſes to pay him the ſaid* 6 *l.* though it ſhould be admitted the ground is ill, viz. that the 6 l. was not due, becauſe this ſolicitation is againſt law and maintenance,

yet

yet it ſeems the ſuing the latitat will be a good conſideration. Mich. 13 Jac. B. dubitatur, between LEACH AND PENTON.]

Aſſumpſit, for that *H.* the conuſor *acknowledged a recognizance of* 1000 l. *to him, and afterwards infeoffed the defendant of his lands, who in conſideration the plaintiff would aſſign the recognizance to him, promiſed to pay*, &c.

[12. If *A.* be *obliged to B. in* an obligation for 40 l. *upon condition for the payment of* 20 *l.* and *A.* eſſoigns [*eloigns*] *himſelf*, ſo that B. knows not how to come at his debt; whereupon *C. a ſtranger, in conſideration of certain herrings given to him by B. and that B. ſhould aſſign the ſaid obligation to C. with a letter of attorney* to put it in ſuit, *promiſes to pay* the ſaid 20 l. this is a good conſideration to have an action; though it was objected that the buying of debts is againſt law; but if that be void, yet the giving of the herrings is * a conſideration. Mich. 7 Car. B. R. between MICHAEL AND CARDEN, adjudged; this being moved in arreſt of judgment.]

It was moved in arreſt of judgment, that a conſideration to aſſign a recognizance over is unlawful, and maintenance, and ſo not good. Reſolved per tot. cur. that an aſſignment of a debt or a recognizance to a ſtranger, is a void conſideration; but an aſſignment of it to the tertenant, by way of diſcharge of his land, is clearly lawful. Cro. Eliz. 551. pl. 2. Paſch. 39 Eliz. B. R. Barrow v. Gray.

Aſſumpſit, to give ſo much money *in conſideration the other would aſſign to him a judgment obtained againſt J. S. in the marſhal's court.* It was moved that this is a choſe in action not aſſignable, and if it was, it is maintenance; but per curiam, it is a good conſideration, and it is common for one to give another a letter of attorney to ſue execution in the name of him who gave it. Sid. 212. pl. 11. Trin. 16 Car. 2. Loder v. Cheſlyn.——Keb. 744. pl. 35. Leader v. Cheſſelin, S. C. and judgment for the plaintiff, niſi; *although it was a judgment by nil dicit*, which is but an award.

See tit. Simony, (A) pl. 6. S. C. and the notes there.

[13. If A. being a clerk, promiſes B. in conſideration that B. will *procure him to be rector of a donative* church, *with cure of the ſouls of the gift of the king*, (as the caſe was) *to pay to B.* 10 *l.* this is not a good conſideration to maintain an action; for it is *ſimony*, and againſt the law of God and man. Mich. 9 Car. B. R. between MACKALLER AND TODDRICK, per curiam, in a writ of error upon a judgment in the court of the Tower of London, upon this promiſe, which was to procure him to be rector of the Tower, which is a donative with cure of ſouls of the king's gift. Intratur Trin. 9 Car. Rot. 714. Paſch. 10 Car. This was
[297] ſo reſolved again by all the court, and the judgment given in the Tower reverſed accordingly.]

See tit. Uſury (B)——In the caſe of Gibſon v. Ferrers, Win. 114. 120, 121. Hill. 22 Jac. C. B. it was agreed by counſel of both ſides, that contracts and obligations for payment of intereſt for forbearance of the money, is good.——It is no unlawful conſideration to pay intereſt, not being more than is permitted. Cro. C. 273. pl. 9. Mich. 8 Car. B. R. in caſe of Harris v. Richards.

[14. If a man promiſes *to pay uſe for the forbearance of money*, according to the rate of 10 l. for the 100 l. per annum, though this is not made void by any ſtatute, yet it is *void by the common law*, and not any good conſideration to maintain an action. Mich. 22 Jac. B. R. in the caſe of OLIVER AND OLIVE, agreed per Doderidge & Whitlock.]

[15. If *A. promiſes B. in conſideration of a marriage between A. and C. the daughter of B.* that he will *pay to A.* [*B.*] 100 *l.* at a time after, *and in the mean time* to pay according to the *rate of* 8 *l. for the intereſt* thereof, this is a good conſideration, eſpecially it being upon a marriage, and not for money lent. Trin. 10 Car. B. R. between CHAPLYN AND DISPLINE, adjudged in a writ of error

error upon a judgment in B. and the firſt judgment affirmed. Intratur Paſch. 10 Car. B. R. Rot. 202. and then cited Paſch. 5 Car. Rot. 134. B. R. between NORTON AND HINCHLEY, adjudged accordingly.]

[16. If A. *ſurrenders a copyhold* to B. *upon condition* that *if he pays* 80 *l.* to B. at a certain day, then the ſurrender ſhall be void, and *after it is agreed* between them *that A. ſhall not pay* the money, *but ſhall forfeit it, and in conſideration thereof B. promiſes to pay to A.* at a certain day 60 *l. or* 6 *l. per annum* from the ſaid day, *for uſe and intereſt of the ſaid* 60 *l. till it be paid.* In an action upon the caſe upon this promiſe, this is a good conſideration; for this 6 l. ſhall be taken to be *intereſſe damnorum*, and not *lucri*, and only limited as a penalty for non-payment of the 60 l. as a nomine pœnæ in an obligation with condition. Mich. 22 Jac. B. R. between OLIVER AND OLIVER, adjudged; this being moved in arreſt of judgment, the which intratur Trin. 21 Jac.] See tit. Uſury (B) pl. 2. S. C. and the notes there.

17. The plaintiffs *declared that they were proprietors of* certain *goods in poſſeſſion of one A. againſt whom J. S. the defendant had commenced a feigned ſuit in the eccleſiaſtical court, in the name of one C. with intent to get the goods into his poſſeſſion; and promiſed the plaintiffs that if they would ſuffer him to recover the goods by the ſaid ſuit, he would render them a true account* of the goods; and ſhewed that J. S. did recover the goods by ſufferance of the plaintiffs. This was an unlawful ſuit for J. S. ſo to ſue in the names of others, and therefore it cannot be a good conſideration; and awarded quod querens nil capiat, &c. Le. 179. pl. 255. Trin. 31 Eliz. B. R. Fiſh and Brown v. Sadler.

18. K. having a houſe adjoining to a priſon, and to which the gaolers uſed to ſend their priſoners to be ſafely kept, *in conſideration that they committed a priſoner to him to keep, by which he might make profit by uttering his meat and drink* as he uſed to do, *promiſed to keep him ſafely, and to ſave the gaolers from all eſcapes*, whereupon they committed the priſoner to him, &c. It was held that the uttering his meat, &c. was a good conſideration. Cro. E. 123. pl. 2. Hill. 31 Eliz. B. R. Barkley v. Kempſtow.

19. Aſſumpſit. Whereas the *plaintiff claimed to have a title to certain lands in D. in conſideration that the plaintiff aſſumed to aſſign his right* and intereſt *to the defendant, he promiſed to pay him* 40 *l.* It was urged that this was an unlawful conſideration, and againſt the ſtatute of 32 H. 8. cap. 9. for it appears not that the plaintiff was in poſſeſſion by the ſpace of a year before, and ſo could not aſſign, nor that the defendant was in poſſeſſion ſo as to take by releaſe; but the exception was diſallowed, becauſe it ſtands indifferent whether he was in poſſeſſion or not. The plaintiff had judgment. Cro. E. pl. 23. Mich. 31 & 32 Eliz. B. R. Dobbins's caſe. [298]

20. Aſſumpſit, &c. for that *defendant being arreſted at the plaintiff's ſuit in conſideration that the plaintiff would permit him to go at large, and would give authority to the bailiff to that purpoſe, he promiſed to appear at the return of the proceſs, or would give the plaintiff* 10 *l.* It was moved in arreſt of judgment, that the promiſe was void,

void, being contrary to the ſtatute of 23 H. 6. but Gawdy and Clench held it good, being made to the plaintiff, who had authority to diſpenſe with his appearance; but if it had been made to the ſheriff himſelf, or any other to his uſe, it had been within the equity of the ſtatute. Cro. Eliz. 190. pl. 1. Mich. 32 & 33 Eliz. B. R. Milward v. Clark.

3 Le. 236. pl. 325. S. C. accordingly; and afterwards judgment was given againſt the plaintiff.

21. Aſſumpſit, *for that a precept was awarded to a bailiff to attach the goods of S. and he attached him by two quarters of corn, and delivered them to the then plaintiff, to deliver them at the next court, and the defendant aſſumed to ſave him harmleſs.* It was the opinion of the court, that the conſideration was void, and againſt law; for attachment cannot be of corn out of ſacks, but if it might, it ought to be kept by the bailiff, and not delivered out of his hands. Cro. E. 230. pl. 20. Paſch. 33 Eliz. B. R. Mead v. Bigot.

So where A. the plaintiff declared, that B. the father of C. the defendant was indebted to A. for malt, and that C. *in conſideration that A. would bring two witneſſes before a juſtice of peace, who ſhould depoſe on oath that B. was ſo indebted to A. promiſed payment,* and avers that he brought two witneſſes who did ſwear, &c. Vaughan Ch. J. was againſt countenancing theſe extrajudicial oaths; but Windham and Atkins thought it not a profane oath, nor within the ſtatute of king James, becauſe it tended to the determining of a controverſy; and accordingly the plaintiff had judgment. Mod. 166. pl. 4. Mich. 25 Car. 2. C. B. Amie v. Andrews.——Freem. Rep. 133. pl. 155. S. C. accordingly, and judgment for the plaintiff.——So of a promiſe by defendant to pay the money, if the plaintiff would take an oath that it was due to him; and the plaintiff averred that he ſwore it *before a maſter in chancery*; and adjudged for the plaintiff. Raym. 153. Paſch. 18 Car. 2. B. R. Bretton v. Prettiman.——Sid. 283. pl. 17. Brett v. Prettiman, S. C. accordingly.——2 Keb. 26. pl. 55. S. C. adjornatur.——Ibid. 44. pl. 91. S. C. and held it a good conſideration, be it before a maſter in chancery, or *before any man living*, this *being intended of a ſolemn oath*; and judgment for the plaintiff.——So where the conſideration was, that B. would procure C. to make oath before a maſter in chancery, it is a good conſideration; and judgment for the plaintiff. 2 Sid. 123. Mich. 1658. B. R. Perkins v. Binke.——So if it was to be *before a judge of aſſiſe.* Ibid. cited by Newdigate J. as the caſe of Kirket v. Frankmer.

Yelv. 19. Jennings v. Hatley, S. C. adjudged accordingly.

23. Aſſumpſit, &c. *for that B. being outlawed, after a judgment againſt him by the plaintiff,* the *defendant,* in *conſideration the plaintiff would forbear to proceed upon the capias utlagatum, promiſed that if the ſaid B. did not pay the debt he would.* After verdict, it was moved that the conſideration was againſt law, becauſe the proceſs was at the ſuit of the king; but Gawdy, Fenner, and Yelverton held the conſideration good; for the proceſs is at the ſuit of the party as well as of the king; but Popham e contra. Judgment for the plaintiff niſi, &c. Cro. Eliz. 909. pl. 21. Mich. 44 & 45 Eliz. B. R. Jennings v. Harley.

Godb. 250. pl. 346. Paſch. 12 Jac. B. R.

24. H. was *in execution* at the ſuit of D.—*B. came to M. the gaoler,* and promiſed him, that *in conſideration he would permit H. to go at large, that H. ſhould pay the debt into court by a certain day, to ſatisfy*

tisfy D. and that he would *ſave the gaoler harmleſs.* M. brought aſſumpſit. But per tot. cur. the promiſe is void, becauſe the conſideration is againſt law. Yelv. 197. Hill. 8 Jac. B. R. Martyn v. Blithman.

Blithman v. Martin, S. C. but there it is, that the aſſumpſit was to the plaintiff the gaoler, to give him 20 l. if he would *deliver A. in execution for debt*, and alleges, he did deliver A. the *debt not being ſatisfied.* It was held an illegal conſideration, and void, and that plaintiff ſhould not have judgment.——2 Bulſt. 213. Paſch. 12 Jac. S. C. accordingly; and per tot. cur. the conſideration is void.

25. If an *informer* takes upon him to *compound* contrary to the ſtatute of 18 *Eliz.* 5. though it be *prohibited*, yet the promiſe is good; and though he cannot withdraw the ſuit, yet he may forbear proſecution; per Montague Ch. J. 2 Roll. Rep. 103. Trin. 17 Jac. B. R. in caſe of Brand v. Cox.

26. The plaintiff and defendant were both *ſuitors to the ſheriff of Middleſex to obtain the office of under-ſheriff* for ſuch a year. The defendant, *in conſideration the plaintiff would deſiſt his ſuit, promiſed* the plaintiff, that *if he obtained the ſaid office, to pay* to the plaintiff 20 *l. for a gelding delivered him by the plaintiff.* All the court held the conſideration to be good and valuable; and adjudged for the plaintiff in C. B. and that judgment affirmed. Cro. J. 612. pl. 7. Hill. 18 Jac. B. R. Parker v. Brown.

27. A *promiſe was* made *to* the plaintiff, *an innkeeper*, that *in conſideration he would keep one B.* (whom the defendant pretended to be *arreſted on a commiſſion of rebellion) for one night, in his inn, as a priſoner, he would ſave the plaintiff harmleſs.* Afterwards B. brought an action of falſe impriſonment againſt the plaintiff, and recovered againſt him, but defendant refuſed to ſave him harmleſs. After verdict, it was moved in arreſt of judgment, that it was not ſhewn that B. was lawfully arreſted. But whether lawfully or not, the illegality thereof not appearing to the plaintiff, judgment was entered for him. Win. 48. Mich. 20 Jac. C. B. Batterſea's caſe.

Hutt. 55. S. C. accordingly, by the name of FLETCHER v. HARCOT.—Win. 49. in S. C. Hobart Ch. J. ſaid, it may be there is a *difference between a public officer and a private man*; for if the ſheriff arreſt a man unlawfully, and promiſes as before, this is a good aſſumpſit; but perchance otherwiſe of a private man, as here; but in the principal caſe the defendant had pleaded *non aſſumpſit*, and this *implies a lawful impriſonment*; for otherwiſe the defendant might have given the unlawful impriſonment in evidence.

28. If I *requeſt another to enter into B.'s land, and in my name to drive out the beaſts and impound them, and promiſe to ſave him harmleſs*, this is a good aſſumpſit, and yet the act is tortious; per Hobart, Hutton, and Winch. Win. 49. Mich. 20 Jac. C. B. in Batterſey's caſe.

But by Hutton, *where the act appears in itſelf to be unlawful*, there it is otherwiſe; *as if I requeſt you to beat another, and promiſe to ſave you harmleſs*, this aſſumpſit is not good; for the act appears in itſelf to be unlawful; but otherwiſe it is as in our caſe, when the act ſtands indifferent.——Hutt. 56. S. P. & S. C. by the name of Fletcher v. Harcot.

Aſſumpſit, *in conſideration the plaintiff would give the defendant* 20 *s. he promiſed to give the plaintiff* 40 *s. if he did not beat T. S. out of ſuch a cloſe*, and alleged, that he gave the defendant the 20 s. Upon non-aſſumpſit pleaded, the plaintiff had a verdict; but it was ſtaid, becauſe the conſideration and agreement was unlawful and void. 2 Lev. 174. Trin. 28 Car. 2. B. R. Allen v. Reſcous.—Freem. Rep. 433. pl. 584. Anon. ſeems to be S. C. and judgment arreſted accordingly.

29. Aſſumpſit, for that the *defendant having a ſci. fa. againſt the goods of J. L. and delivered it to the ſheriff, and affirmed to the plain-*

tiff, that the cloth in the ſhop of C. L. were the goods of J. L. and liable to this execution, and required the plaintiff to execute the writ, and *if he would ſeiſe the ſaid cloth, he promiſed, when required, to give bond to the ſheriff in any reaſonable ſum, to indemnify both him and the plaintiff* for entering and ſeizing the ſaid goods. It was objected, that this promiſe was grounded upon a conſideration very unlawful, (viz.) *to ſave* a man *harmleſs for taking* another man's *goods in execution.* But the court held the * conſideration good, and that the defendant requiring the ſheriff to execute the writ, it was reaſonable he ſhould indemnify him; and a promiſe to give a bond in a reaſonable penalty, without mentioning any certain ſum, is good. Cro. J. 652. pl. 21. Mich. 20 Jac. B. R. Arundell v. Gardner.

30. There is a diverſity where one aſſumes to do a *thing unlawful, which cannot by any means become lawful, as to kill a man,* or to burn a houſe, &c. and where it is to do a *thing unlawful, which in time may be made lawful;* as where it is to make a *feoffment of the land of a ſtranger,* or of an alien, or a corporation, &c. In theſe caſes he is bound to make them, and therefore at his peril muſt obtain lawful liberty to make them; per Walter Ch. B. Litt. Rep. 86. Trin. 4 Car. in the exchequer, Howard v. Approbert.

Lev. 98. Benſon v. French, S. C. accordingly, and the *promiſe* being *ſaid to be made to the bailiff ex parte querentis,* it ſhall be intended that

31. Aſſumpſit, &c. in which the plaintiff declared, that he is a *bailiff,* and having *arreſted J. S. on a warrant,* the *defendant promiſed,* that *in conſideration the plaintiff would permit the ſaid J. S. to be in his houſe, he would deliver him to the plaintiff the next morning.* It was moved in arreſt of judgment, that the promiſe was againſt law, and void; for leaving a priſoner in another's houſe and cuſtody is an eſcape. But per cur. they will not intend that the plaintiff was abſent from J. S. and judgment for the plaintiff. Sid. 132. pl. 4. Paſch. 15 Car. 2. B. R. Benſkin v. French.

ſhe was left there by the aſſent of the plaintiff. And judgment for the plaintiff niſi, &c. ——Keb. 483. pl. 17. S. C. adjudged for the plaintiff niſi.——S. C. cited 2 Jo. 139. but varies the point of it.

Lev. 188. S. C. but ſtates it as of one made *attorney by deed of aſſignment, to recover and receive the debt to his own uſe,* and not of an attorney at law; and

32. An *attorney being employed to take out execution on a recognizance* againſt the defendant, *he promiſed to pay him, &c.* The defendant demurred to the declaration, for that the conſideration is void, as ariſing ex turpi cauſa, it being contrary to his truſt, and oath of an attorney, to forbear when he is employed to ſue. But per cur. it ſhall be *intended the attorney had authority from his client* to forbear, or *to uſe ſuch means as he might think requiſite* to get the debt, and to forbear generally, without ſaying how long, is good; for it ſhall be taken to be perpetual forbearance. Sid. 294. pl. 14. Trin. 18 Car. 2. B. R. Ruſſel v. Haddock.

the court held, that it ſhall be intended that this was aſſigned to the plaintiff in ſatisfaction of a debt, and gave judgment for the plaintiff. ——2 Keb. 75. pl. 60. S. C. mentions, that the attorney was both attorney on record, and alſo aſſignee by letter of attorney, and therefore the conſideration was held good enough; per cur. præter Keeling Ch. J. who doubted. Adjornatur.—Afterwards Keeling Ch. J. conceived it a good conſideration, and judgment for the plaintiff. 2 Keb. 80. pl. 73. S. C.

33. A queſtion ariſing between A. the defendant, a cuſtom-houſe officer, and C. a merchant, plaintiff, what the cuſtom of goods imported did amount to, and what ſum B. had paid; A. the defendant, *in conſideration C. the plaintiff would pay him* 100 *l.* (which in truth was leſs than the cuſtom did amount unto) *promiſed that if B. had paid no more, C. ſhould pay no more;* and averred, that B. had paid no more, yet the defendant had complained to the commiſſioners, and the plaintiff was compelled to pay more. After a verdict for the plaintiff, *it was objected, that* here was no conſideration; for C. was compellable to pay what is due; and *this agreement amounted to no more than to cheat the king, as B. had done.* But per cur. payment of what is due, without any ſuit or trouble, is a good conſideration; and the acceptance of leſs than is due by the officer, and agreement that the merchant ſhall pay no more, is a good agreement between them; for *the officer ſhall anſwer to the king for the reſidue out of his own pocket.* Lev. 128. Mich. 18 Car. 2. B. R. Johnſon v. Aſtell.

Ibid. The reporter makes a quære of this point. ——Keb. 155. pl. 36. S. C. and per cur. there is no queſtion but the cuſtomer is chargeable; for the plaintiff was not bound to depoſit his money before-hand; and if B. did cheat the king, yet A. is bound to anſwer all above what he paid. And judgment for the plaintiff niſi.

34. A *bailiff had taken J. S. in execution* by a ca. ſa. and the *defendant in conſideration he would permit J. S. to ſtay at the houſe of J. D.* in H. *till ſuch a day, promiſed to ſave him harmleſs from all eſcapes.* It was inſiſted, that the conſideration was illegal, becauſe J. S. was in execution; and thereupon the court ſtaid judgment at the firſt, but on laſt day of the term gave judgment for the plaintiff, Hale Ch. J. ſaying, that a long vacation coming on, he would delay the judgment no longer, but directed, that a writ of error be brought, if thought well of. 2 Lev. 17. Trin. 23 Car. 2. B. R. Freake v. Clarke.

[301]

35. C. an *under-ſheriff having ſeiſed goods on an elegit* ſued out by the plaintiff, *promiſed the plaintiff, that in conſideration he would, at C.'s requeſt, ſue out another elegit, to procure the goods to be found by inquiſition, and deliver them to any perſon to be appointed by the plaintiff.* The court held the promiſe not lawful; for, 1ſt, the ſeiſure upon the firſt elegit, without an inquiſition, was not good; ſo that this promiſe is to make good the tort of the defendant. 2dly, It is the duty of the ſheriff to return an indifferent jury, but this promiſe engages him contrary to the duty of his office; and though one part of the promiſe is lawful, yet ſince that depended upon the other part, which was illegal, the whole is naught. And judgment for the defendant. 2 Jo. 24. Mich. 34 Car. 2. C. B. Morris v. Chapman.

Cart. 223. FOREST v. CHAPMAN, S. C. held accordingly. —Freem. Rep. 32. pl. 41. S.C. adjudged accordingly.

36. In conſideration the *plaintiff would deliver the defendant's cattle out of pound,* he promiſed to pay, or ſave him harmleſs. It was held, that this conſideration was not unlawful, though the cattle were duly impounded, becauſe it was not a malum in ſe. 2 Show. 329. pl. 338. Mich. 35 Car. 2. B. R. Well v. Thompſon.

37. Aſſumpſit, in conſideration the *officer would reſtore goods taken on a fi. fa.* to pay the debt, is a good conſideration. 1 Salk. 28. pl. 17. Paſch. 5 Ann. B. R. Love's caſe.

38. An *expreſs promiſe* to pay intereſt, or *money won at play*, will ſupport an action; per Parker Ch. J. 10 Mod. 312. Paſch. 1 Geo. 1. B. R.

(U) Upon an Aſſumpſit. Conſideration. [*What is good.*]

Cro. E. 126. pl. 7. Hill. 31 Eliz. B. R. STONE v. WITHIPOLE, S.C. ſays, the infant was dead, and

[1. IF an *infant takes up* certain *commodities of a mercer* in London *at a certain price*, and after for non-payment of the money he threatens to ſue him, *and the mother* of the infant *promiſes to pay* him *if he will not ſue him*, this is not any conſideration to maintain the action, inaſmuch as the infant was not chargeable in law for the money. WITHIPOLLE'S CASE, adjudged; cited Paſch. 42 Eliz. B. R.]

the action was brought againſt his executor for velvet, and money lent, &c. to the infant, and counted of a promiſe by the executor to pay, in conſideration of forbearance; and that the court was clear of opinion that the action did not lie; for the contract of the infant was merely void, and in debt againſt him he might plead nil debet.——Le. 113. pl. 155. Hill. 30 Eliz. S. C. adjudged againſt the plaintiff.——Lat. 21. S. C. and the contract adjudged void, being for things of ſuperfluity, and not of neceſſity.——Ow. 94. S. C. ſtates it, that the infant was bound in a bond to pay the money, and that the executor promiſed payment; but adjudged, that the plaintiff ſhall be barred.——Poph. 152. S. C. cited by Doderidge as a promiſe made by the infant himſelf, and the action brought againſt the infant, and the aſſumpſit adjudged not good, becauſe he was not liable at firſt, it not being ſhewn to be pro neceſſario veſtitu, and it ought to be ſuitable to his calling.——D. 272. a. marg. pl. 31. cites Whitepoole's caſe, S. C. that the infant made a contract, and at full age promiſed, in conſideration the plaintiff would forbear the ſuit, to pay; and ſays, it was adjudged that the action lay againſt him.

[302]

Cro. E. 700. pl. 14. Morning v. Knop, S.C. and Fenner J. held it no conſideration; but Clench e contra; and the other juſtices being abſent, adjornatur.

[2. *So* if an infant *enters into an obligation* to pay a certain ſum of money, and after the *obligee brings debt* upon the obligation, and procures a latitat to arreſt him, and the *obligor being now of full age*, and having notice thereof, comes to the obligee, and *ſays* to him, that if *he would not arreſt him he would pay him* the money, this is not any conſideration to maintain an action, inaſmuch as the infant might have avoided the obligation by plea. Paſch. 42 Eliz. B. R. between MONNINGS AND KNOPPE.]

Fol. 19.

[3. If A. a *feme covert, makes an agreement with B. to pay* him 100 *l. in marriage with C. her daughter*, and thereupon *D. the brother of A. promiſes B. in conſideration that he will marry C.* the daughter of A. that *he will procure A. to perform* the ſaid agreement with B. upon which B. marries C. this is a good promiſe, upon which B. may bring an action upon the caſe againſt D. though the agreement between A. and B. was not of force, nor was binding between A. and B., A. being a feme covert; for this was an agreement made, though not of effect in law. Paſch. 14 Car. B. R. between MARSH AND FARRANT, per curiam, præter Barkley, who held the contra, becauſe the agreement was void. Adjudged in a writ of error upon a judgment in Exeter, and the judgment affirmed accordingly. Intratur Paſch. 13 Car. Rot. 102.]

[4. If

[4. If an *infant delivers to B.* 20 *l.* and in conſideration thereof *B. promiſes to build him a houſe*, this is no good conſideration; for though the 20 l. was delivered by the hand of the infant, yet this is voidable by him. Mich. 13 Jac. B. per Winch. But ſee the ſame caſe, as it ſeems, for a horſe, Hob. Rep. 105. between AUSTON AND GERVAS, per Hob. becauſe it was only *voidable to be recovered back* by action of account.]

Hob. 69. pl. 80. & 77. pl. 98. S. C. —Brownl. 11. S. C. but S. P. is not taken notice of.

[5. If A. exhibits a *bill in chancery* againſt B. *ſuppoſing* thereby that *he had delivered* 300 *l. to B. in truſt*, whereupon *B. in conſideration* that *A. would end all ſuits againſt him in chancery, promiſes to pay him* 100 *l.* though A. has remedy for it at common law by writ of account, yet this is a good conſideration ſo as to have an action upon the caſe upon the aſſumpſit, becauſe the money was delivered in truſt, which is proper for the chancery, and the ſuit there is a matter of charge. Mich. 10 Jac. B. R. between SIR J. POOLY AND GILBERT, adjudged.]

Aſſumpſit, in conſideration the plaintiff *would deſiſt from his ſuit in chancery, which he intended againſt the defendant for delivering up a bond, of which the defendant had owned himſelf ſatisfied.* The *defendant promiſed to deliver the plaintiff the obligation upon requeſt.* It was objected the conſideration was not good to ſtay a ſuit in chancery; but the court held it good enough, and gave judgment for the plaintiff, and the judgment was affirmed in error. Cro. E. 768. pl. 10. Trin. 42 Eliz. B. R. Dowdenay v. Bland.

Debarring one's ſelf of a remedy in equity, is a good conſideration in aſſumpſit. Vent. 40, 41. Trin. 21 Car. 2. B. R. Wells v. Wells. ——— Lev. 273. S. C. adjudged accordingly. ——It will ſcarce be allowed that an equitable intereſt will be a good conſideration to ſupport an action at law; per cur. 8 Mod. 41 Paſch. 7 Geo. in caſe of Lock v. Wright.

[6. If A. ſues a writ of privilege againſt B. and B. in conſideration that A. will, at the requeſt of B. *forbear to proſecute* the ſaid writ any further, *promiſes* 50 *l.* to A. this is a good promiſe, though it be not averred that the plaintiff had any good cauſe of action; for the promiſe implies a cauſe, inaſmuch as B. deſired a ſtay. This alſo requires a loſs of the writ, and a delay of the ſuit. Hob. Rep. c. 278. between BEDWELL AND COTTON, adjudged.]

Hob. 216. pl. 279. S. C. adjudged accordingly. —Conſideration that *mitteret proſequi* the brother of defendant, defendant promiſes to pay, is good. Sid. 446. pl. 6. Paſch. 22 Car. 2. B. R. Buckley v. Turner. ———Mod. 43. S. C. adjudged for the plaintiff.

[303]

[7. If A. has in his cuſtody 33 cloaks of the goods of J. S. the which 33 cloaks he intends to retain in his cuſtody till J. S. pays him 14 l. which he owes him; whereupon B. comes to A. and *in conſideration he would deliver the* 33 *cloaks* to him, to do with them according to his pleaſure, he *promiſes to pay to A.* the ſaid 14 l. this is a good conſideration for A. to have an action againſt B. though it was objected that it might be that A. had no cauſe to retain the cloaks, becauſe A. is chargeable in detinue by J. S. Paſch. 6 Car. B. R. between GRIMETT AND POWLE, adjudged, this being moved in arreſt.]

A. pawns goods to B. redeemable ſuch a day, and after the day the goods not being redeemed, *B. ſays he will ſell them*; upon which *D. ſays if he will ſtay the ſale* of them *for* 3 *days, he will pay the money, and have the goods. B. ſtays the ſale* accordingly. In an action againſt D. the court held the conſideration good, and this agreement with D. is in nature of a ſale; for he might have detinue for the goods, if he had paid the money. Roll. Rep. 215. pl. 10. Trin. 13 Jac. B. R. Capper v. Dickenſon. ———3 Bulſt. [70. but wrong paged] 68. Capper v. Dickenſon, S. C. and the whole court clear of opinion that the conſideration is good. And judgment for the plaintiff.

A. was *indebted to the plaintiff for keeping a horſe.* The defendant, *in conſideration the plaintiff at his requeſt would deliver the horſe to him to the uſe of A. promiſed to pay* the debt. Per tot. cur. the conſideration is good; for whereas he might have detained the horſe, he at the defendant's requeſt delivered it to him to the owner's uſe, which is a prejudice to the plaintiff, and a benefit to the owner to whoſe uſe it was delivered. Hutt. 101. Mich. 4 Car. Mackerney v. Ewrin.

[8. If *L.* be *indebted to M.* and L. *delivers to M. certain goods* to the value of 100 l. *as in pawn* till he pays him the debt, and after *J. S. comes to M. and promiſes to pay* him the debt, *in conſideration that he will deliver to him the ſaid pawn*, whereupon he delivers it to him accordingly, this is a good conſideration to have an action upon the caſe againſt him. Mich. 7 Jac. B. between LEVETT AND MOYS, per curiam.]

Mo. 857. pl. 1176. Greſley v. Luther, Hill. 11 Jac. S. C. adjudged for the plaintiff by 3 juſtices, but Winch e contra.— Hob. 10. pl. 21. S.C. Winch J. his reaſon was, that he thought the marriage was no advancement to the man; for a woman only is ſaid in law to be advanced in marriage, and ſo is not the man, and therefore ſhe only ſhall have the writ of cauſa matrimonii prælocuti. ——— Brownl. 18. S. C. adjudged a good conſideration. —— Hutt. 39. S. P. cited to have been adjudged.

[9. If B. the daughter of A. be heir-apparent to C. and D. promiſes to A. the mother, in conſideration that ſhe *will conſent* and agree *that the ſaid B. her daughter ſhould marry his ſon, that he would give to the ſaid A.* 100 *l.* upon which A. conſents, and the marriage takes effect, this is a good conſideration; for nature gives the power of diſpoſition to parents, and in nature their children are bound to obey them. Paſch. 12 Jac. B. between GREISLY AND LOUDHER, adjudged. Hob. Rep. 15. the ſame caſe.]

Fol. 20.

Caſe, *for that he had put one J. W. his grandchild clerk to the defendant to ſerve him, &c. and that the defendant was to find him meat, drink, &c. and had given him* 30 l. &c. The *defendant, in conſideration that the plaintiff would give his conſent that the ſaid J. W. ſhould depart out of his ſervice; and if he ſhould depart accordingly, promiſed to pay* the plaintiff 15 l. And after judgment for the plaintiff in B. R. it was aſſigned for error, that here was no conſideration, it being that the plaintiff ſhould give his conſent that J. W. ſhould depart * his ſervice, when he might have left his ſervice without any ſuch conſent. But becauſe his near relation to the ſaid J. W. and his charge in placing him with the defendant, ſhew ſuch an intereſt in him that his conſent might be an effectual means to cauſe him to depart the defendant's ſervice, the judgment was affirmed. Allen 78. Trin. 24 Car. B. R. Ward v. Prinn.

[10. If A. in conſideration that the mother of C. at the inſtance and requeſt of A. *would permit her ſon to ſerve him* for ſuch a time, *promiſes* B. *to pay her* 10 *l.* &c. this is a good conſideration for B. to have an action upon this promiſe againſt A. though it does not appear that C. was within age, or within the government of B. or of what age he was, viz. of the age of 50 or more; for there is a conſideration of nature and reſpect that the ſon owes to the mother; and it is a good conſideration for her not to hinder her ſon to ſerve; and this is done at the requeſt of A. Mich. 15 Car. B. R. between COPPINGS AND TOULOVE, per curiam adjudged, this being moved in arreſt of judgmeut. Intratur Trin. 15 Car. Rot. 223.]

Though *natural affection in itſelf* be ſufficient to raiſe an uſe, it *is not* a *ſufficient* ground *to raiſe an aſſumpſit* upon, without an expreſs quid pro quo. Cro. E. 756. pl. 16. Paſch. 42 Eliz. C. B. in Bret's caſe.

* [304]

Hardr. 74. Arg. cites Pet v. Bridgwater, S. C. and

[11. If *A. is indebted to B.* in 20 l. and thereupon *B. makes a letter of attorney to C. to put it in ſuit, and to recover* the debt *to his own uſe*, and to releaſe it at his pleaſure, and after *A. in conſideration that C. will forbear to ſue* him *for a certain time, promiſes C. to*

pay the debt, this is a good conſideration; for the forbearance of the ſuit whereof he had power, is a meritorious conſideration. 1651. between PITT AND BRIDGWATER; per curiam, this being moved in a writ of error.]

ſay it was moved in arreſt of judgment, that there was no conſideration, becauſe what the plaintiff does muſt be in another's name, and the debt remains due to another, who may ſue in his own name, notwithſtanding the letter of attorney. And per Roll Ch. J. it appears that the plaintiff had power to diſcharge the debt, which is for the defendant's advantage; and therefore held it a good conſideration; but ſaid it would have been otherwiſe if the plaintiff had not had ſuch authority.

Debt by A. againſt B. on a bond conditioned for payment of 360 l. and intereſt. A. obtained a judgment, and afterwards made a letter of attorney to R. the plaintiff, to receive the ſaid principal ſum and intereſt to his own uſe; and in default of payment to proſecute, &c. and thereupon the plaintiff, intending to take out execution againſt B. in the name of A. of which intention the plaintiff giving P. the now defendant, &c. notice, he, the ſaid defendant, 7th June 1654, at London, &c. *in conſideration that the plaintiff would forbear to proſecute B. on the bond, &c. till the end of Michaelmas term* enſuing, *promiſed them to pay*, &c. upon non aſſumpſit pleaded the plaintiff had a verdict; and it was objected, in arreſt of judgment, that this was not a good conſideration; for *where the plaintiff hath no prejudice by forbearance, nor the defendant any benefit*, there it is no good conſideration. Now in this caſe the plaintiff can have no prejudice, becauſe he is not the real creditor, he having only a *letter of attorney* to proſecute in the name of another, and his forbearing might be no benefit to the defendant, becauſe the creditor himſelf might ſtill ſue the defendant, &c. But the court held the conſideration good; and the plaintiff had judgment. Hard. 71. Mich. 1656. in the exchequer, Reynolds v. Proſſer.

Aſſumpſit, *B. owed A.* 20 *l.* and *C. owed B* 30 *l. B. aſſigned the ſaid debt of* 30 *l. to A. in ſatisfaction of the ſaid debt of* 20 *l. and made a letter of attorney to ſue in his name*, and *both of them acquainted C. with this agreement C. promiſed A. in conſideration he would forbear him till ſuch a day to pay the money.* Upon non aſſumpſit, this was held by 3 juſtices only preſent, no good conſideration, becauſe *the letter of attorney to A. was* only an authority to ſue, which is always *revocable* by B. judgment for the defendant. Winch. 7. Paſch. 19 Jac. Potter v. Turner.——Palm. 185. S. C. and the court agreed that the aſſumpſit was not good, and judgment againſt the plaintiff.

[12. [*But*] if *A.* be *indebted to B.* by bill, *and B. is indebted to C.* and *B. in recompence* of his debt due to C. *aſſigns the bill of A. to him, and before the day of payment* of the money, *A. comes to C. and promiſes* him, that *if he will forbear* him the payment of the money *for a week, that* then *he will pay him*, upon which C. forbears him, yet this is not any conſideration to maintain an action upon this promiſe, becauſe notwithſtanding the aſſignment of the bill, yet the *property of the debt remained always in the aſſignor.* Paſch. 42 Eliz. B. R. between MOWSE AND EDNEY, per curiam.]

* [305] Cro. J. 342. pl. 8. Malory v. Lane, S. C. and judgment affirmed accordingly—Hob. 4. pl. 8. S. C. and judgment affirmed; for they were delivered with intent to procure him ſatisfaction, ſo as he might cancel or compound for them; and this done at the inſtance of D. and in hope of his promiſe A. did deliver them, and deprive himſelf of that means, it is a ſufficient conſideration.——Roll. Rep. 26. pl. 4. S. C. and judgment affirmed.

[13. If *B. is indebted to A. and C.* is indebted *to B. by a ſtatute*, and *B. delivers the ſtatute of C. to A.* for the ſecurity of his debt, but *without any aſſignment* of the ſtatute, or letter of attorney to ſue the ſtatute; and after *B. dies, and D. pretending to be* B.'s *executor, promiſes A. in conſideration that A. would deliver* the ſaid ſtatute to him, *that he himſelf would pay* the ſaid debt which was due to him by B. though it does not appear that C. [D.] can have any benefit by this ſtatute, inaſmuch as it does not appear that he is executor, yet inaſmuch as he *pretends to be executor*, and the ſtatute was in the power of A. ſo that he might have cancelled it, this is a good conſideration to have an action upon this aſſumpſit. My Rep. Paſch. 12 Jac. in camera ſcaccarii, between LANE AND SIR *HENRY MALORY. Adjudged upon a writ of error. Vide the ſame caſe Paſch. 12 Jac. B. Hub. Rep. 6.]

S. P.

S. P. of 2 *obligations delivered by B. the obligee to J. S. a creditor, to ſue the bonds and to receive the money, and pay himſelf, and return the reſidue. B. the obligee died,* and M. his *widow, in conſideration J. S. the plaintiff would deliver to him the ſaid* 2 *obligations, promiſed to pay* the debt upon the firſt payment of any ſums of thoſe bonds. It was moved that the authority given by B. to ſue the bonds is determined by his death, and that M. the defendant is not alleged to be executor, and ſo can have no benefit from them; and if ſhe was, then ſhe receives no more than her own, and ſo no conſideration. And of that opinion was Fenner; but Gawdy and Clench e contra, becauſe by the gift of them to J. S. the intereſt in them is given to him, though the debts themſelves, being choſes en action, paſs not, and he had authority to diſpoſe of them; and the delivery of them to M. and her acceptance and promiſe, on this conſideration, whether executrix or not, is ſufficient to bind her. And judgment for the plaintiff. Cro. E. 821. pl. 18. Paſch. 43 Eliz. B. R. Chadwick v. Sprite.

B. in *conſideration that A. will deliver to him a recognizance, in which C. was bound to him to read over, aſſumes* and promiſes, *within ſix days to re-deliver the ſame to A. or to pay him* 1000 *l. in lieu thereof.* Per tot. cur. the conſideration is good and ſufficient. And judgment for the plaintiff. Le. 267. pl. 406. Hill. 28 & 29 Eliz. C. B. Fooly and Preſton.

Cro. E. 807. pl. 9. Philips v. Turner, S. C. adjudged, and affirmed in error by all the juſtices, except Popham, who held e contra.

[14. If there be a communication between A. and B. of a bargain for certain cattle, and C. ſays to A. that *if he ſells any cattle to B. for a certain ſum* of money *to be paid at a day to come,* that *if B. does not pay it, that then he himſelf will pay it;* and thereupon the ſaid *A. ſells* certain cattle to B. *for* 20 *l.* part thereof *to be paid preſently, and the reſidue at a day to come;* this is a good conſideration for A. to have an action againſt C. if B. does not pay the money at the day, though all the money was not to be paid at a day to come. Hill. 43 Eliz. B. R. between TURNER AND PHILLIPS.]

Roll. Rep. 354. pl. 5. S. C. adjudged accordingly. —3 Bulſt. 162. S. C. and the whole court agreed the conſideration to be good; and affirmed the judgment. —Jenk. 324. pl. 27. S. C.

[15. If *S. and B. are bound* in an obligation *to J. S. to pay a* certain *debt for J. D.* and the obligation being forfeited, *B. ſays to S. that if he will pay all the principal to J. S. he promiſes to repay him one moiety,* and thereupon S. pays all accordingly to J. S., S. may have an action upon the caſe upon this promiſe againſt B. if he will not pay him the moiety; for though he might have been charged for the whole debt by the obligee, yet the payment thereof without ſuit, and in diſcharge of B. is a good conſideration to maintain the action. Paſch. 14 Jac. B. R. between BAGG AND SLADE. Adjudged in a writ of error.]

Fol. 21.

Ow. 63. Mich. 39 Eliz. Collins v. Willes, S. C. and Gawdy and Fenner held that the action would lie, but Popham held the conſideration void. —Mo. 468. pl. 668. Mich. 39 & 40 Eliz. S. C. ſays that the action was maintainable ex rigore, but for the practice the judgment was ſtaid. And Popham ſaid, that if the defendants had pleaded the covin between the father

[16. Upon a communication of a *marriage* between the ſon of J. S. and the daughter of J. D. *J. S. offers* 80 *l.* to the ſaid ſon, *in marriage with his daughter,* but the *ſon ſays he will not marry his daughter, unleſs he will give him* 90 *l.* with her; upon which the *daughter* of J. D. perſuades her father that he would give the 90 l. according to the requeſt of the ſon, and *ſhe promiſes her father, that if he will do ſo, that after the marriage ſhe will repay the* 10 *l. back to her father.* Whereupon J. D. pays the 90 l. and the marriage takes effect, yet no action lies for the father of the wife againſt the ſon and his wife upon the ſaid promiſe; for the conſideration is not good, but the promiſe was fraudulent and covinous, to defraud the ſon of his portion; and if this ſhould be allowed every man might be cheated of his wife's portion. Mich. 42, 43 Eliz. B. R. COLLIN's caſe adjudged.]

father and the daughter it would deſtroy the action.——Cro. E. 774. pl. 3. S. C. Mich. 42 & 43 Eliz. and held per tot. cur. an inſufficient and unlawful conſideration.

[17. If *A. and C.* are *bound jointly and ſeverally to D.* in an obligation of 80l. for the payment of 47 l. and *A. gives a counterbond to C.* to pay the money to D. at the day of payment, but does not pay it, by which the principal bond and counterbond are forfeited, and thereupon *D. ſues C. and has judgment* againſt him upon the ſaid obligation of 80 l. and *before the judgment A. had paid to D. 7 l. parcel* of the ſaid 47 l. principal debt, *and after the ſaid judgment, in conſideration of the premiſes, and that the ſaid A. at the inſtance* and requeſt *of D. then pay to D. the ſaid* 47 *l. principal debt, the defendant promiſes not to proceed in the ſaid ſuit* againſt the ſaid C. this is a good conſideration; ſo if he takes C. in execution after upon the judgment, an action upon the caſe lies, though A. had forfeited the ſaid obligation of 80 l. and ſo was bound by the obligation to pay more than he did pay; for it is a good conſideration for D. to have money in his purſe, it being before only a choſe in action. Hill. 10 Car. in the exchequer chamber, between HUBBARD AND FARRER. Adjudged per curiam, in a writ of error upon a judgment in B. R. and the judgment affirmed accordingly. Intratur Trin. 9 Car. Rot. 20.]

[18. If *A.* being *indebted to B. in* 10 *l. makes C. his executor*, and dies, *C. being only of the age of* 14 years, and thereupon *B. intends to procure adminiſtration during the minority* of C. to be granted to him, and thereof gives notice to *E. the wife of A. and mother of C.* and thereupon E. *in conſideration that B. at the requeſt of E. will permit letters of adminiſtration* during the minority of C. *to be granted to her, and that he would give day to E. for the payment* of the ſaid debt till the return of C. out of the realm of Ireland into England, ſhe *does promiſe to pay* B. upon requeſt, after the return of the ſaid C. out of Ireland into England, this is a good conſideration; for this adminiſtration durante minoritate differs from another adminiſtration, in which the ordinary is bound by the ſtatute under the penalty of 10 l. to grant it to the wife; but this is a good conſideration to prevent the vexation, for what remedy could ſhe have if the ordinary would not grant it to her? and though C. might return after his full age, when the ſaid E. ſhould not have aſſets in her hands, yet this is not material, inaſmuch as ſhe ought to pay it out of her own goods, it being upon her own promiſe. Paſch. 12 Car. B. R. between TURTON AND GARDENER adjudged, this being moved in arreſt of judgment. Intratur Hill. 11 Car. Rot.]

[19. If A. be ſeiſed in fee of land, and there being a *communication* between A. and B. *touching the purchaſe* of this land *by B. from A.* and thereupon *B. comes to C. the wife of A. and promiſes her*, in conſideration that *ſhe would not hinder the bargain*, that *he would give her* 10 *l.* or a riding-ſuit, the huſband and wife may have an action upon this promiſe; for this is a good conſideration not to hinder the bargain, to have the aid of the wife, and her good-will to the bargain. Paſch. 11 Car. B. R. * between

(Z) pl. 12. S. C.—— S. C. cited Sty. 298. and there Roll Ch. J. cites a like point of a

* Fol. 22.

promiſe to a feme covert, that if ſhe would procure her huſband to levy a fine of ſuch lands, he would give her a riding-ſuit; and that it was adjudged that the baron and feme could not join in an action for this breach of promiſe.

tween FAWCETT AND CHILDERS. Adjudged per curiam, this being moved in arreſt of judgment.]

A promiſe by A. *to the eldeſt ſon, that if he will conſent that his father ſhall aſſure his lands to A. he will give him* 10 *l.* If he *gives his conſent, though no aſſurance be made*, he ſhall maintain an action. And judgment was given for the plaintiff. Godb. 94. pl. 106. Mich. 28 & 29 Eliz. C. B. Fuller's caſe.

It was moved, that promiſe of marriage is a matter eccleſiaſtical, upon which no action will lie. But the court would not allow it to be argued, but gave judgment for the plaintiff.

* [20. If A. in conſideration that B. promiſed him to take him to be her huſband, promiſes *to take B. to be his wife*, infra breve tempus after, and after A. *marries another woman*, B. may have an action upon the caſe againſt A. upon this promiſe: for this is a good conſideration, though it was objected that it was a ſpiritual conſideration. Paſch. 14 Car. B. R. between STRETCH AND PARKER. Adjudged per curiam in a writ of error out of Alceſter court, and the firſt judgment affirmed. Intratur Mich. 12 Car. Rot. 21.]

Lev. 147. Mich. 16 Car. 2. B. R. Cutter v. Hebden.—Sid. 180. pl. 18. Hebden v. Rutter, S. C. and the court held the conſideration good; for marriage is a preferment, and the loſs thereof is a temporal loſs. And that it was adjudged a good conſideration in the time of Roll Ch. J. in caſe of Baker v. Smith, Sty. 295. 304. [Mich. 1651.]——Keb. 754. pl. 53. S. C. but S. P. does not appear.——S. P. admitted to be a good conſideration. Keb. 866. pl. 11. Paſch. 17 Car. 2. B. R. in caſe of Mills v. Middleton.

In aſſumpſit, the plaintiff counted that *whereas the plaintiff, at the ſpecial inſtance and requeſt of the defendant did promiſe to marry him within a fortnight, the defendant did promiſe to marry her within a fortnight*, and *avers, that ſhe obtulit ſe, and the defendant refuſed* Windham, Atkins, and Ellis J. held, that the action well lay; but Vaughan Ch. J. e contra. But by the opinion of the 3 juſtices, the plaintiff had judgment. Freem. Rep. 95. pl. 109. Paſch. 1673. Holden v. Dickeſon.——Cart. 233. Paſch. 25 Car. 2. C. B. S. C. accordingly.——3 Keb. 248. pl. 17. Dickiſon v. Holcroft S. C. adjudged accordingly.

[21. If *A.* be *indebted to B.* in 200 l. and A. *appoints B. to receive it from C.* and for the better ſatisfaction of B., A. *delivers certain bills of exchange to* one *D. the factor of B. for payment thereof*; and thereupon *C. promiſes B. that in conſideration* [*D. would deliver*] *to him the ſaid bills of exchange* ſo delivered to D. the factor of B. that *he would pay* the ſaid 200 *l.* due by A. to B. this is a good promiſe, for the conſideration is valuable; for though C. can do nothing with the bills, being a ſtranger to them, yet it may be ſome advantage to him to have the poſſeſſion of them, and at leaſt it may be ſome prejudice to B. and therefore the conſideration is good. Trin. 15 Car. B. R. between PAYNTER AND CHAMBERLYN, per curiam adjudged, this being moved in arreſt.]

Aſſumpſit for that *in conſideration he and his wife, at the defendant's requeſt, would convey their eſtate* in certain lands to *C. L. couſin and heir of*

[22. If B. in conſideration *that A.* at the ſpecial inſtance and requeſt of B. *would permit B. to* have and *hold a meſſuage and land*, then in the occupation of B. una cum proficuis & commoditatibus inde provenientibus to his own uſe, promiſes A. *to pay* to him 13 s. at Michaelmas after for rent for the premiſes, and alſo at the ſaid feaſt to deliver the poſſeſſion of the premiſes to A. in as good repair as it was at the time of the demiſe aforeſaid; this is a good conſideration to maintain an action, though it does *not appear that A. had any eſtate therein* at the time of the promiſe, and though it appears that *B. was then in poſſeſſion* thereof. Paſch. 16 Car.

16 Car. B. R. between ADAS AND AYERS adjudged, this being moved in arreſt of judgment. Intratur Hill. 15 Car. Rot. 343.] *M. L. by ſuch ways as the ſaid L. C. ſhould ap-*

point, the *defendant promiſed to pay*, &c. The defendant *pleads, that at that time the plaintiff's wife, nor either of them, had any eſtate in the lands*; and upon a demurrer, all the court held this a good conſideration, becauſe the agreement was for ſuch an eſtate as they had, which might be a right extinguiſhable by a releaſe, although they had no eſtate. And affirmed the judgment. 2 Lev. 33. Hill. 23 & 24 Car. 2. B. R. Woolnough & Ux. v. Virdon.——2 Keb. 708. pl. 78. adjudged for the plaintiff.

*[308]

[23. In an action upon the caſe, if the plaintiff declares that A. the baron of the defendant was indebted to him, and died poſſeſſed of divers goods, the which goods after his death came to the defendant legitimo modo; and that the defendant, in conſideration that the plaintiff would *forbear the ſaid debt for a certain time*, aſſumed and promiſed *to pay* the debt, this is a good conſideration; for though there is not any ſufficient matter ſhewn, by which it may appear that the defendant could have any benefit by this promiſe, * yet inaſmuch as the words are, that he will *forbear the debt*, and *not the defendant*; ſo that the promiſe is to forbear all the world, and every ſtranger that may be ſued, viz. the executor or ordinary, this is a good conſideration; for it is a *prejudice to the plaintiff*, and a *benefit to a ſtranger*. Mich. 22 Jac. B. R. between HILL AND BAYLIE, per curiam affirmed, the which intratur Hill. 21 Jac. Rot. 836. M. 1651, between † HUME AND HINTON adjudged per curiam, this being moved in arreſt of judgment. Intratur 1651, Rot. 1446. But in this caſe it was *not alleged, that any goods came to the hands of the defendant which were the goods of the debtor*; and in this caſe the conſideration was to ſtay for his money till, &c.]

† Sty. 304. S. C. adjudged for the plaintiff. Hardr. 73. cites S. C. Arg. by the name of Hummers v. Hunton, but cites as adjudged that it was no conſideration, becauſe ſhe was not liable to any ſuit; ſo that the plaintiff had no prejudice by ſuch forbearance.—Raym. 32. S. C. cited, Arg. by the name of Hunce v. Hinton; and that it was adjudged for the plaintiff.

Aſſumpſit againſt the *executrix* of B. for that B. being indebted to the plaintiff, and ſhe having proved *the will*, and thereby *poſſeſſed herſelf of a leaſe for years, promiſed in conſideration the plaintiff would not moleſt her, but give her time till Michaelmas next to pay* the debt. It was moved, that it was not averred that ſhe had aſſets, but adjudged, that it being alleged ſhe had the term, it ſhall be intended ſhe had it as aſſets, and the forbearance of ſuit and her having aſſets are the cauſe of this action. And adjudged for the plaintiff. Cro. J. 273. pl. 1. Paſch. 9 Jac. B. R. Bond v. Baine.—9 Rep. 93. b. Banes's caſe, alias, Banes v. Paine S. C. ſtates it, that *ſhe promiſed to pay the debt, or otherwiſe to aſſign her intereſt of the leaſe*; adjudged in B. R. for the plaintiff, and affirmed by all the juſtices of C. B. and barons of the exchequer. ——Jenk. 290. pl. 27. S. C.

[24. If A. be bound in an *obligation* of 60 l. to B. *upon condition for payment of* 30*l.* at a day to come, and *after the day of payment*, and the 30 l. not being paid, *in conſideration* that *A. would pay the* 30*l.* ‡ to B. in ſatisfaction of the obligation, *B. promiſes that he will accept it in ſatisfaction, and* that he will *deliver up the obligation*, if B. does not deliver up the obligation to A. he may have an action upon the caſe upon this promiſe; for though legally, after the obligation forfeited, 30 l. can be no ſatisfaction of 60 l. yet to have the money in his hands without ſuit is a good conſideration to maintain this action upon the promiſe. Trin. 15 Car. B. R. between RAWLINS AND LOCKEY, adjudged, this being moved in arreſt.]

Cro. E. 194. in pl. 8. S. P. cited

‡ Fol. 23.

to have been adjudged a good conſideration. Paſch. 23 Eliz. Coke v. Hewett.—Le. 238. pl. 317.

321. [bis] cites S. C. as adjudged accordingly, Paſch. 25 Eliz. in B. R. and both books ſay, that this was agreed to per tot. cur.

Aſſumpſit,

Aſſumpſit, &c. for that there being *a controverſy between the plaintiff, lord of the manor of L. and the defendant claiming to hold by copy certain lands*, parcel of the ſaid manor, both parties *ſubmitted to the award of J. S.* The defendant in conſideration that the *plaintiff promiſed* him *that if the ſaid J. S. ſhould adjudge the copy to be good, then he would ſuffer the defendant to enjoy* the ſaid lands, and the ſaid *defendant promiſed* the plaintiff, *that if the ſaid J. S. ſhould adjudge the copy not to be ſufficient*, that then *he would ſurrender and deliver up the poſſeſſion to the plaintiff without ſuit*, and aſſigned the breach; per Gawdy, this is a good conſideration, it being to avoid ſuits at law. And judgment for the plaintiff. Le. 103. pl. 137. Paſch. 30 Eliz. B. R. Cook v. Sangate.——4 Le. 31. pl. 85. S. C. in totidem verbis.

Aſſumpſit, whereas the *plaintiff was bound to pay the defendant* 30 *l. May* 9, 1624. The *defendant in conſideration the plaintiff would pay him* the ſaid 30 *l. the ſaid* 9 *May, promiſed him to deliver up the ſaid bond to be cancelled*, and that he paid the money the ſaid day, but the defendant had not delivered up the bond, but cauſed him to be arreſted thereupon; the defendant *pleaded quod non ſolvit*, and found for the plaintiff. It was moved, that it was no ſufficient conſideration; for conſideration ought to be matter of profit and benefit to him to whom it is done, or trouble to him who doth it. Reſolved, it was a good conſideration to have it paid without ſuit or trouble, and perhaps the not paying of it at the time might be more prejudicial to the plaintiff, than the forfeiture would be of advantage, if he ſhould be forced to ſue for it. Adjudged for the plaintiff. Cro. C. pl. 5. Paſch. 1 Car. C. B. Flight v. Craſden.——Hutt. 76. Flight v. Greſh S. C. and becauſe it appears, that by the non-performance of this promiſe the plaintiff had prejudice, and the jury had found quod ſolvit, the plaintiff had judgment.

† [309]

* Cro. C. 241. pl. 2. Cooks v. Douze, Hill. 17 Car. S. C. adjudged that the conſideration was good, and rule was given that the judgment ſhould be affirmed.

[25. If A. be indebted to B. in 20 l. and B. ſays to A. that he will ſue him for the debt, whereupon A. ſays to him that if he will *forbear him per paululum tempus*, that he will pay him; this is no good conſideration of an aſſumpſit, becauſe he may ſue him preſently. Paſch. 6 Jac. B. between Brian and Salter, adjudged. Paſch. 8 Car. B. R. between * Brooke and Dowse, adjudged in a writ of error upon † a judgment given e contra in the cheney-court at Wincheſter, and the judgment there given reverſed. Paſch. 15 Car. B. R. between Stiles and Rowland, adjudged in a writ of error upon ſuch a judgment in B. and this reverſed accordingly for this error. Intratur Mich. 14 Car. Rot.]

——S. C. cited, and denied to be law; per cur. Sid. 45. Mich. 13 Car. 2. B. R. in pl. 3.

A like exception was taken, and urged that parvum tempus may be but punctum temporis. Sed non allocatur; for the defendant being indebted to the plaintiff, the debt in itſelf is a ſufficient conſideration. Le. 61. pl. 80. Paſch. 29 Eliz. C. B. Gill. v. Harwood.——Goldſb. 48. pl. 6. Whorewood v. Gibbons, ſeems to be S. C. and S. P. held accordingly, per tot. cur. abſente Anderſon.——3 Le. 200. pl. 252. Eſtrange v. Owlet, Trin. 30 Eliz. B. R. ſays it was held, that forbearance per paululum tempus is a good conſideration; but it ſeems imperfectly reported; and in Eſcrig's caſe, 4 Le. 3. 31 Eliz. a certain time of forbearance is mentioned.

A conſideration, quod paululum ceſſaret, was held not good; and though the plaintiff alleged, that he forbore for half a year, this did not help the caſe. Cro. E. 19. pl. 19. Paſch. 25 Eliz. C. B. Lutwich v. Huſſey.——Cro. E. 759. pl. 29. Paſch. 42 Eliz. C. B. it was ſaid per cur. to have been adjudged that a conſideration to forbear per paululum tempus is void, becauſe it is not certain, and paululum tempus is not temporis pars.

Cro. C. 438. pl. 8. Tolſon v. Clerk, S. C. and the judgment in C. B. was reverſed.—S. C. cited per cur. Sid. 45. pl. 3. Mich. 13 Car. 2. B. R.

[26. If A. promiſes B. that in conſideration that he will *forbear to ſue him* for a certain debt *pro aliquo tempore* that he will pay him, and *avers that he forbore him for a year*, this is not a good conſideration; for aliquod tempus is full as little as paululum tempus. Hill. 11 Car. B. R. between Telston and Clarke, per curiam there in a writ of error upon a judgment in Shaftſbury, and the judgment reverſed accordingly. Intratur Trin. 11 Car. Rot. 687.]

Brownl. 6. S. C. but nothing ſaid

[27. If A. leaſes lands to B. at will, and A. in conſideration *that B. will ſurrender to him the ſaid eſtate at will, promiſes* to B. *that*

that he will provide a parſonage for J. S. this is no good conſideration to maintain an action, becauſe he might determine this eſtate at will at his pleaſure. Mich. 8 Jac. B. between KENT AND PRAT, per curiam, where it was put in the *declaration*, that he *was poſſeſſed of a* [*term*,] *without ſhewing what* term, and therefore the court took it to be a leaſe at will.]

ſaid by the court; but in the margin it is ſaid that judgment was arreſted becauſe the conſideration was not valuable.

[28. *But* in this caſe, *if* it had been *alleged* that there was *a controverſy between A. and B. whether it was a leaſe at will, or for years*, and thereupon the aſſumpſit had been made as before, this had been a good conſideration. Mich. 8 Jac. B. per Coke.]

[29. If A. in conſideration *that B. will make an eſtate at will* to him, ſuch *as his counſel ſhall deviſe, promiſes*, &c. this is no good conſideration; for that he may preſently after the eſtate made determine it. Mich. 12 Jac. B. between KELLE AND TISDALE, per curiam.]

Poph. 183. S. C. cited by the name of KEBLE's caſe, as held accordingly.——

Noy 83. cites 19 Jac. Kebb's caſe, S. P. and ſeems to be S. C.

[30. In an action upon the caſe by A. againſt B. if the plaintiff declares that they accounted inſimul, concerning, &c. and *upon* this *account B. was found* 10*l. in arrear* to the plaintiff; and thereupon *B. affirmed that he had paid it to J. S. to the uſe of the plaintiff, and thereupon B. promiſed, that if he does not prove in a ſhort time that he had paid it to J. S. to the uſe of the plaintiff, he would pay it to the plaintiff*, and *avers, that he had not proved it* from the time of the promiſe to the time of the action brought, which was *a year*, this is a good conſideration; for here he is found in arrear 16 l. and the *law makes a promiſe to pay* it, and though here a further time is given to him for his advantage, and it ſhould be admitted that this time is no conſiderable time, and therefore void, yet the promiſe in law ſtands good; but this time is conſiderable, for *the time ought not to be too ſhort, but that he may make his proof within it*; and here it was per unum annum; for here by the words *(ſhort time)* is to be intended a reaſonable time to make the proof. Trin. 1649. between VIGOROUS AND DRAKE, * adjudged, per curiam, in a writ of error upon a judgment in Exeter; but the judgment was reverſed for another error. Intratur Hill. 16 Car. Rot. 696. B. R.]

Tit. Error, (K. c) pl. 1. S. C. but not S. P.

[310]

* Fol. 24.

[31. If *A. and B.* at the requeſt of A. and *for the proper debt of A. are bound* in an obligation of 10 l. *to C.* and after *A. makes D. his executor*, and dies; and after *B. and D. at the requeſt of D.* mange anglice, *ſpend a quarter of lamb, bread, and ale, to the value of* 5 *s.* in the houſe of J. S. and thereupon, there being a diſcourſe between them concerning the ſaid obligation, *D. aſſumes* and promiſes to B. *in conſideration that B. would pay one half of the reckoning*, for the ſaid quarter of lamb, bread, and ale, that *he would pay the ſaid* 10 *l.* due upon the ſaid obligation, and thereupon *B. pays one half* of the reckoning, B. may well maintain an action againſt D. upon this aſſumpſit; for it appears that he is executor of A. who was the principal in the obligation; and alſo he invited

B. to eat and drink this, for which the ſaid 5 s. was to be paid; ſo that in equity he ought to pay the obligation, and reckoning alſo; and though as to the hoſt both are liable to pay the reckoning, unleſs the *hoſt knows B. to be invited*, yet *when a debt is due jointly by two, it is a good conſideration that if the other will pay one moiety, he himſelf will diſcharge the other* of an obligation for 10 l. for though the benefit be but ſmall, yet it is a benefit; for when it was joint both might be ſued, and if one does not appear, but is outlawed, the other may be compelled to pay all; and if the judgment be againſt both, yet upon an execution, one may be taken in execution; and upon ſuch a reckoning, if one departs without payment, the hoſt may compel the other to pay all before he departs, and ſo he has a benefit by the payment of a moiety. Mich. 9 Car. B. R. between MOORE AND BRAY, adjudged, this being moved in arreſt of judgment. Intratur Trin. 9 Car. Rot. 1144.]

Teſtator being indebted to J. S. the defendant's *executor promiſed that if he had goods ſufficient he would pay it*, and alleged that he had goods ſufficient. The plaintiff had a verdict, and judgment, and that judgment affirmed in error; for the aſſumpſit was good, the defendant having aſſets, and being of his own promiſe, ſhall be charged de bonis propriis. Cro. E. 91. pl. 18. Hill. 30 Eliz. B. R. Trewinian v. Howell. ——— Le. 93, 94. pl. 121. S. C. adjudged; but mentions the promiſe to be, that if the plaintiff could prove that the goods were delivered to the teſtator, he would pay the value of them, &c.

[32. If B. as *adminiſtrator* to J. D. is indebted to A. in 20 l. and upon this, B. in conſideration that adminiſtration is committed to him, and that he has aſſets in his hands, aſſumes and *promiſes to pay* the debt *as ſoon as any debt* due to the inteſtate *comes to his hands to the value of the debt*, and *after ſuch a debt comes to his hands*, yet no action lies upon this promiſe; for here is no conſideration to maintain this action, by which the adminiſtrator ſhould be charged of his own goods; for here the *conſideration is not to forbear to ſue, or any other conſideration.* Trin. 14 Car. B. R. between KITCHINMAN AND THE BISHOP OF OSSORY in Ireland, in a writ of error upon a judgment in Ireland, and the judgment reverſed accordingly for this error among others. Intratur Hill. 13 Car. Rot. 1141.]

* [311]

Aſſumpſit, &c. for that *his father gave him 3 l. per annum during his life; and being about to ſue for it, the executor promiſed that in conſideration he would forbear, he would pay the money*; the defendant pleaded that his teſtator was indebted in ſeveral ſums ultra quod he had not aſſets; but upon demurrer it was adjudged, that it is *not material whether he had aſſets or not*; for by the promiſe he had cauſed the plaintiff to deſiſt, who at that time might be prepared to prove aſſets. Vent. 120. Paſch. 23 Car. 2. B. R. Davis v. Wright. ——— 2 Lev. 3. Davis v. Reyner S. C. adjudged for the plaintiff; for *he is charged upon his own promiſe* in conſideration of forbearance; and forbearance of a ſuit for a legacy is ſufficient con-

[33. If A. (to whom the teſtator was indebted) comes to the executor, and ſays that he intends to ſue him for the debt; whereupon the *executor promiſes in conſideration* that the *plaintiff will * forbear him for a reaſonable time*, he will pay him, *and A. forbears to ſue him for a reaſonable time*, this is a good conſideration to charge the defendant in an action upon the caſe, out of his own eſtate, without aſſets; for by this promiſe it is intended as well to forbear to ſue the executor, as to forbear the debt; and a *forbearance of ſuit* is a good conſideration without aſſets, at the time of the promiſe. Mich. 14 Car. B. R. between JOHNSON AND WITHCOTT, per curiam, upon a demurrer, where the defendant pleaded that he had not aſſets at the promiſe made. Intratur Mich. 14. Rot. 588. The word in Latin was toleraret.]

conſideration. ——— 2 Keb. 744. pl. 52. S. C. adjornatur. ——Ibid. 758. pl. 23. S. C. adjudged for the plaintiff; but *if it had appeared by the declaration that the plaintiff had no cauſe of action, then the forbearance would not be ſufficient.*

[34. In an action upon the caſe by A. againſt B. if the plaintiff declares that * C. the baron of B. was indebted to him in 10 l. and after his death B. his wife being big with child, in conſideration that A. the plaintiff *would forbear to ſue her as adminiſtrator of C. till ſuch a day*, B. promiſed to pay the debt; and it is *not ſaid* in the declaration *that B. was the adminiſtrator of C.* this is no good conſideration to have an action upon the caſe; for it does not appear that B. had any thing to do with it, or to be charged for the debt more than a meer ſtranger. Mich. 9 Car. B. R. between WHITCHER AND DAVIS, per curiam, adjudged in arreſt of judgment after verdict for the plaintiff.]

* Fol. 25.

The plaintiff declared that the defendant's *huſband, upon an accompt* between them, *was indebted to the plaintiff* in ſo much, *and promiſed to pay it, and died*; and that the defendant being *his widow*, and *having notice thereof, and alſo that the plaintiff intended to ſue her*, came to the plaintiff, and *promiſed that if he would not ſue her until ſuch a time*, then in conſideration thereof *ſhe would pay*, &c. It was moved in arreſt of judgment that it is *not ſhewn that ſhe was executrix*, or any ways chargeable with this debt of her huſband, and ſo no ground to ſue her. Peremptory day was given the defendant, at which day the reporter ſays he heard nothing more. Palm. 441. Trin. 2 Car. Goodwin v. Willoughby. ——— Lat. 141. S. C. in totidem verbis. ——— Poph. 177. S. C. the judges varied in opinion, and ſo no judgment. ——Noy 81. S. C. and Jermin prayed judgment for the plaintiff, becauſe the defendant firſt made the requeſt to forbear. And peremptory day was given the defendant to ſhew cauſe, &c. ——— Hardr. 73. Arg. cites S. C. that this promiſe does not bind the wife, unleſs ſhe were executrix or adminiſtratrix, or chargeable with the debt.

Caſe for that the defendant's *teſtator being indebted to the plaintiff* in 35 l. *promiſed to pay it when thereunto required*, and that the ſaid *teſtator had made the defendant executor, and left ſufficient aſſets, and in conſideration the ſaid debt was not paid, and that the plaintiff had given him time till Lady-day next to pay it, he promiſed to pay* &c. The plaintiff had a verdict and judgment in B. R. but reverſed on error in the exchequer chamber, becauſe the conſideration was inſufficient; for the defendant is not bound by law to pay the 35 l. after the death of the teſtator, and the giving a longer day to pay money, which by law he is not obliged to pay, is not a ſufficient conſideration. Moor 702. pl. 977. Paſch. 37 Eliz. Matthew v. Matthew.

[35. In an action upon the caſe, if the plaintiff declares that whereas he had *delivered* 100 *l.* to the defendant, the defendant did *promiſe to repay* to the plaintiff, at a day after, *the ſame* 100 *l. with a recompence* for it, though if it ſhould be intended that he ſhould repay the ſame 100 l. in ſpecie, this could not be any conſideration for the promiſe, becauſe the defendant could not have any benefit thereby, yet it ſhall be *intended to be the ſame in value*, and not in ſpecie, and therefore a good conſideration. Mich. 9 Car. B. R. between CRUSE AND BERRY, adjudged, in a writ of error. Intratur Trin. 9 Rot. 1163.]

The count was of a loan. The aſſumpſit was laid *to pay the* 100*l. aforeſaid upon requeſt.* It was objected that it might be demanded as ſoon as lent, and that it muſt be the ſame 100 l. in ſpecie; but per tot. cur. e contra, and that it ſhall be intended the ſum aforeſaid; and the rather in this caſe, (as Popham ſaid) becauſe the aſſumpſit is † grounded on a loan, which implies a uſe of the money by the defendant, and conſequently the ſame money as was received cannot be repaid. Yelv. 50. Mich. 2 Jac. B. R. Game v. Harvie.

† [312]

[36. If *A. and B.* are *bound in* an obligation of 10 *l. to C. for the proper debt of A.* and after *A. dies*, and after E. being the *wife of A. promiſes B. in conſideration that B. will pay* the 10 l. to C. that *ſhe will repay it to B.* upon which B. pays it to C. no action upon the caſe lies againſt E. upon this promiſe, becauſe there is no conſideration for E. to make ſuch promiſe, and B. was before bound to pay it, and not E. Mich. 9 Car. between WESTBIE AND COCK-

COCKAINE adjudged in the exchequer chamber in a writ of error, upon the judgment given in B. R. reverſed accordingly. Intratur Trin. 7 Car. B. R. Rot. 347.]

[37. In an action upon the caſe upon an aſſumpſit by A. againſt B. if the plaintiff declares that whereas he, viz. *A. and Eliz. his wife*, the *adminiſtratrix of C. recovered* by judgment a certain debt againſt *J. S.* and after the ſaid *Eliz. died*, and after *adminiſtration of the goods of C. unadminiſtered was granted to the plaintiff*, and after the *plaintiff ſued out an elegit* upon the ſaid judgment againſt J. S. and thereupon the ſheriff took an *inquiſition*, whereby it was *found that he had divers lands*, &c. *ſubject* to the execution; and this inquiſition was reduced into writing, whereupon there was a *colloquium between the plaintiff and defendant concerning the delivery of* this inſtrument, containing *the* ſaid *inquiſition, to the defendant*; *and thereupon* the *defendant did promiſe in conſideration thereof, to deliver the ſaid inſtrument to the plaintiff*; upon which he delivered it to the *defendant*, who, though requeſted, *had not re-delivered it*; this is a good conſideration, though it appears by the inducement that the plaintiff had not any cauſe to have the elegit, inaſmuch as the judgment was in the right of his wife, as adminiſtratrix; ſo that the huſband, upon the new adminiſtration, comes in paramount the judgment; yet inaſmuch as the *action is grounded upon the delivery and re-delivery of the inſtrument containing the inquiſition*, this is a good conſideration to maintain the action. Hill. 9 Car. B. R. between COUCHE AND JEFFRYS adjudged, upon a writ of error upon a judgment in Lanceſton, and the firſt judgment affirmed accordingly. Intratur Hill. 7 Car. Rot. 993.]

[38. In an action upon the caſe upon a promiſe, if the plaintiff declares that whereas the *defendant*, ſuch a day, had *demiſed a meſſuage to the plaintiff for* certain *years, in conſideration of* 10*l. rent per annum* to be paid by the plaintiff, according to his promiſe thereof made, the *defendant in conſideration thereof did then promiſe to dreſs the meat* * *of the plaintiff, after the rate of* 2*d. the joint*, from time to time *during the term*, and to provide other neceſſaries for him, this is a good promiſe and a good conſideration; for the acceptance of the leaſe by the plaintiff under the ſaid rent, was the conſideration of this promiſe; for perhaps he would not have accepted this leaſe under the ſaid rent, if it had not been for this promiſe. Mich. 11 Car. B. R. betweeen ARUNDLE AND ROWDEN, dubitatur, this being in arreſt of judgment; but after, per curiam, this is a good conſideration. But after judgment was given againſt the plaintiff for another cauſe, and fault in the declaration.]

* Fol. 26.

(S) pl. 1. S. C. but S. P. does not appear.

[39. If *A. makes void a promiſe to B.* and after *a ſtranger* comes to B. and in *conſideration that B. will relinquiſh the promiſe* made to him by A. he *promiſes to pay him* 10*l.* this is not a good conſideration to charge him, becauſe the *firſt promiſe was void.* Mich. 14 Jac. upon a writ of error at Serjeants Inn, between BERNARD AND SIMONS, put by Altham, and agreed per curiam.]

[40. If

[40. If *a man ſues a ſcire* [*fieri*] *facias* to have execution, *and ſays* to the ſheriff, *ſuch are the goods of the party*, ſhewing them to him; whereupon, in *conſideration that the ſheriff will execute* the execution *upon thoſe goods, he promiſes to ſave him harmleſs*, this is not a good aſſumpſit, becauſe he ought to take notice of them at his peril. Mich. 14 Jac. B. R. in SUTHEMAN's caſe, held by Dod. & Hought.]

[41. If A. delivers an *execution to the ſheriff* at his ſuit againſt B. and *in conſideration that the ſheriff, without any fee, will execute* it, he *promiſes the ſheriff to pay to him a certain ſum*, which is *as much as the ſheriff is allowed to take by the ſtatute of* 28 *Eliz.* Though it be admitted, that the ſheriff cannot have any remedy for his fees, yet becauſe it was lawful for the ſheriff to take his fees, and he made the execution at his requeſt, and this is for his benefit, this is a good conſideration. Hill. 41 Eliz. B. R. between STAUNTON AND SULIARD.]

Cro. E. 654. pl. 15. S. C. in the exchequer chamber; and the judges were of opinion to affirm the judgment on this point; but another error being aſſigned, it was reverſed on that other point. —— Mo. 468. pl. 669. Suliard v. Stamp, S. C. adjudged and affirmed in the exchequer chamber. —— Mo. 660. pl. 97. S. C. and judgment affirmed. But ſee in a nota at the end of the caſe it is ſaid that the judgment was agreed to be reverſed by the opinion of all the juſtices, but was ended by compromiſe.

[42. If *B. is obliged to A. in* 200 *l.* and *A.* being indebted in ſo much to the king, *aſſigns* the obligation *to the king*, and after *B. in conſideration that A. will forbear to procure any proceſs* againſt him for the ſaid debt *till Hilary term next* following, aſſumes and *promiſes to pay to A.* 200 *l.* this is not a good conſideration to maintain an action, becauſe by the aſſignment the debt was made over to the king; and therefore the forbearance by A. to procure proceſs is no benefit or eaſe to B. becauſe it may be awarded againſt him for the king, notwithſtanding the promiſe. Hill. 41 Eliz. B. R. between BOWES AND PAWLET adjudged, upon a writ of error.]

Cro. E. 653. pl. 14. S. C. accordingly, by all the juſtices and barons in the exchequer chamber, and ſo a judgment in B. R. to the contrary was reverſed. —— Mo. 701. pl. 974. S. C. adjudged in B. R. and that judgment reverſed accordingly in the exchequer chamber.

[43. If A. promiſes B. in conſideration that he will *not ſue an attachment out of chancery upon a decree*, which is *there made againſt him*, that then *he will pay him* 20 *l.* (it ſeems it is intended that *the decree was at his ſuit*) this is a good conſideration to maintain an action upon the caſe; for thereby he ſhall avoid the impriſonment of his body, of which the chancery had power for the contempt of the decree. Hill. 42 Eliz. B. R. between * COLSTON AND CARRE, per curiam, præter Popham; and there was cited the caſe of COWLY AND WINDHAM, to be adjudged in point.]

* Cro. E. 847. pl. 1. Mich. 43 & 44 Eliz. B. R. Coulſton v. Carr, S. C. held accordingly. Noy 38. Coolſton v. Carre, S. C. but S. P. does not appear.

[44. If *A. be indebted in* 20 *l. to B.* and dies, and his *executor, in conſideration that B. will forbear him for a reaſonable time, promiſes to pay* him the debt, this is a good conſideration to have an action, with an *averment that he forbore* him afterwards for a certain time, viz. 8 *years*. Paſch. 14 Jac. B. R. between † LINGHEN AND BROUGHTON, per curiam. Trin. 18 Jac. B. R. 1307. between

† Mo. 853. pl. 1167. Linghill v. Broughton, S. C. and per tot. cur. the court may judge

of the reaſonableneſs of the time, though not of the meaning of paululum temporis; and 8 years is a reaſonable time of forbearance; and the plaintiff had judgment.——3 Bulſt. 206. S. C. adjudged for the plaintiff.——Roll. Rep. 379. pl. 38. S. C. adjudged for the plaintiff.

tween † WHITTY AND BROWNE adjudged, in a writ of error upon a judgment in Dartmouth. Mich. 15 Car. B. R. between ‡ JOHNSON AND WHITCHCOTT, admitted upon a demurrer. Intratur Mich. 14 Rot. 588.]

§ * See pl. 58. S. C.——† See pl. 33. S. C.

Executor who had goods of teſtator being threatened by the plaintiff to be ſued, in conſideration *that he would be patient and quiet promiſed to pay*. The court conceived the conſideration well enough, in regard (being patient) is intended for ever. And Keeling Ch. J. ſaid this was a good aſſumpſit, the words amounting to it. 2 Keb. 77. pl. 65. Trin. 18 Car. 2. B. R. Boylſton v. Ruſſel.

Fol. 27.

Cro. E. 455. pl. 3. S. C. and it being objected, that the conſideration is not ſufficient, for perhaps the forbearance was only a quarter of an hour, &c. and though it was alleged quod abſtinuit & adhuc abſtinet, that will not help it; and of that point ſome of the juſtices doubted, but the greater part held, that it was not a ſufficient conſideration. Sed adjornatur. And afterwards it was reverſed for this cauſe.——Mo. 680. pl. 952. S. C. the judgment was reverſed in the exchequer chamber, becauſe no certain time was mentioned in the promiſe to forbear.——Ow. 109. S. C. in the exchequer chamber. Sed adjornatur.——Bulſt. 92. S. C. cited per cur. Mich. 8 Jac. as adjudged in the exchequer to be no time, and void for uncertainty.——S. C. Jenk. 301. pl. 71. S. C. adjudged and affirmed in error. Paululum temporis may be the next inſtant.

A promiſe to forbear to ſue is for all his life-time, and not per paululum tempus; per Haughton J. Godb. 448. pl. 494. Trin. 21 Jac. B. R. in caſe of Fiſher v. Warner.

[45. If *A.* be *indebted to B.* in 100l. and B. was about to commence a ſuit for the recovery of the debt, and C. a *ſtranger* comes to him, and *ſays*, that if *he will forbear him he himſelf will pay it*; this is a good conſideration for this aſſumpſit to B. if B. *avers that he had* abſtained and *forbore to ſue A.* and adhuc does abſtain and *forbear*, though no certain time was appointed for the forbearance; for it ſeems a perpetual forbearance is intended, the which he hath performed. Mich. 37, 38 Eliz. B. R. between SACKFORD AND PHILLIPS adjudged.]

The plaintiff counts that *J. S. was indebted* to him *upon an obligation, and he forfeited it, and dies*, and made the defendant his *executor*, and that the plaintiff was forced to ſue the obligation; and in conſideration of the premiſes, the defendant *aſſumed, that if the plaintiff would forbear him pro brevi tempore, that he would pay him.* And the plaintiff fidem adhibens, &c. forbore 4 years to ſue him, and ſaid, that the defendant had aſſets. The defendant ſaid abſque hoc that he had aſſets. And upon that, the plaintiff demurred, and adjudged for him; for the alleging of aſſets in the count is ſurpluſage. And now the conſideration was ſufficient; for he had *counted he had forbore for 4 years.* Het. 62. cites Paſch. 40 Eliz. Rot. 537. Palmer v. Rouſe.

[46. *So* if A. be indebted to B. and C. a ſtranger ſays to him, that *if he will forbear him for a little time* that he himſelf will pay him, this is a good conſideration of an aſſumpſit, *averring a certain time of forbearance.* Paſch. 41 Eliz. B. R. between SCOVELL AND COVELL cited to be adjudged Mich. 37, 38 Eliz. B. R.]

Caſe, &c. *for that the defendant being indebted in 6 l. and his ſon pro diverſis negotiis, &c. in 63 l. to the plaintiff, the defendant in conſideration plaintiff would forbear to ſue for thoſe debts for one month promiſed to pay them*; it was adjudged per tot. cur. that he ſhall be charged with the whole debt of 69l. for though he was not liable to his ſon's debt, nor was it reduced to any certainty, yet when he promiſed to pay, he ſhall be liable, the forbearance being a damage to the plaintiff, though as to the ſon's debt, it was no benefit to the defendant. Sid. 38. pl. 8. Paſch. 13 Car. 2. C. B. Beſt v. Jolly.

Aſſumpſit for that *B. owed the plaintiff* 100 *l. on bond*, and the *defendant, in conſideration the plaintiff would at his requeſt forbear to ſue B. promiſed that if B. did not pay the money he would.* Per cur. where the conſideration is ſuch as can be no benefit to the party, it is not good; as where it is to *forbear for an hour*, &c. but where it is to forbear *generally, without limiting any time*, there it ſhall be intended for a convenient time, or altogether; judgment for the plaintiff. Hutt. 46. Mich. 19 Jac. May v. Sidley.——Cro. J. 683. pl. 1. Hill. 21 Jac. C. B. Mapes v. Sidney S. C. the plaintiff

ſhewed

ſhewed that he forbore to ſue B. per magnum tempus, viz. from the promiſe to ſuch a day, which was a year and a half; and when the date of the writ does not appear, it ſhall be intended that he did forbear till the day of the writ.———Win. 22. Maps v. Sidley S. C. adjornatur.

[47. [*So*] *If* A. is indebted to B. upon which *B. arreſts him*, and while he is under the arreſt, a ſtranger comes to B. and ſays, that if he will forbear A. for a little time, he will pay him; whereupon *B. ſuffers A. to go at large*, this *is a good conſideration* for an aſſumpſit, *though he arreſts A. within an hour after*, for the deliverance from the preſent danger is a good conſideration. Paſch. 41 Eliz. B. R. in COVELL'S CASE, per Popham.]

Defendant promiſed that if plaintiff would *forbear him per paululum tempus, he would pay him infra breve tempus*, and plaintiff counted that he forbore him half a year; this is no good conſideration, for no one * can define what ſhall be paululum tempus. But Haughton ſaid, that a promiſe on good conſideration to pay infra breve tempus, ſhall not be immediately; quod Ley Ch. J. conceſſit. 2 Roll. Rep. 368. Mich. 21 Jac. B. R. Paulter v. Heaver.

*[315]

[48. [*So*] If *J. S. makes W. and his wife executors*, and afterwards ſeveral ſuits and *controverſies ariſe between them and T.* for and *concerning the right of executorſhip*, in the eccleſiaſtical court, and *T. in conſideration that* the ſaid *W. at his requeſt had ſubmitted to the award of L. theſe matters*, &c. *promiſes that* the ſaid *W. ſhould not be* troubled or *moleſted for or concerning this right* of the ſaid executorſhip, this is a good conſideration, viz. the ſubmiſſion to the award, though he *might immediately have revoked it*. Paſch. 38 Eliz. B. R. between LINE AND NEALE, adjudged in a writ of error upon ſuch a judgment in B.]

Cro. E. 460. (bis) pl. 9. NEVE v. LINE, S.C. & per tot. cur. it ſhall be intended a ſubmiſſion, with an abiding to the award, and ſo was the intent of the parties; and if he had revoked it, the defendant ought to have pleaded it, otherwiſe it ſhall not be intended. Wherefore judgment was affirmed.

[49. If *A. is indebted to B.* and *C. promiſes B. that if he will not pay him*, that then *he himſelf will*, if *A. does not pay* it *within a convenient time*, this will be a good conſideration for B. to have an action againſt A. upon this promiſe. Mich. 42, 43 Eliz. B. R. between SADLER AND HAWKES, adjudged. (It muſt be *intended that there was a promiſe to forbear to ſue A. in the mean time.*)]

(S) pl. 2. S. C.

[50. If *A. contracts with B. for money paid, to deliver* to him *a pigg of lead*, and dies, and after *C. his adminiſtrator delivers lead ore to D. to make a pigg of lead* thereof, *to be delivered to B.* in ſatisfaction of the pigg promiſed by the teſtator, and after *B. demands his pigg of C. who ſays* that *he had delivered ore to D.* &c. and then *D. being preſent*, in conſideration thereof *promiſes to deliver the pigg to B. at a certain day* after, this is a good conſideration. Mich. 18 Jac. B. R. between JACKSON AND FROST, adjudged, this being moved in arreſt of judgment.]

[51. If *A. delivers* [*money*] *to B. to pay C.* and *B. promiſes C. to pay it* to him, yet A. [C.] can have no action againſt B. upon this aſſumpſit, becauſe there is not any conſideration between them. Hill. 37 Eliz. between HOWLET AND HALLET, adjudged, per curiam.]

A. indebted to B. delivers goods to C. in ſpecie, amounting

to the value of the debt, *to ſatisfy B. the ſaid debt*; B. requires payment of C.

[52. *But if* in this caſe *he had given day* to B. to pay it, this had been a good conſideration, upon which he might have an action in the ſaid caſe; per Walmſly.]

——C. promiſes B. in conſideration of *forbearance*, to pay ſuch a day. Adjudged for B. Yelv. 164. Mich. 7 Jac. B. R. Brand v. Liſley.

Aſſumpſit, *for that the defendant J. B. was indebted to G. the plaintiff by obligation in 5 l. to be paid the 1ſt of November* following, *in conſideration that he, the 3d of November, at the inſtance and requeſt of the plaintiff, would pay him the ſaid 5 l. without ſuit, he promiſed to deliver him a bond, in which J. S. was indebted to him in 20 s. with a letter of attorney to ſue for the debt.* After verdict and judgment for the plaintiff the defendant brought error, for that he did no more than the law compelled him to do, viz. to pay the money which was due before; and that the conſideration was void, becauſe it doth not appear that the defendant could have any benefit by it. As to the firſt, Gawdy and Fenner (only in court) conceived, that there was no conſideration; but as to the 2d, they differed, and were of opinion to reverſe the judgment, but yet they would adviſe. Cro. E. 193. pl. 8. Mich. 32 & 33 Eliz. B. R. Greenleaf v. Barker.——Le. 238. pl. 317. S. C. held accordingly.

[53. If a man is bound in an obligation of 40 l. for the payment of 20 l. and the *obligee promiſes the obligor* that *in conſideration* that *he will pay the money without ſuit*, that after payment *he will deliver up the obligation* to him, this is a good conſideration to maintain an action, if the obligee does not perform the promiſe. Hill. 41 Eliz. B. R. 35. per Popham. Paſch. 14 Jac. B. R. per Coke.]

[316]

Cro. E. 429. pl. 31. Reynolds v. Pinhowe, S. C. adjudged for the plaintiff; for it is a benefit to him to have it without ſuit or charge, and

[54. If *A. recovers a debt, and damages to 7 l. againſt B.* and after *A. in conſideration of 4 l. paid him by B. aſſumes* and promiſes *that he will forbear further to proſecute* his ſuit, *and* that he will *releaſe it, and* alſo that he and his attorney will *acknowledge ſatisfaction* of the ſum recovered; though this 4 l. cannot be any ſatisfaction of the 7 l. due by the record, yet the *acceptance* of the 4 l. is a good conſideration to raiſe this aſſumpſit, whereby to compel him to diſcharge the 7 l. Mich. 37, 38 Eliz. B. R. between PINOWE AND REYNOLDS, adjudged.]

it may be that there was error in the record, ſo as the party might have avoided it.——Mo. 412. pl. 564. Reynold v. Purchowe, S. C. adjudged good.

In conſideration that *I will make my debt appear*, this is trouble and pains, and therefore a good conſideration, and judgment for the plaintiff. Raym. 32. Mich. 13 Car. 2. B. R. Travers v. Meers.—— Sid. 57. pl. 25. Travers's caſe, S. C. adjudged for the plaintiff.——Keb. 163. pl. 112. S. C. & S. P. agreed per cur.

If *A.* be *bound to B. by a bill of* 1000 *l.* and *A. pays B.* 500 *l. in diſcharge* of this bill, *which B. accepts, and thereupon promiſes A. to deliver up to him his ſaid bill*; though this 500 l. is no ſatisfaction of the 1000 l. yet it is ſufficient to make a good promiſe, and upon a good conſideration, becauſe he has paid the money, viz. 500 l. and he has no remedy for it again. Per Coke Ch. J. 3 Bulſt. 162. Paſch. 14 Jac.

Goldſb. 156. pl. 85. S. C. adjudged accordingly. —Mo. 710. pl. 992. Adams v. Dixon, S. C. and upon error brought in the exche-

[55. In *debt by A. againſt M.* upon an obligation, if *D. is bail* for M. and after *A. recovers*, and then proceſs is continued till *A. has execution awarded againſt D.* the bail, and after *A. in conſideration that D. will pay* to him the condemnation, aſſumes and *promiſes to D. to diſcharge him* of the ſaid execution, *and* further *to aſſign over the* ſaid *obligation of M. the principal*, whereupon D. pays the money to A. but A. will not aſſign over or deliver the obligation to him; here is a good conſideration for D. to have an action upon the caſe upon this aſſumpſit againſt A. For though the money paid by D. to A. was due, and D. compellable to pay

it

it by force of the execution awarded againſt him, yet *there might be charge*, labour, *and trouble to A. in the ſerving of the execution* for the getting of the money; and then when D. gives this money to A. without this trouble or charge, this is a good conſideration for an aſſumpſit. Trin. 39 Eliz. B. R. between DIXON AND ADAMS, adjudged.]

quer chamber, judgment was reverſed, becauſe the conſideration was inſufficient.—Cro. E. 538. pl. 74. Dixon v. Adams, S. C. and judgment reverſed by the whole court, the conſideration not being ſufficient; for D. had done no act whereto the law would not have compelled him.

[56. If a *man makes a contract* with J. S. *and dies inteſtate*, and his *adminiſtrator in conſideration of forbearance*, &c. *promiſes to pay* it, &c. this is a good conſideration, though the adminiſtrator was not chargeable upon this contract at common law; for he was chargeable in conſcience. Paſch. 5 Jac. B. R. between WALKER AND WITTEL, per curiam. Mich. 4 Jac. B. R. between RICHARDSON AND SIR MOYLE FINCH, per curiam, becauſe he is bound in conſcience to pay it.]

Aſſumpſit againſt an executor, *for that the teſtator being indebted to the plaintiff upon ſimple contract, and the executor having ſufficient aſſets, promiſed that if the plaintiff would forbear to ſue him till ſuch a time he would pay the debt.* Per tot. cur. this is a good conſideration, and judgment for the plaintiff. Cro. J. 47. pl. 16. Mich. 2 Jac. B. R. Fiſher v. Richardſon.——Yelv. 55. Fiſh v. Richardſon, S. C. accordingly; *but* if the *heir promiſes*, upon forbearance of ſuit to pay ſuch a debt, yet no aſſumpſit lies againſt him; for there is no conſideration, becauſe the heir is not liable to any debt without ſpecialty.

[57. If a man [*binds*] *himſelf and his heirs* in an obligation and dies, and after the *obligee ſues the heir, who had no aſſets* deſcended to him, upon the obligation, and the *heir ſays* to him that if *he will not ſue him*, that then *he will pay* him the money, this is no conſideration ſo as to maintain an action; becauſe he was not chargeable * without aſſets. LORD GRAY's caſe, adjudged, cited Paſch. 42 Eliz. B. R. 11. in Monning's and Knopp's caſe.]

Aſſumpſit was made by *heir* to pay a debt where it does *not* appear he was *bound*; the court doubted if good. Otherwiſe of *executor*, becauſe he is liable without expreſs words. Sid. 148. pl. 13. Paſch. 17 Car. 2. B. R. Hunt v. Swain.——Lev. 165. S. C. the plaintiff conceiving the judgment of all the court againſt him, prayed nil capiat per billam, with intent to commence de novo.——Raym. 127. S. C. adjornatur.

*[317]

[58. If in action upon the caſe the plaintiff ſays that the *defendant was poſſeſſed of* divers goods which were the *goods of her huſband* in his life, *and converted* them to her uſe, [and] defendant *did promiſe in conſideration the plaintiff would forbear her for a certain debt due by the huſband to the plaintiff*, &c. that the defendant would pay it, this is no good conſideration; for *it may be that ſhe had theſe goods as bona paraphernalia*, and ſo ſhe is not chargeable with the debt, inaſmuch as he has not ſhewn what goods they were. Trin. 18 Jac. B. R. Rot. 1307. between WHITTEY AND BRAWNE, adjudged in a writ of error.]

[59. If A. promiſes B. in conſideration *if J. S ſhall win a game at butts of* 21 *up*, that *he will pay* to B. 20 *l.* *and if not, then B. promiſes to pay to A.* 50 *l.* this is a good conſideration for A. to have an action againſt B. for the mutual conſideration. Hill. 41 Eliz. B. R. between METCALFE AND ASCUE, per curiam. Trin. 2 Jac. B. DASSET's caſe, per curiam.]

Mo. 549. pl. 736. Medcalf's caſe, S. C. and upon nihil dicit judgment paſſed for the plaintiff, and the juſtices argued the declaration good, but Popham ſeemed the contrary upon evidence

dence to a jury.——Mounſon J. conceived ſuch conſideration ſufficient, the counter promiſe being reciprocal; for all the communication ought to be taken together. But Manwood held, that though ſuch reciprocal promiſe between the parties themſelves at the match is ſufficient, becauſe there is conſideration good enough to each, as the preparing of the bows and arrows, the riding or coming to the place appointed to ſhoot, the labour in ſhooting, the travel in going up and down between the marks; but that for the bettors by, there is not any conſideration, unleſs the bettor gives aim. 2 Le. 154. pl. 187. Mich. 20 Eliz. C. B. Weſt v. Stowell.

Fol. 29. S. P. but the court held it no conſideration, becauſe

[60. If *B. is indebted to A. in* 20 *l.* and *C. is indebted to B. in the like ſum, and C. promiſes A. in conſideration that he is content to accept the ſaid ſum by the hands of C. and to forbear it* for *four days*, that *he will pay him* the ſaid ſum, this is good conſideration for A. to maintain an action upon the caſe againſt C. Paſch. 41 Eliz. B. R. between Wilmot and Prigget.]

it is a collateral thing, and A. did not ſay that he would diſcharge B. ſo that A. may ſue B. notwithſtanding; for whatever the intention was, the words do not make it appear to be ſo. And per Roll Ch. J. a promiſe by R. to pay a debt to S. which T. owes to S. is a nudum pactum. Sty. 249. Hill. 1650. B. R. Newcomen v. Leigh. —— S. C. cited Hardr. 73. Arg.——S. C. cited Vent. 9. as ſaid to be adjudged. —— Sid. 396. cites S. C. and ſays that no judgment was entered on the roll; but Twiſden J. affirmed that there was a rule for entering the judgment, which he ſuppoſed not done, becauſe the parties, on hearing the reſolution of the court, might agree the matter between them.

B. owed 40 *l. to A. the plaintiff*, and *the defendant owed the like ſum to B. who appointed A. to receive it of the ſaid D. who in conſideration præmiſſorum, and that the plaintiff would forbear him for a quarter of a year, promiſed to pay* the money. It was moved in arreſt of judgment, that D. the defendant was no party to the agreement between B. and the plaintiff, ſo as to make him chargeable to the plaintiff, and then the forbearance is not material, and in the mean time he is ſuable by B. ſed non allocatur. For upon the whole matter here it appears that the defendant agreed to the transfer of the debt of B. to A. the plaintiff, and that it was agreed he ſhould be diſcharged againſt B. Vent. 153, 154. Mich. 23 Car. 2. B. R. Oble v. Dittleſfield.

Mo. 574. pl. 791. Whitecalf v. Jones, S. C. the plaintiff promiſed B. to pay the debt which A. owed him; and this was held a good conſideration,

[61. If *A. is indebted to B. in* 20 *l. and* A. *comes to C. and intreats him to pay* the ſaid 20 l. to B. *and* if he will, he *promiſes to repay* the ſaid ſum to him again, whereupon C. aſſumes and promiſes to pay the ſaid 20 l. to B. *and* after *does not* pay it, A. ſhall have an action upon the caſe upon this promiſe againſt C. for this is a good conſideration; for though he ſhall not have benefit by it, yet here was a *mutual aſſumpſit*, and ſo he ſhall not have any prejudice. Mich. 41 & 42 Eliz. B. R. between Jones and Witchells. Dubitatur.]

though he did *not allege that he had paid the money*. Per tot. cur. in an action brought * by C. againſt A. —— Cro. E 703. pl. 22. Wiſhals v. Johns S. C. and the action was brought by C. againſt A. and judgment for the plaintiff. —— S. C. cited Cro. E. 848. in pl. 1. by name of Wichhall v. Johns. —— S. C. cited Noy 38. by the name of Withal v. Jones.

* [318]

62. *A. was indebted to B.* and *B. to C. the defendant*, and *C. in conſideration that the plaintiff would procure B. to make a letter of attorney to C. to ſue A. promiſed to pay the plaintiff* 10 *l.* It was objected that this was no conſideration; for the defendant by this letter of attorney gets nothing but his labour and trouble; ſed non allocatur; for it is not ſo much the profit which redounds to the defendant as the labour of the plaintiff in procuring the letter of attorney, that is to be reſpected. 4 Le. 110. pl. 225. 19 Eliz. B. R. Webb's caſe.

63. *Arbitrators being about to award that R. the defendant ſhould deliver up to the plaintiff two ſeveral obligations to be cancelled, wherein the plaintiff was bound to the defendant, he (the defendant) in conſideration that*

that the article ſhould be left out of the award, promiſed that himſelf would deliver them up gratis, &c. but did not, and afterwards put the bonds in ſuit, whereupon the plaintiff brought his action and ſet forth this matter, and that the ſaid clauſe was omitted ad ſpecialem inſtantiam ipſius querentis; and judgment was given for him. 3 Le. 105. Paſch. 26 Eliz. Brett v. Pegrim.

64. *A. being in priſon at the ſuit of B.* upon an account, the *gaoler ſuffers him to eſcape, and being at liberty, promiſeth to B. that if he will permit him to be at large, and further, if he does ſuch an act, he will pay to him* 10 *l.* which he doth not pay; whereupon B. brings aſſumpſit againſt him, it was adjudged that the action would not lie; for that both the conſiderations ought to be proved, and A. was at large before. 4 Le. 3. pl. 8. Hill. 26 Eliz. B. R. Rawſon v. Brown.

65. *R. was indebted to B. in* 14 *l.* and *A. was indebted to R. in* 50 *l.*—*A. in conſideration that R. allowed him* 14 *l. and promiſed him to diſcharge him of ſo much parcel of the ſaid* 50 *l. promiſed to pay to the ſaid B. the plaintiff, the ſaid* 14 *l.* Per tot. cur. (Anderſon abſente) the conſideration is good; for A. was diſcharged of ſo much againſt R. and R. might alſo plead payment of the 14 l. by the hands of the defendant. Goldſb. 49. pl. 8. Paſch. 29 Eliz. Body's caſe.

66. Aſſumpſit for *rent* upon a leaſe for years behind, and demanded; the defendant *promiſed* the plaintiff, *that if he could ſhew him a deed that the rent was due, he would pay him* the rent and arrearages; the *plaintiff ſhewed him the indenture of leaſe*, by which the rent was due for 4 years. It was moved in arreſt that the ſhewing of the deed was no conſideration. But it was adjudged for the plaintiff; for when a thing is to be done by the plaintiff, be it never ſo ſmall, it is ſufficient ground of an action, and the ſhewing of the deed is a cauſe to avoid a ſuit. Cro. E. 67. pl. 16. Mich. 29 & 30 Eliz. B. R. Sturbin v. Albany.

Cro. E. 150. pl. 22. Mich. 31 & 32 Eliz. B. R. the S. C. in conſideration of the payment of a rent-charge granted to the plaintiff out of another's land.——Le. 172. pl. 240. Shirley v. Albany S. C. on the ſame point as Cro. E. 150. and judgment for the plaintiff.

67. Conſideration that *A. would not proceed to diſprove a will* in the prerogative court, &c. is good. Le. 118. pl. 159. Trin. 30 Eliz. B. R. Rivet v. Rivet.

68. *Love* or *friendſhip* are not conſiderations to ground actions upon. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. per cur. in caſe of Harford v. Gardiner.

69. Conſideration that *A.* huſband of the executor, and (with whoſe teſtator the plaintiff was bound in a bond and had paid the money) *might enjoy the goods of teſtator*, he aſſumed to pay the plaintiff, &c. it is void; as if it had been that defendant might enjoy his own goods. Le. 173. pl. 241. Hill. 31 Eliz. B. R. Muſted v. Hoppers.

Cro. E. 149. pl. 19. S. C. but S. P. does not appear.

70. Aſſumpſit. *The father* having 3 ſons, *had an intent to charge his lands with* 4 *l. per annum to each of his younger ſons* for their lives, but the *eldeſt ſon deſired him not to charge the lands, and promiſed to pay them duly* 4 *l. per annum*, to which the 2 younger *ſons being*

[319]

Le. 192. pl. 275. Rookwood v. Rook-

wood, S. C. the whole court held the action did well lie.

being preſent agreed; and he promiſed them to pay it. All the court held clearly that it is a good conſideration. Cro. E. 164. pl. 6. Mich. 31 & 32 Eliz. C. B. Rookwood's caſe.

Cro. E. 337. pl. 1. The declaration was, that quidam exitus junctus fuit, but held that it ſhould refer to both iſſues.

71. Aſſumpſit, for that *iſſue being joined in ejectment between him and the now defendant*, and *intended to be tried at the next aſſiſes, in conſideration that the (defendant, now) plaintiff would forbear to inforce their title, and make a ſlender defence, he promiſed to pay*, &c. Upon non aſſumpſit pleaded the jury *found quod aſſumpſit, but that there were two iſſues joined* between the parties, *and that the defendants had not joined, but that one had pleaded the general iſſue, and the other a ſpecial plea, on which iſſue was joined, and the promiſe was in conſideration of making a ſlender defence in both iſſues.* But adjudged for the plaintiff, becauſe the common parlance is, that the parties have joined iſſue, and is as proper where 2 iſſues are joined as only one. Moor 351. pl. 471. Hill. 36 Eliz. Blackwell v. Eyre.

72. A. in conſideration B. would ſell him 4 cows for 10 l. promiſed *to pay the* 10 *l. at Eaſter* following, *and if he failed that he would pay him* 100 *l. when required.* B. ſold him the cows, but A. failed of payment at Eaſter. B. brought action for the 100 l. and recovered; and on error brought the conſideration was held good, and the judgment affirmed. Cro. E. 747. pl. 28. Hill. 42 Eliz. Glaſcock v. Duffield.

73. Aſſumpſit, for that the *defendant's brother was indebted to the plaintiff in* 8 *l.* and made M. his wife executrix, leaving aſſets, and that *he intended to ſue the executrix to recover the* 8 *l. ſecundum debitum legis curſum*, and the *defendant, in conſideration the plaintiff would forbear the executrix, promiſed to pay*, &c. It was moved in arreſt of judgment, that this debt ſhall be intended ſtrongeſt againſt the plaintiff, to be a debt upon a ſingle contract, with which an executrix is not chargeable, and to ſtay this ſuit is not any conſideration; and of this opinion were all the court. But *if he had declared that he intended to have brought an aſſumpſit againſt her*, (as this declaration does not warrant it, becauſe he intends to recover the debt itſelf, which cannot be in action on the caſe) *or* that he intended *to ſue in chancery for it*, (which cannot be intended here, becauſe of the words ſecundum debitum legis curſum) then perhaps this action would have lain; for the conſideration of ſtaying the ſuit is good, but as it is here it is not good. Judgment for the defendant. Cro. E. 804. pl. 3. Hill. 43 Eliz. B. R. Peck v. Loveden.

Cro. E. 906. pl. 13. Garnons v. Hodges, S. C. adjudged for the plaintiff.

74. Conſideration, *quod conaretur procurare* J. S. to permit the defendant to have the poſſeſſion and profit of ſuch an houſe, is good. Yelv. 11. Mich. 44 & 45 Eliz. B. R. Gurnons v. Hodges.

75. Conſideration that *executor will take* 150 *l. for* 200 *l.* due to teſtator is good. Yelv. 10. Mich. 44 & 45 Eliz. B. R. Goring v. Goring,

76. *Promiſe*

76. *Promiſe* againſt *promiſe* is a good conſideration; per cur. Yelv. 134. Trin. 6 Jac. B. R. Bettiſworth v. Campion. Hob. 88. pl. 117. S. P. adjudged for the plaintiff; but the reporter ſays, note here, the promiſes muſt be at one inſtant; or elſe they will be both nuda pacta. Hill. 12 Jac. Nicholls v. Raynbred.

77. *Defendant granted to the plaintiff* 1000 *trees, to be cut within* 3 *years.* The *plaintiff cut ſome,* and the *defendant promiſed* him, *in caſe * he would cut no more within the* 3 *years, he ſhould have licence to cut the reſidue after the* 3 *years,* whereupon the defendant deſiſted. This is a good conſideration; admitted by the pleadings. Yelv. 195. Mich. 8 Jac. B. R. Tatam v. Perient.

78. Coke Ch. J. ſaid he had never ſeen it otherwiſe, but that when *one draws money from another,* this ſhould be a good conſideration to raiſe a promiſe. 3 Bulſt. 162. Paſch. 14 Jac.

79. If the *conſideration puts the other to charge, though it be no ways profitable to the promiſer,* yet this ſhall be a good conſideration to raiſe a promiſe; per Doderidge J. to which Coke Ch. J. agreed. 3 Bulſt. 162. Paſch. 14 Jac.

80. Aſſumpſit againſt an adminiſtratrix, on a promiſe to pay a debt of her inteſtate's for wares had of the plaintiff, in conſideration he would *let two ſurvey the account,* is good. Het. 8. & 11. Paſch. 3 Car. C. B. Marſh v. Colepepper. Cro. C. 70. pl. 4. S. C. adjudged for the plaintiff; for the ſhewing the accounts to her friends was a trouble to the plaintiff, and more than he needed to have done.

81. *B. was bound to the plaintiff in* 40*l. for payment of* 20*l.* R. the *defendant was bound to H. by obligation dated* 5 *Feb.* 1621, *in* 100*l. for payment of* 55*l. on* 5*th of Feb. following.* The ſaid ſums being due, and not paid, the *defendant,* 1 *Feb.* 1624, *in conſideration the plaintiff would forbear the* 20*l. till* 1627, *and would compound with the ſaid H. for the* 50*l. and intereſt then due, and deliver the ſaid bonds into his hands, promiſed to pay him the ſaid* 20*l. and* 50*l. and all the intereſt which he ſhould pay or compound for;* all which the plaintiff had performed, and the defendant had not paid him, &c. It was objected, that the conſideration as to the 20 l. is not good; for that the defendant had not any benefit thereby, nor is it alleged that he gave notice what he paid for the compoſition. But it was reſolved, that it being *alleged that he paid ſo much and required it,* and it was not paid upon requeſt, it was ſufficient; and judgment for the plaintiff, and affirmed on error. Cro. C. 272. pl. 9. Mich. 8 Car. B. R. Harris v. Richard.

82. Debtor pays a ſmall part of a debt, and deſires a general releaſe, and promiſes in conſideration thereof to pay the *reſidue when God ſhould enable him,* and the defendant did ſeveral times after renew his promiſe to the plaintiff. Afterwards a great eſtate fell to the defendant. Quære, if a good conſideration here? Mar. 151, 152. pl. 220. Hill. 17 Car. C. B. Moſſe v. Brown.

83. The count was, that whereas he, *at the inſtance and requeſt of the defendant, had taken pains to reconcile differences betwixt the defendant and J. S. and others, the defendant promiſed to pay to the plaintiff*

plaintiff 100*l.* at a certain day. It was objected, that this was no more than a voluntary curteſy; but Glyn Ch. J. held e contra; for this was undertaken at the inſtance of the plaintiff [defendant,] and here was a continued conſideration, though the pains taken were paſt; and judgment, niſi, &c. Sty. 465. Mich. 1655. B. R. Hardreſs v. Prowd.

Keb. 9. pl. 20. S.C. adjornatur.

84. The defendant, in conſideration of 5 s. promiſed to pay 40 s. if he *ever played a game called even or odd* for money or wine. This is a good conſideration. Raym. 13. Paſch. 13 Car. 2. B. R. Johnſon v. Samworth.

The promiſer muſt have benefit, and the other ſuſtain ſome loſs; per cur.

85. Every promiſe ought to have a conſideration; and that ought to be either *benefit to him that makes it*, or *diſadvantage to the plaintiff*; per Reeve J. Mar. 203. Paſch. 18 Car. in pl. 243. Godb. 203. Mich. 11 Jac. C. B. in pl. 290. —— Jenk. 324. pl. 37. [but the original French is obſcure.] —— Comyns's Rep. 99. Paſch. 13 W. 3. in caſe of Thorpe v. Thorpe, ſays, that it is ſufficient to maintain an aſſumpſit, if the conſideration was a benefit to him that was the defendant, or be of any trouble or prejudice to the plaintiff. —— S. P. 7 Mod. 13. Paſch. 1 Anna, B. R. in Sir George Tuke's caſe.

[321]

86. Aſſumpſit, &c. *to pay for a horſe a barley-corn a nail, doubling it on every nail*; and the plaintiff averred, that there were 32 nails in the horſe's ſhoes, and doubling it on every nail, it came to 500 quarters of barley. On non-aſſumpſit pleaded, the Ch. Juſt. at the trial directed the jury to give the value of the horſe, which was 8 l. in damages; and ſo they did. 1 Lev. 111. Mich. 15 Car. 2. B. R. James v. Morgan.

Lev. 257. Bolton v. Fenne, S.C. and per cur. after verdict it ſhall be intended that plaintiff had intereſt either by aſſignment or by authority of the ſeamen, to receive it; and the intent of this promiſe and forbearance was only that the plaintiff ſhould go no more to the treaſurer for the money, and thereby diſcover that the defendant had not paid it according to his order. —— 2 Keb. 437. pl. 84. S. C. adjudged for the plaintiff.

87. Aſſumpſit, for that he *was poſſeſſed of ſeveral tickets for ſeamen's wages, and had an order from the treaſurer of the navy for paying them*; and that the defendant being *an under-officer, promiſed, that if the plaintiff would not trouble the treaſurer in procuring another order, he would pay*, &c. It was moved in arreſt of judgment, that the plaintiff had not ſhewed any title to the tickets, as that he was executor or adminiſtrator, &c. or by an aſſignment, &c. but per Twiſden J. (abſentibus aliis) it is good enough, after a verdict eſpecially, ſince he declared he had an order from the treaſurer to receive the money, which he could not have granted, unleſs he had a title to it. Judgment for the plaintiff. Sid. 392. pl. 25. Mich. 20 Car. 2. Bolton v. Fenn.

Saund. 210. pl. 30. S.C. adjudged againſt the plaintiff, and the promiſe was only nudum pactum. — 2 Keb. 465. pl. 50. S.C. Keeling Ch.

88. Aſſumpſit, for that W. R. *defendant's teſtator being indebted to A.* a ſtranger, *who aſſigned* the debt *to B. the plaintiff, and authorized him to receive it. S. the defendant, the executor, promiſed* B. the plaintiff *to pay it to him, in conſideration he would accept him for his debtor.* Adjudged on demurrer for the defendant, there being no conſideration of forbearance, but to accept him for his debtor, which he is not, he being ſtill debtor to the firſt creditor; and the authority to receive is determined by the death of W. R. the teſtator, and differs from the caſe of Ruſſel v. Haddock,

dock, where he who had the authority to receive the debt forbore. Lev. 262. Hill. 20 & 21 Car. 2. B. R. Forth v. Stanton.

J. obſerved, that here is no advantage to S. the executor defendant, nor loſs to the plaintiff, becauſe *A. may yet revoke*; ſo there is no conſideration. *Contra if it were to diſcharge A.* which the court agreed. And judgment for the defendant.

89. Aſſumpſit to a *vicar*, in conſideration of *preaching*, is good. Sid. 409. pl. 2. Paſch. 21 Car. 2. B. R. Tailor v. Gay.

90. In aſſumpſit *for that the lord O. was indebted to him in* 250*l. and that the defendant had money of the ſaid lord's ſufficient in his hands to pay the ſaid debt, and that it was mutually agreed between them that the plaintiff ſhould accept* 200*l. in ſatisfaction of his debt, and that the defendant would pay the money on ſuch a day, and that in conſideration the one would perform his part, the other would perform his part.* Upon non-aſſumpſit, the plaintiff had a verdict, but judgment, quod nil capiat, becauſe this was no good conſideration. 2 Jo. 87. Mich. 29 Car. 2. B. R. Woodward v. Rigby.

Freem. Rep. 464. pl. 635. Rigby v. Woodward, S. C. ſays, that the plaintiff had judgment in B. R. and upon error brought, the judges, una voce, affirmed the judgment, and held the conſideration good; for North ſaid, when an agreement to abate 50 l. is pleaded, it ſhall be intended a complete agreement, and ſuch a one as my lord might have taken advantage of.

91. *J. S. is indebted to A. in* 12*l.* and *B. is indebted to J. S. in a like ſum*, and *B. promiſes A. that if A. at his requeſt, would procure an order from J. S. in writing to B. to pay the money to A. which B. owed J. S. then B. will pay to A. the money.* Per cur. the procuring the note at B.'s the defendant's requeſt, by A. the plaintiff, is a ſufficient conſideration. 2 Vent. 71. Trin. 1 W. & M. in C. B. Bockenham v. Thacker.

92. *Where* the *doing a thing will be a good conſideration*, a *promiſe to do* that thing will be ſo too; per Holt Ch. J. 12 Mod. 459. Paſch. 13 W. 3. in caſe of Thorp v. Thorp. [322]

93. *Parting with my note* to the defendant is a good conſideration. 7 Mod. 12, 13. Paſch. 1 Ann. B. R. Tuke's caſe.

S. P. where the note was given by J. S. to the plaintiff for 50 l. and the defendant, in conſideration of the plaintiff's delivering it to him, promiſed to pay him 50 l. and though after verdict it was moved, that the note was uſeleſs, and of no value, becauſe it does not appear to be for a conſideration, and that it is not a gift but a delivery, yet Holt Ch. J. ſaid, the delivery ſhall be intended abſolute and indefinite; and it is evidence of a debt, and therefore the parting with it is a good conſideration; and though the conſideration of the note was proved at the trial, yet he thought it was not neceſſary. 1 Salk. 25. pl. 9. Paſch. 1 Ann. Meredith v. Short.——2 Ld. Raym. Rep. 759. Meredith v. Chute, S. C. adjudged accordingly.

94. If A. *undertakes* to do a thing *without hire*, as to take up brandies out of one cellar, and to lay them down in another cellar, no action lies for the non-feaſance; but if he *enters on the doing it*, action lies for the *miſ-feaſance*, if it be through his own neglect or *miſmanagement*, becauſe it is a deceit; but not if by mere accident; per Holt. 1 Salk. 26. pl. 12. Trin. 2 Annæ B. R. Coggs v. Bernard.

2 Ld. Raym. Rep. 909. S. C. argued ſeriatim by the court. And judgment for the plaintiff.

(U. 2) Conſideration of Aſſumpſit. Good. Forbearance of * Suit.

* See (U) pl. 5, 6. 11. 15. 17. 24. 42, 43. 53. 57, 58.

1. THE defendant was *indebted to the plaintiff in* 10 *l. for ſo much lent*, and in conſideration that the plaintiff would not ſue him for the ſaid 10 l. he *promiſed to deliver the plaintiff* 10 *quarters of barley upon requeſt.* The plaintiff ſhewed, that he did not ſue, &c. and that ſuch a day he required the barley, but defendant did not deliver it. Adjudged for the plaintiff. See Mo. 685. pl. 947. Hill. 31 Eliz. Hog v. Block.

2 Le. 105. pl. 183. Tooley v. Windham, S. C. and judgment was given againſt the plaintiff.

2. A difference ariſing between the plaintiff and the defendant for the *profits of* certain *lands taken by defendant's father in his life-time*, and the plaintiff intending to exhibit a bill in equity againſt the defendant, and a ſubpœna being taken out, the defendant promiſed, that in conſideration the plaintiff would forbear the ſuit, *and if the plaintiff could prove that the defendant's father had taken the profits*, &c. he would pay the ſame; and adjudged this was no good conſideration for an aſſumpſit, it being *grounded on an unjuſt ſuit*; for the plaintiff *did not allege, that the father held the land by leaſe or otherwiſe, nor was the defendant either heir or executor*, or *adminiſtrator*, and ſo there was no colour of reaſon to charge him; and if it had been ſo alleged, yet no cauſe to charge him for a perſonal tort. Cro. E. 206. pl. 43. Mich. 32 & 33 Eliz. C. B. Tooley v. Windham.

Lat. 151. Trin. 2 Car. S. C. And per cur. by the words (that he would not ſue him, &c.) he has waived the benefit of the bond, though the promiſe does not take away the force of it; he may ſue him nowithſtanding, and then the defendant † may ſue the plaintiff upon his promiſe; and the words of not ſuing ſhall be intended for his life, and cites BRACHAM's caſe reſolved accordingly; but per paululum tempis is an ill conſideration. ——— Poph. 183. BEVEN v. COWLING, S. C. and that the words non implacitabit ſhall be taken indefinitely for nunquam implacitabit; and therefore judgment was affirmed, for otherwiſe the defendant ſhall both take advantage of this promiſe and of the bond alſo; and here he hath, in a manner, forſaken the benefit of his bond, and betaken himſelf to the benefit of this aſſumpſit.

3. Plaintiff declared, that the defendant was bound to him in 100l. which he intended to ſue him for, and the defendant, in conſideration that the plaintiff would *defer the payment and not ſue him upon that bond*, promiſed that he would pay him. It was objected, that the conſideration is not good; for he may forbear, and defer for a day only, &c. But the court held it good; for the *deferring ſhall be intended during all the life of the obligee*; and that, if he ſues him ſooner upon that bond, an action on the caſe lies; and that ſo it was ruled in one BARKENHAM's caſe. But if it had been quod deferret per paululum tempus, it had not been good without putting a certain time. Noy 83. Cowlin v. Cook.

† [323]

Cro. E. 561. pl. 18. S. C. ſays judgment was given in B. R. for

4. The defendant, *in conſideration the plaintiff would relinquiſh a ſuit* which he had *againſt a ſtranger, promiſed to ſave the plaintiff harmleſs of all actions concerning ſuch a leaſe.* Adjudged no good conſideration, becauſe he may afterwards proſecute it again when

he ſhall pleaſe. Mo. 539. pl. 707. Trin. 39 Eliz. B. R. Roſſe v. Moore.

the plaintiff; but that afterwards it was reverſed in the exchequer chamber, becauſe it was no good conſideration. ——— S. C. cited in the caſe of Dell v. Fereby.—Cro. E. 868. pl. 2. Hill. 44 Eliz. B. R. which was in aſſumpſit, that *in conſideration the plaintiff would ſtay from farther proſecution of a ſuit* in N. the *defendant promiſed to pay all his charges and expences laid out therein*, &c. though it was objected, that though he did forbear to proſecute he may proſecute when he pleaſes; and therefore no good conſideration. But the court held the conſideration good, eſpecially for the charges expended, and denied the law to be ſo in the caſe before cited. Cro. E. 868. pl. 2. Hill. 44 Eliz. B. R. Dell v. Fereby.

5. An *erroneous judgment was had againſt B.* and *B. in conſideration that A. will forbear to take out execution*, thereupon *promiſes to pay* the debt at ſuch a day certain. It was moved, that the conſideration was not good, the judgment being erroneous; et adjornatur. But the reporter conceives the conſideration is good, notwithſtanding the judgment is erroneous, becauſe it appears not to the court but that the judgment is good; otherwiſe, if the judgment had been reverſed by writ of error before the action brought on the promiſe; for there it appears judicially to the court, that it is erroneous. Godb. 349. pl. 444. Trin. 21 Jac. B. R. Kite v. Smith.

6. Caſe, for *that he and the defendant diſcourſing of ſuch a one who died inteſtate, and was indebted to the plaintiff, the defendant ſaid, forbear to ſue me till I come to London, and forbear his debt, and I will pay it;* and averred, that he did forbear. Upon a demurrer, it was objected that it did not appear that the defendant was chargeable for the debt. But Hyde and Twiſden held the declaration good, and all agreed, that if it had been *(forbear the debt) generally*, the action well lay, though no adminiſtration was committed, becauſe the ordinary is liable. Curia advifare vult. Sid. 242. pl. 4. Paſch. 17 Car. 2. B. R. Quick v. Copleſton.

Lev. 161. S. C. the diſcourſe was with the inteſtate's widow, as ſhe was on her journey to London; and for fear of being arreſted ſhe made ſuch promiſe; but it *not* being *ſhewn that ſhe was executor or adminiſtrator*, the forbearance of her was agreed by the court to be no conſideration; but the words ſubſequent *(forbear till Midſummas)* are diſtinct and general, not only to forbear her and all others; and are good conſideration whether ſhe be liable or not. And judgment for the plaintiff. ——— Keb. 866. pl. 12. Weeks v. Copleſton, S. C.

7. Plaintiff *ſued a capias ad reſpondendum*, and after the return thereof the defendant, *in conſideration the plaintiff would forbear further proſecution, promiſed to pay*, &c. The court held this a good conſideration; and though the firſt return be paſt, yet an alias may be taken out; and judgment for the plaintiff. 2 Keb. 200. pl. 33. Paſch. 19 Car. 2. B. R. Gurdon v. Crane.

8. Caſe, for that *A. was indebted to him, and died inteſtate, and* that *he intending to ſue the defendant ut adminiſtratorem*, and *giving him notice thereof, he promiſed that if the plaintiff would forbear to ſue him till he married ſuch a woman, he would pay* him. It was objected in arreſt of judgment, that it did not appear by the declaration that the defendant was liable to be ſued, and ſo ill; but the other juſtices, præter Twiſden, held that judgment ſhall not be arreſted, but that the declaration upon the (ut) and upon the notice is good; and ſo the plaintiff had judgment, niſi, &c. Sid. 337. pl. 4. Trin. 19 Car. 2. B. R. Downes v. Beck.

Lev. 222. S. C. adjornatur; but on a 2d motion it was adjudged for the plaintiff; for (ut) is an affirmative. ——— 2 Keb. 722. pl. 31. S. C. adjudged accordingly.

——— Sty. 405. Hill. 1654. Roll Ch. J. ſaid that the words (as executor) is not an affirmance that he

he is ſo, and that ſuch a caſe was ruled in the exchequer; and in the principal caſe, judgment was given for the defendant, niſi, &c. Hayward v. Ducket.

In conſideration to *forbear his debt*, or *to ſue*, is good enough; for per cur. it is to forbear generally, and that muſt be intended a forbearance of all perſons; but otherwiſe it had been if it had been to forbear the defendant; and though the promiſe was collateral, and no debt due from the defendant, yet the promiſe being generally to pay, and not upon requeſt, the court held a requeſt not neceſſary. And though the plaintiff did not aver that the defendant was executor or adminiſtrator to the perſon that was the debtor, and died before the promiſe, nor that any goods came to the defendant's hands, and ſo did not appear to be chargeable, yet the court held the conſideration good enough for the reaſons before mentioned. Freem. Rep. 439. pl. 595. Mich. 1676. Anon.

9. A. promiſed, in conſideration *B. would forbear to ſue C.* that *A. would pay him*, without ſaying how long. But Wyld J. ſaid, it had often been adjudged that where it is to forbear, *and no time mentioned*, it muſt be intended during his life; and judgment for the plaintiff. Freem. Rep. 66. pl. 79. Mich. 1672. C. B. Anon.

10. E. brought action againſt G. for monies due, whereupon H. promiſed E. that if he would forbear to ſue G. for the ſaid debt, *G. ſhould not leave the kingdom without paying the plaintiff's debt*. It was argued that this was not a promiſe to pay the debt in default of the principal, which is the caſe provided againſt by the ſtatute, but a collateral promiſe on a conſideration ariſing between the plaintiff and the defendant; for it is not brought for the debt of G. but for the damages ſuſtained, by H. the defendant's ſuffering G. to leave the kingdom without paying the debt; and the conſideration is that the plaintiff waived his action againſt G. and conſequently the coſts thereof. The court held that if there is no certain time of forbearance, the party is to forbear for ever; and inclined that there was a new conſideration, ſo that it was not for the debt of G. and conſequently not within the ſtatute of frauds for want of a note in writing. Sed adjornatur. Gib. 202. pl. 15. Hill. 4 Geo. 2. B. R. Elkins v. Heart.

(U. 3.) Conſideration of Aſſumpſit. Good. Forbearance of * Debt.

* See (U) pl. 12. 18. 25, 26. 28. 30. 33. 44, 45, 46, 47.

1. CONſideration that the plaintiff *would permit the defendant to take out letters of adminiſtration to her huſband*, and give her *further day* for the payment, promiſed to pay, &c. was held not good. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in error in the exchequer, Filcocks v. Holt.

Mo. 685. pl. 946. HOLT v. TILCOCK, S. C. and judgment on nil dicit. The conſideration was held inſufficient, it not appearing that the plaintiff had adminiſtration committed to him before, or had entered any caveat, or done any act to hinder the wife's adminiſtring; and as to the giving a further day, the defendant was not his debtor at the time, and ſo the conſideration inſufficient, and judgment reverſed.

2. Aſſumpſit, for that the *defendant was poſſeſſed of divers goods of the plaintiff's*, and *in conſideration the plaintiff would forbear the goods, the defendant promiſed to deliver them within 6 months*. It was moved that there was no conſideration, for it is that he ſhould forbear,

bear, and doth not ſhew for what time. But the court held it good enough; it is a ſufficient conſideration that he forbore, and when the defendant ſaid he would deliver them within 6 months, therein is implied that the other ſhould forbear 6 months. Adjudged for the plaintiff. Cro. E. 387. pl. 10. Paſch. 37 Eliz. B. R. May v. Alvares.

3. Aſſumpſit, that the *teſtator was indebted to the plaintiff upon obligation of* 20 *l. and the defendant having aſſets, in conſideration quod daret diem ſolutionis pro uno anno, promiſed he* would pay it. It was holden a good conſideration, and the words ſhall be conſtrued as deferring day of payment, and upon the plaintiff's promiſe to deliver the bond to the defendant. The plaintiff had judgment. Cro. E. 643. pl. 47. Mich. 40 & 41 Eliz. C. B. Chambers v. Leverſage. [325]

4. *A. and B. were bound jointly and ſeverally* to C. afterwards *C. releaſed to A.* In diſcourſe between B. and C. as to this debt, *B. in conſideration that C. would forbear him the payment of the money due on the ſaid bond till ſuch a day, promiſed to pay it*, &c. This is no conſideration; for the debt is intirely diſcharged. Per tot. cur. (Bankes Ch. J. being abſent.) Mar. 202. pl. 243. Paſch. 18 Car. C. B. Hammond v. Roll.

5. A *general forbearance* is a good conſideration be the party liable or not. Cited per cur. Lev. 161. as adjudged in the caſe of Heriot v. Hinton.

6. In aſſumpſit, the plaintiff declared that in conſideration he would *forbear till he or* [*and*] *they could ſend to Liverpool*, the defendant promiſed to pay, and that he did forbear, &c. The court ſaid that forbearance generally, or for a convenient time, is a good conſideration, but * aliquo tempore, or paululum tempus, is not; but becauſe the conſideration was to forbear *till he or they* ſhould ſend, &c. and the plaintiff declared, that he did forbear *till they* (*omitting* till *he* or [and] they) did ſend; and for that cauſe the judgment was arreſted. Sid. 49. pl. 3. Mich. 13 Car. 2. B. R. Tricket v. Mandlee.

Keb 114. pl. 17. Tricket v. Hanby, S. C. ſays it was he (and) they.——Ibid. 180. pl. 148. S. C. and per cur. theſe conjunctive words muſt not be disjoined to be made he (or) they.——Ibid. 193. pl. 178. S. C. ſays the court conceived the averment well enough, Forſter abſente, and judgment for the plaintiff.

* But where the conſideration was that the plaintiff would forbear him pro aliquo parvo tempore, *viz. for a fortnight or thereabouts*, he promiſed to pay, &c. This conſideration is good by reaſon of the viz. for a time certain, and averring that he forbore for that time and longer; but without ſuch viz. it would not be good. And judgment for the plaintiff. Bulſt. 41. Mich. 8 Jac. Baker v. Jacob.

(U. 4) Conſideration of Aſſumpſit. Good. Promiſe of one Perſon † for the Debt of another.

† See (U) pl. 14. 39. 49. 51, 52. 60. And ſee tit. Parol.

1. THE defendant promiſed the plaintiff *that if he would accept the defendant for his paymaſter for a debt due to the plaintiff by a ſtranger, and would forbear the defendant* 6 *months, he would pay the debt*; but adjudged no conſideration becauſe the plaintiff might ſue the ſtranger notwithſtanding, and therefore *is at no prejudice.* Hardr. 73. Arg. cites Hill. 1650. B. R. Lee v. Newcombe.

he is ſo, and that ſuch a caſe was ruled in the exchequer; and in the principal caſe, judgment was given for the defendant, niſi, &c. Hayward v. Ducket.

In conſideration to *forbear his debt*, or *to ſue*, is good enough; for per cur. it is to forbear generally, and that muſt be intended a forbearance of all perſons; but otherwiſe it had been if it had been to forbear the defendant; and though the promiſe was collateral, and no debt due from the defendant, yet the promiſe being generally to pay, and not upon requeſt, the court held a requeſt not neceſſary. And though the plaintiff did not aver that the defendant was executor or adminiſtrator to the perſon that was the debtor, and died before the promiſe, nor that any goods came to the defendant's hands, and ſo did not appear to be chargeable, yet the court held the conſideration good enough for the reaſons before mentioned. Freem. Rep. 439. pl. 595. Mich. 1676. Anon.

9. A. promiſed, in conſideration *B. would forbear to ſue C.* that *A. would pay him*, without ſaying how long. But Wyld J. ſaid, it had often been adjudged that where it is to forbear, *and no time mentioned*, it muſt be intended during his life; and judgment for the plaintiff. Freem. Rep. 66. pl. 79. Mich. 1672. C. B. Anon.

10. E. brought action againſt G. for monies due, whereupon H. promiſed E. that if he would forbear to ſue G. for the ſaid debt, *G. ſhould not leave the kingdom without paying the plaintiff's debt*. It was argued that this was not a promiſe to pay the debt in default of the principal, which is the caſe provided againſt by the ſtatute, but a collateral promiſe on a conſideration ariſing between the plaintiff and the defendant; for it is not brought for the debt of G. but for the damages ſuſtained, by H. the defendant's ſuffering G. to leave the kingdom without paying the debt; and the conſideration is that the plaintiff waived his action againſt G. and conſequently the coſts thereof. The court held that if there is no certain time of forbearance, the party is to forbear for ever; and inclined that there was a new conſideration, ſo that it was not for the debt of G. and conſequently not within the ſtatute of frauds for want of a note in writing. Sed adjornatur. Gib. 202. pl. 15. Hill. 4 Geo. 2. B. R. Elkins v. Heart.

(U. 3.) Conſideration of Aſſumpſit. Good. Forbearance of * Debt.

* See (U) pl. 12. 18. 25, 26. 28. 30. 33. 44, 45, 46, 47. Mo. 685. pl. 946.

1. CONſideration that the plaintiff *would permit the defendant to take out letters of adminiſtration to her huſband*, and give her *further day* for the payment, promiſed to pay, &c. was held not good. Le. 240. pl. 323. Mich. 32 & 33 Eliz. in error in the exchequer, Filcocks v. Holt.

HOLT v. TILCOCK, S. C. and judgment on niſi dicit.

The conſideration was held inſufficient, it not appearing that the plaintiff had adminiſtration committed to him before, or had entered any caveat, or done any act to hinder the wife's adminiſtring; and as to the giving a further day, the defendant was not his debtor at the time, and ſo the conſideration inſufficient, and judgment reverſed.

2. Aſſumpſit, for that the *defendant was poſſeſſed of divers goods of the plaintiff's*, and *in conſideration the plaintiff would forbear the goods, the defendant promiſed to deliver them within 6 months*. It was moved that there was no conſideration, for it is that he ſhould forbear,

bear, and doth not ſhew for what time. But the court held it good enough; it is a ſufficient conſideration that he forbore, and when the defendant ſaid he would deliver them within 6 months, therein is implied that the other ſhould forbear 6 months. Adjudged for the plaintiff. Cro. E. 387. pl. 10. Paſch. 37 Eliz. B. R. May v. Alvares.

3. Aſſumpſit, that the *teſtator was indebted to the plaintiff upon obligation of 20 l. and the defendant having aſſets, in conſideration quod daret diem ſolutionis pro uno anno, promiſed he* would pay it. It was holden a good conſideration, and the words ſhall be conſtrued as deferring day of payment, and upon the plaintiff's promiſe to deliver the bond to the defendant. The plaintiff had judgment. Cro. E. 643. pl. 47. Mich. 40 & 41 Eliz. C. B. Chambers v. Leverſage. [325]

4. *A. and B. were bound jointly and ſeverally* to C. afterwards *C. releaſed to A.* In diſcourſe between B. and C. as to this debt, *B. in conſideration that C. would forbear him the payment of the money due on the ſaid bond till ſuch a day, promiſed to pay it*, &c. This is no conſideration; for the debt is intirely diſcharged. Per tot. cur. (Bankes Ch. J. being abſent.) Mar. 202. pl. 243. Paſch. 18 Car. C. B. Hammond v. Roll.

5. A *general forbearance* is a good conſideration be the party liable or not. Cited per cur. Lev. 161. as adjudged in the caſe of Heriot v. Hinton.

6. In aſſumpſit, the plaintiff declared that in conſideration he would *forbear till he or* [*and*] *they could ſend to Liverpool*, the defendant promiſed to pay, and that he did forbear, &c. The court ſaid that forbearance generally, or for a convenient time, is a good conſideration, but * aliquo tempore, or paululum tempus, is not; but becauſe the conſideration was to forbear *till he or they* ſhould ſend, &c. and the plaintiff declared, that he did forbear *till they* (*omitting* till *he* or [and] they) did ſend; and for that cauſe the judgment was arreſted. Sid. 49. pl. 3. Mich. 13 Car. 2. B. R. Tricket v. Mandlee.

Keb 114. pl. 17. Tricket v. Hanby, S. C. ſays it was he (and) they.——Ibid. 180. pl. 148. S. C. and per cur. theſe conjunctive words muſt not be disjoined to be made he (or) they.——Ibid. 193. pl. 178. S. C. ſays the court conceived the averment well enough, Forſter abſente, and judgment for the plaintiff.

* But where the conſideration was that the plaintiff would forbear him pro aliquo parvo tempore, *viz. for a fortnight or thereabouts*, he promiſed to pay, &c. This conſideration is good by reaſon of the viz. for a time certain, and averring that he forbore for that time and longer; but without ſuch viz. it would not be good. And judgment for the plaintiff. Bulſt. 41. Mich. 8 Jac. Baker v. Jacob.

(U. 4) Conſideration of Aſſumpſit. Good. Promiſe of one Perſon † for the Debt of another.

† See (U) pl. 14. 39. 49. 51, 52. 60. And ſee tit. Parol.

1. THE defendant promiſed the plaintiff *that if he would accept the defendant for his paymaſter for a debt due to the plaintiff by a ſtranger, and would forbear the defendant 6 months, he would pay the debt*; but adjudged no conſideration becauſe the plaintiff might ſue the ſtranger notwithſtanding, and therefore *is at no prejudice*. Hardr. 73. Arg. cites Hill. 1650. B. R. Lee v. Newcombe.

Vent. 9. S. C. and ſtates it that the defendant, on view of the note, in conſideration that the plaintiff would accept of his promiſe for the money, and ſtay a fortnight for the ſame, he promiſed to pay; and that the opinion of the court was againſt the plaintiff; but there it is ſaid, that if it had been *in conſideration that the plaintiff would accept of the defendant for his debtor*, that might have been good, becauſe * that is *an implied diſcharge* of the other, whom if he had ſued, the defendant might have had an action.—— Lev. 248. S. C. all the court held it no conſideration, and gave judgment for the defendant.——S. C. cited by Hale Ch. J. Vent. 154. and ſaid to be good law; for there it did not appear that the defendant was at all indebted to him that ſent the note.

2. B. being indebted to A. in 20l. the plaintiff wrote a letter to C. the defendant to pay it. C. upon reading the letter, ſaid to A. that if he *would accept him for his debtor he would pay him in a fortnight*. It was moved in arreſt that it was not ſhewn that C. was indebted to B. nor that A. would forbear the ſaid 20l. for the fortnight, or that he would forbear to ſue B. And judgment was arreſted. Sid. 396. pl. 3. Hill. 20 & 21 Car. 2. B. R. Clipſam v. Morris.

* [326]

2 Keb. 543. pl. 6. & 557. pl. 50. S. C. adjudged for the defendant.

3. M. was *indebted to A.* in 200l. *and having an annuity out of the lands of C.* the defendant, he agreed that C. ſhould pay ſo much money to A. the plaintiff, and *C. promiſed to pay* the ſame. The court held that this is no conſideration. Mod. 12. pl. 35. Mich. 21 Car. 2. B. R. Abbot v. Moore.

4. The defendant's ſon being indebted to the plaintiff, the defendant in conſideration that the plaintiff, at the ſpecial inſtance of the defendant, would *forbear to arreſt his ſon till after the 23d Oct. promiſed to pay on or before that day*, is a good conſideration; for the defendant has to the laſt inſtant of the 23d Oct. to pay the money, and the next inſtant for forbearance, the plaintiff has performed his part; for he is not bound to forbear but only one inſtant after the 23d Oct. And ſo the action is well enough. Ld. Raym. Rep. 357, 358. Mich. 10 W. 3. Waters v. Glaſſop.

See tit. Collateral. Tit. Parol.

(U. 5) Conſideration of Aſſumpſit. Good. By Executor or Adminiſtrator.

See (U) pl. 31, 32. 34. 50. 56. —See (R)

1. THE defendant in conſideration *that he was natural ſon and adminiſtrator to the inteſtate, and that the goods of his father had come to his hands, promiſed to pay* the debt to the plaintiff. It was found that no goods came to the defendant's hands; and it was held that his being adminiſtrator and ſon of the inteſtate, was no conſideration to maintain the action. Le. 94. Hill. 30 Eliz. in pl. 121. cites it as adjudged in B. R. Hudſon's caſe.

Yelv. 184. S. C. adjudged againſt the plaintiff; for by the death of the wife the defendant had [illegible] by the

2. Aſſumpſit, for that A. made his will, and thereby bequeathed a legacy of 7l. to the plaintiff, and made his wife *executrix*, who afterwards *married the defendant*, and had goods of the teſtator's in his hands, *and in conſideration the plaintiff would forbear to ſue for the legacy, he promiſed to pay it*, which he had not done. The defendant pleaded that his wife died before the promiſe made to the plaintiff; and holden a good plea; for the wife being dead he was not chargeable with the legacy; and though it was alleged

leged that he has goods in his hands, yet it is not ſhewn how, and he is thereby liable to the executor or adminiſtrator for them. Cro. J. 257. pl. 16. Mich. 8 Jac. B. R. Smith v. Johns.

of the goods and without employment or converſion of them to his own uſe after her death, he is not chargeable either in the eccleſiaſtical court, or at common law.——Ow. 133. S. C. adjudged for the defendant.——Bulſt. 44. S. C. adjudged for the defendant.

3. J. S. being poſſeſſed of goods, made his will, and the plaintiff his executor. The defendant, in conſideration *that the plaintiff would forbear to join in the probate of the teſtament, and would releaſe totalem executionem of the will, promiſed, &c.* It was moved that one executor's relinquiſhing to another is no benefit, but a truſt, and ſo no good conſideration. Fleming Ch. J. and Williams J. held that totalem executionem was all one as totaliter. And per tot. cur. this is a good conſideration; and judgment for the plaintiff. Bulſt. 185. Paſch. 10 Jac. Wemſtone v. Webbe. [327]

4. A *ſurety paid the money*, and the principal being dead, his *executor promiſed the ſurety, if he would forbear to ſue for ſuch a time, to pay the money.* It was moved in arreſt of judgment, that this conſideration is void; but per curiam, the action well lies againſt the executor, becauſe he was liable in equity. Sid. 89. pl. 7. Mich. 14 Car. 2. Scott v. Stevens.

Lev. 71. Scott v. Stephenſon, S. C. adjudged for the plaintiff, niſi, &c.—Keb. 346. pl. 29. S. C. and per cur. this is good cauſe of ſuit. Sed adjornatur.

But ſee the ſtatute 29 Car. 2. cap. 3. ſ. 4. at tit. Executors.—And ſee tit. Parol (A)

(U. 6) Conſideration of Aſſumpſit. Good. Relating to Marriage and Portions.

See (U) pl. 9. 16. 20.—See tit. Frauds.—See tit. Marriage.—See tit. Parol.

1. PLaintiff brought an action upon a promiſe, that *if he married M. with the aſſent of her father*, the defendant would give him 20 l. Adjudged a good conſideration by the court. Het. 50. Mich. 3 Car. C. B. Jenkins's caſe.

2. *Diſcharge of a promiſe of marriage* by a woman to a man, is a good conſideration. Raym. 400. cites Mich. 1661. The caſe of Baker v. Smith.

3. Aſſumpſit to a woman, that *in conſideration you will forbear to marry for 7 years, I will marry you.* Freem. Rep. 66. pl. 78. Mich. 1672. Archer cited it as adjudged in C. B. in a Hertfordſhire cauſe; and the court agreed to it.

(U. 7) Conſideration of Aſſumpſit. Good. As to granting, releaſing, &c. Intereſts in Lands, &c.

See (U) pl. 22. 27, 28, 29.—See tit. Parol.——See tit. Grants.

1. THE law will not give ſuch *conſtruction* to the words of a promiſe, contract, or aſſumpſit, but that all the words ought to be wholly reſpected *according to the letter*; as where the promiſe

promiſe was that *in conſideration that the plaintiff ſhould leaſe to the defendant for life, habendum after the death of A. which cannot be good by way of leaſe, but* ought to enure *by way of grant of the reverſion*; and if a leaſe be ſo made, the leſſee ſhall be in poſſeſſion according to the premiſes, ſo as becauſe no leaſe can be made according to the words of the conſideration, no ſupply thereof ſhall be by any favourable conſtruction; and ſo it was adjudged. Le. 275, 276. pl. 372. Paſch. 26 Eliz. B. R. Curriton v. Godbury.

2. S. being very ſick, and having ſeveral children infants, *B. in conſideration that S. after his death would commit the education of his children, and the diſpoſition of his goods, for their education, during their minority, to him, promiſed S. to procure certain cuſtomary lands to be aſſured to one of his children.* Whereupon S. appoints B. overſeer of his will, and that his goods ſhould be under his diſpoſition. S. dies, and thereby the goods of S. to ſuch value came to B.'s hands, to his great profit. B. does not procure ſuch lands to be
[328] aſſured. Exception was taken in arreſt of judgment, that here is no ſufficient conſideration; and the court awarded that querens nil capiat per billam. 3 Le. 88. pl. 127. Mich. 26 Eliz. B. R. Smith v. Smith.

3. Aſſumpſit, in conſideration the plaintiff, at the requeſt of the defendant, would *yield up all his intereſt in ſuch a cloſe* to H. B. the defendant promiſed to pay the ſaid plaintiff 70 l. and *alleged* that he did *deliver the deed, containing a leaſe* of the cloſe to one W. J. to deliver, ſimul cum toto ſtatu ſuo, to the ſaid H. B. and that the ſaid W. J. for the plaintiff, and by his appointment, delivered and ſurrendered, &c. and H. B. accepted it and tore off the ſeal. Adjudged that this was not a good conſideration, becauſe it was no good ſurrender of his intereſt; for it was *by word only, and not by deed.* Cro. E. 487. pl. 4. Mich. 38 & 39 Eliz. B. R. Sleigh v. Bateman.

4. In conſideration the plaintiff *would not join with his uncle in the defence of a ſuit*, the defendant *promiſed to give him* 10 *l.* This is no good conſideration, unleſs he *ſhews a pretence of ſome intereſt in the land, or that he was heir to his uncle*, ſo as it might probably be an advantage to him, that the land ſhould not be recovered by the defendant; but as it is, it is all one as if he had ſaid it to a ſtranger. Judgment againſt the plaintiff. Freem. Rep. 21. pl. 25. Mich. 1671. C. B. Rutter's caſe.

Ld. Raym. Rep. 662. S. C. adjudged for the plaintiff. ——— 12 Mod. 445. S. C. accordingly.

5. A *releaſe of an equity of redemption* is a good and valuable conſideration for an aſſumpſit; per Holt Ch. J. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in caſe of Thorpe v. Thorpe.

6. A *ſurrender of a leaſe at will, &c.* is of a thing apparently of no value, and therefore makes no conſideration. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in caſe of Thorpe v. Thorpe.

(U. 8) Conſideration of Aſſumpſit. Good. Delivering up of Pledges, Securities, &c.

1. TWO merchants being reciprocally indebted the one to the other, *agreed betwixt themſelves to deliver all their bills and bonds into the hands of S. who promiſed not to deliver them to the parties till all accounts were ended between them*; but yet he delivered them to the one, and the other brought his action; and it was adjudged maintainable, yet there was not any conſideration; for he had no benefit by keeping of them, nor was it material, for the action was grounded upon the promiſe and deceit. Cro. E. 138. in pl. 20. and Le. 186. in pl. 261. cites it as a late caſe, Smith v. Edmonds.

2. Plaintiff declared that *he had recovered againſt W. 20 l. in the court of S. and had a lev. fa. to the bailiff there to make execution* of the goods of W. *and whereas he was ready ſo to do, the defendant promiſed* the plaintiff, that *in conſideration he would deliver the defendant the ſaid goods, he, within 14 days after Michaelmas, would pay* the plaintiff the 20 l. *or otherways re-deliver to the plaintiff the ſaid goods, if, in the mean time, no other* makes title to them, and proves them to be his own goods, * [and averred that none made title to them within that time] a ſpecial *verdict found* the recovery and aſſumpſit, but further, *that before the recovery W. was poſſeſſed of theſe goods as his own proper goods, and* by indenture *ſold them to R. his brother for money, with a proviſo that W. † notwithſtanding ſhould have the poſſeſſion for 4 years not yet expired, he to pay to R. 20 s. a year*, and *that if the ſaid W. at the end of the 4 years ſhould repay the ſaid money, the ſale ſhould be void; and that the ſaid R. made title to the ſaid goods by virtue of that ſale*, this is a good promiſe; though W. had only a ſpecial property in theſe goods, and though they were not liable to the execution; for the plaintiff having the poſſeſſion of the goods, his delivery of them to the defendant is a good conſideration. And judgment was given for the plaintiff. Le. 220. pl. 303. Mich. 32 & 33 Eliz. Byne v. Playne.

* Cro. E. 218. pl. 5. Hill. 33 Eliz. B. R. Bind v. Plain, S. C. and reſolved a good conſideration; for by the delivery the defendant has the benefit of the uſe of them, and the plaintiff has loſs by his being chargeable to the action of W. and the conſideration is good, eſpecially as it is only for the re delivery of them, or payment of ſuch a ſum; and adjudged for the plaintiff, and judgment affirmed. ——— Cro. E. 301. pl. 16. S. C. is upon another point. ——— Mo. 596. pl. 112. Plaine v. Bynd, S. C. but S. P. does not appear.

† [329]

3. Aſſumpſit, for that the defendant *in conſideration of* ſuch *clothes delivered at ſuch a place, promiſed to pay 8 l. and in conſideration of a debt upon arrearages of account, the defendant being indebted in 18 l. he promiſed to pay it.* In error it was held, that the conſideration upon the ſecond aſſumpſit was not ſufficient, but for the 1ſt the judgment was affirmed, and for the 2d reverſed. Cro. E. 537. pl. 71. Mich. 38 & 39 Eliz. in the exchequer chamber, Grimſton v. Reyner.

The *delivery of goods to* the defendant, if they were the goods *of the plaintiff, or of a ſtranger*, was held a good conſideration for an aſſumpſit; but if they were the goods of *the defendant*, it was held no conſideration, becauſe he did no more than by law he was compellable to do. Freem. Rep. 212. pl. 218. Mich. 1676. B. R. ſays this difference was taken by North Ch. J. nemine contradicente.

Yelv. 4. S. C. and that it was adjudged in B. R. a good conſideration, becauſe the very poſſeſſion of

4. Aſſumpſit *for that he was to deliver* 20 combs of *barley to J. S. on ſuch a day, and in conſideration he would deliver the ſame to the defendant before the day, the defendant promiſed to deliver it to J. S. at the day;* adjudged a good conſideration; but upon error brought in the exchequer-chamber, this judgment was reverſed. Cro. E. 883. pl. 19. Paſch. 44 Eliz. B. R. Riches v. Bridges.

the corn might be a credit, and a good countenance to the defendant to be eſteemed a rich man in the country, as in caſe of delivery of 1000 l. in money, to deliver again upon requeſt. But note, that this judgment was reverſed in the exchequer chamber. ——— Yelv. 50. Mich. 2 Jac. B. R. it was ſaid by Gawdy and the whole court, that this reverſal was ill. ——— S. P. as to a promiſe to re-deliver 4 broad cloaths, &c. adjudged no conſideration. Yelv. 128. Paſch. 6 Jac. B. R. Pickas v. Guile. — 1 Salk. 26. in pl. 12. Holt Ch. J. cited this laſt caſe of Pickas v. Guile, and ſaid it was not law, and that it was always grumbled at; and cited the caſe in Cro. J. 667. [pl. 2. Trin. 21 Jac. B. R. * Wheatly v. Low] where money was delivered to pay over fine mora, is contrary; for though the party has no benefit, yet if he takes the truſt upon him he is bound to perform it. ——— 2 Ld. Raym. Rep. 920. S. P. Trin. 2 Ann. by Holt Ch. J. Arg. accordingly.

* Palm. 281. Paſch. 20 Jac. Loe's caſe, S. C. adjudged for the plaintiff.

A. had forfeited three bills, in which he was indebted to the defendant, and

5. If *obligee*, after forfeiture of the bond, *tells the obligor that if he pays part of the money to A. to whom the obligee is indebted, he promiſes that the bond ſhall be delivered up to him;* and adjudged that aſſumpſit lies. Palm. 169. cites Mich. 14 Jac. Harvey's caſe.

the defendant, in conſideration the plaintiff would pay the 3 ſeveral ſums 3 days after, promiſed that he would deliver them to the plaintiff. The court were of opinion that it was no ſufficient conſideration. Hutt. 76. Paſch. 1 Car. cites it as reſolved in B. R. Greenwood v. Becket.

Palm. 281. Loe's caſe, S. C. reſolved per tot. cur. that the action well lies. And judgment for the plaintiff.

6. Aſſumpſit, the *plaintiff was bound to J. S. in* 40 *l. for the payment of* 20 *l.* and *the bond being forfeited, he delivered* 10 *l. to the defendant to pay it to J. S. in part* of payment, *without delay*, in conſideration whereof the *defendant promiſed*, &c. *but did not pay it.* It was moved to be no conſideration, it not being alleged that he delivered it to the defendant upon his requeſt, and that the accepting it to deliver to another fine mora, cannot be any benefit to the defendant to charge him with this promiſe. But per cur.

[330]

his accepting and promiſing to deliver it is a good conſideration; and judgment was for the plaintiff, and that judgment affirmed in error. Cro. J. 667. pl. 2. Trin. 21 Jac. B. R. Wheatley v. Low.

7. A. *obtained a judgment, and upon payment of part of the money recovered, promiſed to make a releaſe of the whole;* and adjudged that aſſumpſit lies. Palm. 169. cites Trin. 27 Jac. Winowe v. Reynolds.

8. In conſideration that the *plaintiff had promiſed to pay the defendant* 10 *l. at a day according to the condition of a bond,* the *defendant promiſed to deliver the obligation;* and adjudged a good conſideration. Cited by Harvey J. Hutt. 101. Mich. 4 Car.

9. The declaration was that *the defendant, in conſideration he was indebted to the plaintiff in* 20 *l. promiſed to deliver divers cattle to J. S. to the uſe of the plaintiff.* Per cur. here is no conſideration expreſſed which can relate to the diſcharging the debt, and ſo the promiſe is but nudum pactum, and the plaintiff at liberty to bring his action for the money. Sty. 330. Trin. 1652. B. R. Godwin v. Batkin.

(X) Upon an Aſſumpſit. At what Time it lies. [*Before all the Days are paſt.*]

[1. IF *A. promiſes B.* that *if he will marry his daughter, he will give* him 100 *l. viz.* 50 *l. at ſuch a day, and* 50 *l. at another day* after; and becauſe B. was indebted to C. in 100 l. A. at the requeſt of B. for the conſideration aforeſaid, promiſed to pay the money accordingly the ſaid days to C. and after the marriage takes effect, and *A. does not pay to C. the* 50 *l. at the firſt day*, B. ſhall have an action againſt him upon this promiſe *before the ſecond day*. Hill. 43 Eliz. B. R. between TAYLOR AND POSTON adjudged.]

Cro. E. 776, pl. 8. Foſter v. Taylor, S. C. and 2 juſtices held that the action well lay, but the other judges being abſent they would adviſe. —— Cro. E. 807. pl. 8. Taylor v. Foſter, S. C. adjudged accordingly for the plaintiff; for though *in debt on bond, where the intire debt is to be recovered*, the action lies not till the laſt day, yet it is not ſo *in aſſumpſit or covenant, where damages only* are to be recovered; and though the 100 l. had been *to be paid to a ſtranger*, and not to himſelf, the action would well lie for the plaintiff, becauſe the promiſe was to him.

[2. If *A. in conſideration that B. had* bargained and *ſold to him certain tuns of* ſtrong beer, *at the requeſt of A. promiſes to pay* to *him* 4 *l. for every tun ſuper deliberationem inde* of 30 tun of ſtrong beer, an action lies upon this promiſe for ſo many tun as he delivers, *before the delivery of all the* 30 *tun*. Mich. 12 Jac. in the exchequer chamber, between FIELD AND DEALE adjudged, quod vide Mich. 12 Jac.]

*[331]

[3. If A. in conſideration *that B. will marry his daughter*, promiſes *to pay him* 20 *l. viz.* 10 *l. at Michaelmas, and* 10 *l. at Lady-day after*, and after B. takes the daughter of A. to his wife, and A. does not pay the 10 l. at Michaelmas; though this be in nature of a debt, for which B. may have an action of debt, yet *B. may have* an action upon the caſe upon this promiſe, *for the non-payment of the firſt* 10 *l. before Lady-day is come;* for this is *alleged in the declaration as an expreſs promiſe*, and in law [they are as] two ſeveral promiſes. Hill. 7 Car. B. R. between MILLES AND MILLES adjudged, this being moved in arreſt of judgment, and though damages were * given to 20 l. for it does not appear that it was given in reſpect of the ſecond 10 l.]

Cro. C. 241. pl. 1. S. C. adjudged accordingly; but held it would have been otherwiſe, if an action of debt had been brought for it, the contract or bill being inſire. —— S. P. Br. Action ſur le Caſe, pl. 108. cites it as agreed Trin. 5 Mar. that it is in nature of a covenant. —— If a man *aſſumes to pay* 50 *quarters of malt in five years, every year* 10 *quarters*, an aſſumpſit lies if he fails of payment of any of them, and he ſhall recover damages for all that is arrear, and for all the reſidue of the 5 years; per Jones and Berkley J. but Crooke J. doubted. Cro. C. 350. Hill. 9 Car. B. R. in pl. 13. —— S. P. cited per cur. 4 Rep. 94. between PECK AND REDMAN, 2 & 3 P. & M. Dyer 113. as adjudged, that action on the caſe lies; though debt does not before all the days are paſt; and that otherwiſe it would be againſt the bargain and intent of the parties; for Peck provided it annually for his neceſſary uſe. —— D. 113. a. pl. 55. S. C. and S. P. admitted, but no judgment appears.

Aſſumpſit, &c. *in conſideration of a marriage had between the plaintiff's ſon, and the defendant's daughter, he promiſed to pay* to the plaintiff 400 *marks in* 7 *years next following, at certain feaſts, by equal portions.* It was moved in arreſt, that it appeared that one of the 7 years was to come when the action was brought, and ſo he had no cauſe of action for all the money promiſed; and therefore the court abated the writ. Bendl. 57. pl. 93. Trin. 4 & 5 P. & M. Joſcelin v. Skelton. —— Kelw. 208. b. 209. a. pl. 8. [10] S. C. in totidem verbis. —— 3 Le. 4. pl. 11. S. C. in totidem verbis. —— Mo. 13. pl. 51.

pl. 51. S. C. accordingly. ——— Cro. E. 118. pl. 5. Rhodes J. cited S. C. as adjudged, that at the end of every year a ſeveral action lies for the proportion.

Where G. in conſideration of a marriage of his daughter with the ſon of J. S. *promiſed* to give 700 l. and *to pay* 100 *l. a year, every year until all the ſum be paid*; it was held clearly in this court, that a ſeveral action might be brought of every 100 l. but becauſe the action was brought for all the 700 l. before the 7 years were out, judgment was given againſt him; for if a man be bound in a bond of 100 l. to pay 20 l. for ſo many years, he ſhall not have an action of debt until the laſt year expired. Ow. 42. cited by Rhodes as 30 Eliz. Gaſcoign's caſe.

[4. In an action upon the caſe, if the plaintiff declares that the 26th of May 1629, at the city of Exeter, in conſideration that the plaintiff had *ſold* to the defendant *ſex pecias panni nigri*, Anglice ſix pieces of black grogram, the *defendant promiſed to pay to him* 47*s. for every piece*, amounting in the whole to 14 l. 2 s. ad ferias Pentecoſtes, Anglice vocat. Whitſontide-fair *then next following*, and the action is brought long after Whitſontide, and avers that the defendant had not yet paid it, but *does not aver that Whitſontide-fair is not come*; and therefore, after a verdict upon non aſſumpſit pleaded, and judgment in the city court, it was reverſed in B. R. Hill 7 Car. between TAYLOR AND LEE. Intratur Paſch. 7 Car. B. R. Rot. 158.]

[5. If A. promiſes B. for a certain conſideration, &c. *to pay* * *to B.* 15 *l. yearly*, and every year, *during* the term of 4 *years* then next enſuing, if *J. S. a certain meſſuage in D. ſhould ſo long have and occupy*, if *J. S. occupies* the meſſuage *for one or two years* of the ſaid four years, B. may have an action upon the caſe for the ſaid ſeveral 15 l. due for them before the end of the other two years; and though he does not occupy it for the laſt two years, yet an action lies for the firſt two years; for this *is to be paid yearly, and every year*; and therefore the limitation, *if ſo long* he occupies it, *refers to every year*, and not intirely to the four year. Trin. 23 Car. B. R. between FREER AND PRENTICE, adjudged, in a writ of error upon ſuch a judgment given in B. this being aſſigned for error, and the firſt judgment affirmed accordingly. Intratur Hill. 22 Car.]

* Fol. 30. All. 20. S. C. the limitation being (if J. S. ſo long live) and adjudged for the plaintiff, though it was not averred that J. S. lived ſo long; for the action lies after the firſt year, the word *(ſi) being a limitation ſubſequent.* ——— So where, *in conſideration the plaintiff promiſed the defendant that he ſhould enjoy ſuch lands from ſuch a day for five years, he promiſed to pay* 20 *l. yearly at ſuch and ſuch a feaſt.* The *defendant occupied the land for a year and a half*, and brought action for 30 l. It was moved that the promiſe and conſideration was intire; and therefore, without averring that the defendant had enjoyed the land 5 years, action does not lie. But adjudged per tot. cur. for the the plaintiff; for the promiſe being that 20 l. ſhall be paid for every year, ſeveral actions lie for every day of payment: *but* if it had been that he ſhould enjoy for 5 years, and *in conſideration thereof ſhould pay* 100 *l. in five years, viz.* 20 *l. a year*, action lies not till all the term is expired. Cro. E. 118. pl. 5. Mich. 30 & 31 Eliz. B. R. Hunt v. Sone. ——— 2 Le. 107. pl. 137. Hill. 29 Eliz. C. B. the S. C. adjudged for the plaintiff. ——— 4 Le. 13. pl. 49. S. C. in totidem verbis. ——— Ow. 42. Hunt's caſe, alias Hunt v. Torney, S. C. adjudged for the plaintiff.

[332] 6. It was agreed in C. B. that if a man, *for marriage of his daughter, promiſes to pay* 20 *l. at Eaſter for* 4 *years, and fails* 2 *years*, the plaintiff may have action upon the caſe upon the aſſumpſit, for the non-payment of the 2 years, though the other 2 years are not yet come; for *this is in nature of a covenant.* Br. Action ſur le Caſe, pl. 108. cites Trin. 5 M.

7. A *judgment* was had *by A. againſt T. an adminiſtrator, for a debt of the inteſtate. T. in conſideration that A. would forbear to take*

out

out execution till *Octab. Mich. promiſed to pay the ſame at Michaelmas*, but did not pay it. *A. brought action after Mich. and before Octab. Mich.* All the court held the conſideration well enough, and that the ſuit after Mich. and before Octabis was ſo too, becauſe the *aſſumpſit was not performed by the non-payment at Mich.* But this was the greateſt doubt. Cro. E. 758. pl. 29. Paſch. 42 Eliz. C. B. Tiſdale's caſe.

8. Aſſumpſit, for that the *defendant being indebted* to him *in* 4 *l. promiſed to pay it by* 5 *s. per month.* The *action was brought within* 4 *months after the promiſe*, and ſo before all the money was due. It was held that the action was well brought *before all the days were paſt*; for the action is grounded on a promiſe, which is broken by every non-payment, according to the promiſe. Cro J. 504. pl. 16. Mich. 16 Jac. B. R. Beckwith v. Nott.

2 Roll. Rep. 47. Beckwith v. Pott, S. C. accordingly.—Jenk. 333. pl. 68. S.C. adjudged and affirmed in error.

9. In action againſt a ſtranger, on promiſe to pay *upon proof* made, may be brought before proof made, and the proof on the trial will be ſufficient. Raym. 32. Mich. 13 Car. 2. B. R. Traverſe v. Meeres.

Sid. 57. pl. 25. S.C. adjudged accordingly.—So where the words were, *in conſideration you will prove that I have beaten your ſon, I will pay you* 5 *l.* action lies before any proof made; and if he proves it in the action he ſhall recover, cited Sid. 57. pl. 25. as adjudged 15 Jac. in Grinden's caſe.——S. P. Palm. 160. Hill. 18 Jac. by Dodderidge and Chamberlaine J. clearly. But otherwiſe if he had ſaid, that *after you have proved that I ſtruck him, then I do aſſume to pay you* 5 *l.*

10. If a man agrees to pay ſuch a ſum at 3 ſeveral days, here he may not declare for this ſum till the days are paſt; but when the days are paſt, *a general indebitatus aſſumpſit* lies; per Holt. Ch. J. Skin. 326. pl. 4. Mich. 4 W. & M. in B. R. Francam v. Foſter.

(Y) What ſhall be a good Aſſumpſit. Where *Part of the Conſideration* is *not good.*

[1. IF A. promiſes B. in conſideration *that ſhe will not ſue an attachment* out of chancery *upon a decree* which is there made *againſt him, and* in conſideration that ſhe *will give to him all her title and right of dower*, that *then he will pay to her* 20 *l.* though the ſecond conſideration is void, becauſe it cannot be given to a ſtranger, but only releaſed to the tenant of the land by way of extinguiſhment, yet the action upon the caſe lies upon the other conſideration, which is good. Hill. 42 Eliz. B. R. between COLSTON AND CARRE, per curiam.]

See (U) pl. 43. S.C. and the notes there.

* [333]

[2. If a man, in conſideration *of a ſurrender, and of* 10 *l.* paid, *promiſes to do* ſuch a thing, though the *ſurrender cannot be made*, ſo that this conſideration is void, yet the action is maintainable upon * the other conſideration. 36 Eliz. between CUPPS AND GOULDING, adjudged. Cited Hill. 42 Eliz. B. R.]

Cro. E. 50. pl. 1. Mich. 28 & 29 Eliz. S. C. but S. P. does not appear.——Le. 296. pl. 405. Mich. 28 & 29 Eliz. S. C. but nothing mentioned there of the conſideration of a ſurrender and 10 s. But Coke, in his argument for the plaintiff, ſaid that where 2 or many conſiderations are put in the declaration, though ſome are void, yet if one be good the action well lies, and damages

pl. 11. S. C. accordingly.——Cro. E. 118. pl. 5. Rhodes J. cited S. C. as adjudged, that at the end of every year a ſeveral action lies for the proportion.

Where G. in conſideration of a marriage of his daughter with the ſon of J. S. *promiſed* to give 700 l. and *to pay* 100 *l. a year, every year until all the ſum be paid*; it was held clearly in this court, that a ſeveral action might be brought of every 100 l. but becauſe the action was brought for all the 700 l. before the 7 years were out, judgment was given againſt him; for if a man be bound in a bond of 100 l. to pay 20 l. for ſo many years, he ſhall not have an action of debt until the laſt year expired. Ow. 42. cited by Rhodes as 30 Eliz. Gaſcoign's caſe.

[4. In an action upon the caſe, if the plaintiff declares that the 26th of May 1629, at the city of Exeter, in conſideration that the plaintiff had *ſold* to the defendant *ſex pecias panni nigri*, Anglice ſix pieces of black grogram, the *defendant promiſed to pay to him* 47*s. for every piece*, amounting in the whole to 14 l. 2 s. ad ferias Pentecoſtes, Anglice vocat. Whitſontide-fair *then next following*, and the action is brought long after Whitſontide, and avers that the defendant had not yet paid it, but *does not aver that Whitſontide-fair is not come*; and therefore, after a verdict upon non aſſumpſit pleaded, and judgment in the city court, it was reverſed in B. R. Hill 7 Car. between TAYLOR AND LEE. Intratur Paſch. 7 Car. B. R. Rot. 158.]

[5. If A. promiſes B. for a certain conſideration, &c. *to pay* * *to B.* 15 *l. yearly*, and every year, *during* the term of 4 *years* then next enſuing, if *J. S. a certain meſſuage in D. ſhould ſo long have and occupy*, if *J. S. occupies* the meſſuage *for one or two years* of the ſaid four years, B. may have an action upon the caſe for the ſaid ſeveral 15 l. due for them before the end of the other two years; and though he does not occupy it for the laſt two years, yet an action lies for the firſt two years; for this *is to be paid yearly, and every year*; and therefore the limitation, *if ſo long* he occupies it, *refers to every year*, and not intirely to the four year. Trin. 23 Car. B. R. between FREER AND PRENTICE, adjudged, in a writ of error upon ſuch a judgment given in B. this being aſſigned for error, and the firſt judgment affirmed accordingly. Intratur Hill. 22 Car.]

* Fol. 30. All. 20. S. C. the limitation being (if J. S. ſo long live) and adjudged for the plaintiff, though it was not averred that J. S. lived ſo long; for the action lies after the firſt year, the word *(ſi) being a limitation ſubſequent*.——So where, *in conſideration the plaintiff promiſed the defendant that he ſhould enjoy ſuch lands from ſuch a day for five years, he promiſed to pay 20 l. yearly at ſuch and ſuch a feaſt*. The *defendant occupied the land for a year and a half*, and brought action for 30 l. It was moved that the promiſe and conſideration was intire; and therefore, without averring that the defendant had enjoyed the land 5 years, action does not lie. But adjudged per tot. cur. for the the plaintiff; for the promiſe being that 20 l. ſhall be paid for every year, ſeveral actions lie for every day of payment: *but* if it had been that he ſhould enjoy for 5 years, and *in conſideration thereof ſhould pay* 100 *l. in five years, viz.* 20 *l. a year*, action lies not till all the term is expired. Cro. E. 118. pl. 5. Mich. 30 & 31 Eliz. B. R. Hunt v. Sone.——2 Le. 107. pl. 137. Hill. 29 Eliz. C. B. the S. C. adjudged for the plaintiff.——4 Le. 13. pl. 49. S. C. in totidem verbis.——Ow. 42. Hunt's caſe, alias Hunt v. Torney, S. C. adjudged for the plaintiff.

[332] 6. It was agreed in C. B. that if a man, *for marriage of his daughter, promiſes to pay* 20 *l. at Eaſter for* 4 *years, and fails* 2 *years*, the plaintiff may have action upon the caſe upon the aſſumpſit, for the non-payment of the 2 years, though the other 2 years are not yet come; for *this is in nature of a covenant*. Br. Action ſur le Caſe, pl. 108. cites Trin. 5 M.

7. A *judgment* was had *by A. againſt T. an adminiſtrator, for a debt of the inteſtate. T. in conſideration that A. would forbear to take out*

out execution till *Octab. Mich. promiſed to pay the ſame at Michaelmas*, but did not pay it. *A. brought action after Mich. and before Octab. Mich.* All the court held the conſideration well enough, and that the ſuit after Mich. and before Octabis was ſo too, becauſe the *aſſumpſit was not performed by the non-payment at Mich.* But this was the greateſt doubt. Cro. E. 758. pl. 29. Paſch. 42 Eliz. C. B. Tiſdale's caſe.

8. Aſſumpſit, for that the *defendant being indebted* to him *in* 4 *l. promiſed to pay it by* 5 *s. per month.* The *action was brought within* 4 *months after the promiſe*, and ſo before all the money was due. It was held that the action was well brought *before all the days were paſt*; for the action is grounded on a promiſe, which is broken by every non-payment, according to the promiſe. Cro J. 504. pl. 16. Mich. 16 Jac. B. R. Beckwith v. Nott.

2 Roll. Rep. 47. Beckwith v. Pott, S. C. accordingly.—Jenk. 333. pl. 68. S.C. adjudged and affirmed in error.

9. In action againſt a ſtranger, on promiſe to pay *upon proof* made, may be brought before proof made, and the proof on the trial will be ſufficient. Raym. 32. Mich. 13 Car. 2. B. R. Traverſe v. Meeres.

Sid. 57. pl. 25. S.C. adjudged accordingly.—So where the words were, *in conſideration you will prove that I have beaten your ſon, I will pay you* 5 *l.* action lies before any proof made; and if he proves it in the action he ſhall recover, cited Sid. 57. pl. 25. as adjudged 15 Jac. in Grinden's caſe.——S. P. Palm. 160. Hill. 18 Jac. by Dodderidge and Chamberlaine J. clearly. But otherwiſe if he had ſaid, that *after you have proved that I ſtruck him, then I do aſſume to pay you* 5 *l.*

10. If a man agrees to pay ſuch a ſum at 3 ſeveral days, here he may not declare for this ſum till the days are paſt; but when the days are paſt, *a general indebitatus aſſumpſit* lies; per Holt. Ch. J. Skin. 326. pl. 4. Mich. 4 W. & M. in B. R. Francam v. Foſter.

(Y) What ſhall be a good Aſſumpſit. Where *Part of the Conſideration* is *not good.*

[1. IF A. promiſes B. in conſideration *that ſhe will not ſue an attachment* out of chancery *upon a decree* which is there made *againſt him, and* in conſideration that ſhe *will give to him all her title and right of dower*, that *then he will pay to her* 20 *l.* though the ſecond conſideration is void, becauſe it cannot be given to a ſtranger, but only releaſed to the tenant of the land by way of extinguiſhment, yet the action upon the caſe lies upon the other conſideration, which is good. Hill. 42 Eliz. B. R. between COLSTON AND CARRE, per curiam.]

See (U) pl. 43. S.C. and the notes there.

* [333]

[2. If a man, in conſideration *of a ſurrender, and of* 10 *l.* paid, *promiſes to do* ſuch a thing, though the *ſurrender cannot be made*, ſo that this conſideration is void, yet the action is maintainable upon * the other conſideration. 36 Eliz. between CUPPS AND GOULDING, adjudged. Cited Hill. 42 Eliz. B. R.]

Cro. E. 50. pl. 1. Mich. 28 & 29 Eliz. S. C. but S. P. does not appear.——Le. 296. pl. 405. Mich. 28 & 29 Eliz. S. C. but nothing mentioned there of the conſideration of a ſurrender and 10 s. But Coke, in his argument for the plaintiff, ſaid that where 2 or many conſiderations are put in the declaration, though ſome are void, yet if one be good the action well lies, and damages

damages ſhall be taxed accordingly.——2 Le. 71. pl. 96. Golding's caſe, S. C. & S. P. per Coke, Arg.

S. P. Cro. J. 127. pl. 10. Trin. 4 Jac. adjudged accordingly. Criſp v. Gamiel.

3. Where *divers conſiderations are alleged* by the plaintiff in aſſumpſit, and *ſome are frivolous and void*, yet if any of them are good the plaintiff ſhall recover; per cur. and judgment accordingly. Cro. E. 149. pl. 20. Mich. 31 & 32 Eliz. B. R. Bradburne v. Bradburne.

4. If *part of a conſideration* is *good*, it ſuffices. Cro. E. 759. Paſch. 42 Eliz. C. B. in pl. 3.

(Z) Who ſhall have the Action. [*And Pleadings.*]

* Roll Rep. 28. pl. 28. S. C. and judgment affirmed per tot. cur.—† (Y. b.) pl. 1. S. C. but not S. P.——(Z. b.) pl. 3. S. C. but not S. P.

[1. IF *A. in conſideration that B. has truſted him* for his diet, *promiſes to pay* 10 l. at a day, though he *does not mention to whom* he promiſes to pay it, yet this ſhall be intended to be to B. who had truſted him. Trin. 12 Jac. B. R. between * CHAPPELL AND WOODHAM, in camera ſcaccarii, adjudged; and that ſuch a declaration is good. Contra Paſch. 3 Jac. B. R. between † GOLDSMITH AND PRESTON, per curiam.]

See (M) pl. 1. S. C. and the note there.

[2. If a *communication* be *between the father of A. and B. for a marriage between A. and the daughter of B.* and *B. affirms* and publiſhes to the father of A. *that he would give to any one who ſhould marry his ſaid daughter with his aſſent* 100 *l.* and after *A. marries the ſaid daughter*, yet he ſhall have no action upon this aſſumpſit, becauſe B. *did not mention to whom he made the promiſe*. Trin. 3 Jac. B. R. between WEEKE AND TYBOLD, per curiam.]

Such promiſe was made to the after-huſband's father to pay him 10 *l.* and the huſband brought the action, and it was agreed by Richardſon and Yelverton, nullo contradicente, that the action well lies for the ſame; and *the party to whom the benefit of the promiſe accrues may bring the action.* Hett. 30. Trin. 3 Car. C. B. Provender v. Wood.

[3. If a man *promiſes* to *J. S. to pay his daughter* 40 *l. at her marriage*; ſhe marries; *ſhe and her huſband* ſhall *not* have any action upon this promiſe, *but the father*. Paſch. 5 Jac. B. R. between ARCHDALE AND BARNARD, adjudged.]

[4. If *C. is indebted to A.* and *D. is indebted to N. in* 20 *l.* and *C. at the requeſt of D. pays the* 20 *l. for him to N. and appoints D. to pay ſo much over to A. for him*, and *D. in conſideration of the premiſes, promiſes to pay the* 20 *l. to A.* A. cannot have an action upon the caſe upon this promiſe againſt D. for he is a *ſtranger* thereto, and there is no conſideration for any aſſumpſit to him. Trin. 4 Jac. B. R. between RICLY AND DENNET, adjudged.]

‡ Fol. 31.

[5. If *A. and B. are bound* in an obligation *to pay to C.* 20 *l.* ‡ *when* he comes to the age of 21, and after *A. makes B. his executor*, and dies, and *B. having aſſets aſſigns them to D.* and in conſideration of this aſſignment *D. promiſes to C. to pay to him the* 20 *l. when* he comes to the age of 21; C. when he comes to the age of 21, ſhall have an action upon the caſe upon this promiſe againſt D. though

though no conſideration comes from C. for if a *man delivers money to J. S. to pay over to B. in ſatisfaction of a debt due to him*, this raiſes a debt to B. and cannot be revoked, and ſo here. Paſch. 1649, between DISBORN AND DENABY, adjudged; this being moved in arreſt of judgment after verdict upon non-aſſumpſit for the plaintiff. Intratur Hill. 24 Car. Rot. 1010.]

[6. Upon *a communication of marriage between the daughter of A. and the ſon of B.* A. promiſes B. in conſideration that *B. will aſſure* 40 *l. a-year to his ſon, and* alſo convey *a jointure to the daughter of* A. that *then A. will give* to the ſon of B. *with his daughter* 100 *l.* in marriage; in this caſe the father, to whom the aſſumpſit was made, ſhall have the action, and not the ſon. Mich. 22 Car. B. R. between * BAYFIELD AND COLLARD, adjudged; this being moved in arreſt of judgment, where the caſe was the ſame in effect with this. Intratur Trin. 22 Car. Rot. 673. Norf. where the *promiſe* was made *after marriage for a further proviſion* of maintenance, *that the father ſhould give* 50 *l. to the huſband, and the other ſhould pay to the wife* 100 *l.* after the death of her huſband, if he died in the life of his wife, and the action was brought by the adminiſtrator of the father of the wife after the death of her huſband, living the wife. Contra Mich. 40, 41 Eliz. B. R. between † HAWES AND LEVETT, per curiam. But there a judgment is cited to the contrary.]

* See tit. Condition (A. d.) pl. 25. Playfield v. Collard, S. C. but there it is ſtated as an agreement after marriage.—Aſſ. 1. Bafield v. Collard, S. C. A. died, and the ſon of B. died, and aſſumpſit was brought by the adminiſtrator of A. and held that the action lay for the adminiſtrator; and agreed alſo that it might have been brought by the daughter.——Sty. 6. Anon. S. P. and ſeems to be S. C. adjudged accordingly.——S. C. cited Arg. Hard. 42.

Where the intended huſband, in conſideration of a marriage with the daughter of J. G. *promiſes J. G. to make a jointure on his daughter*, there as well the daughter as the father may bring the action; per Brampſton Ch. J. Mar. 73. Mich. 15 Car. in pl. 110.

† Mo. 550. pl. 740. LEVER v. HEYS, S. C. Popham and Fenner held that the ſon ſhould have the action; but Clench e contra, abſente Gawdy.——Cro. E. 619. pl. 8. Levet v. Hawes, S. C. adjornatur.——Ibid. 652. pl. 11. S. C. adjornatur; but ſays that it was afterwards adjudged for the defendant.—S. C. cited Cro. E. 849. in pl. 3. ſays it was adjudged that the action brought by the father for non-payment of the money to the ſon, was adjudged not to be maintainable.——Het. 176. S. C. by the name of Hadves v. Levit, but not adjudged.

[7. If *A. delivers* 20 *l. to B.* and in conſideration thereof B. *aſſumes* and promiſes *to A. to* cauſe and *procure J. S. to pay the ſaid ſum* of 20 l. *to J. D. a ſtranger, upon a certain day*; if J. S. does not pay the ſaid money to J. D. A. who delivered the money, ſhall have an action upon the caſe againſt B. upon this promiſe. Paſch. 11 Car. B. R. between OSMOND AND CROSSING, adjudged upon a demurrer; but this was not moved. Intratur Hill. 11 Car. Rot. 348.]

So if A. covenants with B. that C. a *ſtranger* ſhall *pay to D. a ſtranger*, D. has no remedy to come at the money, but the covenantee ſhall have the action of covenant for non-payment; per Coke Ch. J. Roll Rep. 197. pl. 38. Paſch. 13 Jac. B. R. in caſe of Quick & Harris v. Ludborough.

But where a man promiſed to one *to make ſatisfaction of all debts which he owed to another, who was then abſent*, he to whom the ſatisfaction was to be made brought the action on the caſe, and good. Het. 177. cites 43 & 44 Eliz. Rixon v. Horton.

But where wages were due to A. from the Eaſt India Company, *he orders B. to receive the money, and pay it to C. to whom he is indebted*; *C. brings an indebitatus aſſumpſit againſt B.* At the trial at Guildhall, Holt Ch. J. ſaid that the action could not be maintained by C. whereupon the plaintiff was nonſuited. 11 Mod. 241. pl. 16. Trin. 1709. 8 Ann. B. R. Clifford v. Berry.

[8. If A. who is the *uncle of B. an infant, delivers* 12 *l. to J. S. to educate B* the infant, and in conſideration thereof *J. S. promiſes*

miſes to educate B. and alſo *at his full age to pay to* him, viz. *B. the ſaid* 12 *l.* B. when he comes to his full age, may have an action upon the caſe againſt J. S. for the 12 l. if he does not pay it according to his promiſe; * for the uſe of the money in the mean time was the conſideration of the education, and the money was to be paid to B. Paſch. 13 Car. B. R. between OLDHAM AND BATEMAN, adjudged per curiam; this being moved in arreſt of judgment.]

Sty. 156. Mich. 1649. Vaux v. Steward. Roll Ch. J. held the promiſe intire, and ſo the action was well brought; but adjornatur.—— Ibid. 157. S. C. Roll Ch. J. continued of the ſame opinion; but upon a caſe cited out of Yelverton to the contrary, the court ordered the caſe to be brought, and in the mean time they would adviſe.—— Ibid. 203. Vaux v. Draper, S. C. and Roll Ch. J. Nicholas, and Aſke held the conſideration intire, and not to be divided; but Jerman J. e contra; and judgment for the plaintiff, niſi, &c.

[9. If in an action upon the caſe by A. and B. againſt C. it be recited in the *declaration, that whereas certain* particular *cattle belonging to A. and other* particular *cattle belonging to B. were taken away by perſons unknown, and in conſideration of* 10 *l. given by A. and B. to C.* C. aſſumed and *promiſed to procure the ſaid cattle to be reſtored* to A. and B. and becauſe the cattle were not reſtored they brought this action; this action is well brought jointly by A. and B. though the cattle which belonged to A. ought to be reſtored to him, and the other cattle to B. and ſo the thing to be performed is ſeveral, and not joint; yet inaſmuch as the contract is joint, and the conſideration joint, and it is not known how much the one gives, and how much the other, the action is well brought jointly. Hill. 1649. between IVANS AND RAANS, plaintiffs, againſt DRAPER, adjudged, this being moved in arreſt of judgment. Intratur Trin. 1649. Rot. 1104.]

S. C. cited Arg. Godb. † Fol. 32. 361. pl. 453.—S.C. cited All. 1. Mich. 22 Car. B. R. per cur.

[10. If *A.* be *in execution at the ſuit of B.* and *C. a ſtranger* comes to the wife of B. in the abſence of B. and *promiſes the wife that if B. her huſband will diſcharge A.* out of execution, that *he will pay the debt* † at *ſuch a day* to B. *if A. does not pay it before;* and after B. comes home, and his wife acquaints him with the ſaid aſſumpſit, and he agrees thereto, and thereupon diſcharges A. out of execution, this is a good aſſumpſit, whereupon B. the huſband may have an action, though the huſband gave no command or authority before to the wife to make the agreement; for the agreement thereto after is ſufficient. 27 H. 8. 24. adjudged. TATAM'S CASE.]

‡ Cro. E. 369. pl. 7. Hill. 37 Eliz. B. R. Jordan v. Jordan, S.C. adjudged for the defendant, becauſe he declares of a promiſe made to B. and not to himſelf.

[11. If *A. appoints B. an attorney to ſue out a latitat againſt J. S.* at his ſuit *for a debt due* to him by J. S. and to arreſt him, and *B. accordingly takes out a latitat, and ſhews it to J. S. and his intent to arreſt him* thereupon, upon which *J. M. promiſes B. that if he will forbear* to arreſt J. S. *he will pay the debt* at a certain time to A. whereupon B. forbears to arreſt him, and after *A. agrees* thereto, and brings an action upon the caſe againſt J. D. [M.] upon his promiſe; and it ſeems it lies, though the attorney had no authority to take his promiſe before it was made, for the agreement thereto after is ſufficient. Contra between ‡ JURDAN AND JURDAN, adjudged upon a demurrer.]

[12. If

[12. If A. diſcourſes with B. about his ſale of land to B. and after *B. aſſumes* and promiſes *to C. the wife* of A. *in conſideration that ſhe will not hinder* the ſaid A. *her huſband to levy a fine to him* of the ſaid lands, *to pay to C.* 10 *l. or to give her a riding-ſuit*: if the wife does not hinder the huſband, but he levies the fine accordingly, the huſband and wife may have an action upon this promiſe; for the promiſe is laid in the declaration to be made to the wife, for they may join at the election of the huſband. Paſch. 11 Car. B. R. between FAWCETT AND CHILDERS, per curiam adjudged, this being moved in arreſt of judgment.]

See (U) pl. 19. S. C.

[336]

[13. If *A. gives goods to B. of the value of* 80 *l. out of which he ſhould pay to C.* 20 *l.* if B. does not pay the 20 l. to C. C. may have an action upon the caſe againſt B. and *declare that he was indebted to him in* 20 *l. for goods of the value of* 80 *l. are given to him by A. out of which he ſhould pay* 20 *l. to C.* for when goods of the value of 80 l. are given to B. by agreement between him and A. that he ſhould pay 20 l. to C. this *becomes a debt to C.* as if A. deliver 20 l. to B. to pay over to C.—C. may have an action of debt or account, or an action upon the caſe, upon a promiſe for it againſt B. Mich. 1651. between STARKY AND MYLNE, adjudged per curiam; this moved in arreſt of judgment. Intratur Trin. 1651. Rot. 1701.]

Sti. 296. Starkey v. Mill S.C.—So in aſſumpſit, for that one *delivered* 10 *l. to the defendant to deliver to the plaintiff*, and the *defendant promiſed the plaintiff to pay it unto him*. Ruled that aſſumpſit does not lie. But Walmſley ſaid, that if the plaintiff had given a day for payment of it, it had been a good conſideration. Cro. E. 380. pl. 31. Hill. 37 Eliz. C. B. Howlet v. Osborn.

14. A. *ſold land to B. at an undervalue*, afterwards *J. S. the uncle of A. at A.'s requeſt treated with B. for a re-conveyance to A. and promiſed to give B.* 50 *l.* whereupon *B. promiſed to re-convey*; J. S. tendered the 50 l. at the time appointed, but B. refuſed it. A. brought action on the promiſe, which Clench thought was ill; becauſe the promiſe was to J. S. and not to A. But Manwood Ch. B. and Shute, held that it ſhall be *intended the agreement of A.* though made by J. S. And the count ſets forth that it was ad requiſitionem of A. and ordered judgment for the plaintiff, niſi, &c. Sav. 23. pl. 57. Paſch. 24 Eliz. Sadler v. Paine.

So where A. promiſed to B. that *in conſideration B. will make unto A. a leaſe of ſuch lands*, that *A. will aſſign the ſame to B.'s ſervant*, if A. will not make the leaſe the ſervant ſhall have the action on the *promiſe*, and not B. Arg. 2 Le. 205. pl. 255. cites it as 25 Eliz. Crew's caſe.

15. In conſideration of a *marriage between A.'s ſon and B.'s daughter, A. promiſed to give* 100 *l. ſtock to his ſon, and B. promiſed to give* 100 *l. in money*. B. paid the money, but A. did not give the ſtock. It was adjudged that the action was maintainable by B. the daughter's father. Het. 176. cites it as the caſe of CARDINAL v. LEWIS; and the court ſaid they would ſee that record.

S. C. cited as adjudged. Cro. E. 652. in pl. 11.

15. Aſſumpſit, whereas the *defendant's ſon had aſſaulted and beat the plaintiff, of which he complained to a juſtice of peace, and required the peace*, &c. the father, *in conſideration the plaintiff would deſiſt his complaint againſt his ſon, promiſed* the plaintiff *that his ſon ſhould keep the peace againſt the plaintiff and W. R. the plaintiff's ſon; and yet the ſaid ſon had aſſaulted and wounded the ſaid W. R. the plaintiff's ſon*, whereby he loſt his ſervice. The court held it no good conſideration,

tion, becauſe the battery of the ſon is not any ground of action to the father, unleſs he had ſhewed he was his ſervant, which he hath not done; and therefore it was adjudged for the defendant. Cro. E. 849. pl. 3. Mich. 43 & 44 Eliz. B. R. and 881. pl. 13. Paſch. 44 Eliz. B. R. Rippon v. Norton.

16. *A ſuit being commenced* the *defendant promiſed the plaintiff's attorney on the behalf of the plaintiff that he would pay*, &c. in conſideration, &c. Afterwards the *plaintiff brought an action* upon the caſe, *and declared ſpecially*, as here, and not generally, as of a promiſe made to himſelf; and held good. And it was ſaid it would be *good either way*. Latch. 206. Trin. 3 Car. Legate's caſe.

17. *A. ſold a houſe to B.* and *in conſideration thereof B. promiſed to pay, &c. to A. and C.* In an action brought by A. and C. it was adjudged to be no good conſideration to C. Cited by Windham, Keb. 64. as 24 Car. 1. the caſe of Evans v. Jampney.

18. The count was that *A. deſired B. to lend C.* 40 *l.* who lent it accordingly, and *A. repaid to B. the* 40 *l.* ſo lent, and then *A.* [337] *brought an action againſt C. in his own name* for this money; and the judge held the action did well lie, as lent by himſelf. Clayt. 133. pl. 240. before Thorpe J. 1649. Jackſon v. Dickenſon.

As when in conſideration of 10 s. given by two men, a man aſſumes to do ſomething to or for them ſeverally, or to or for a ſtranger.

19. Caſe, &c. the *plaintiff* had *delivered the goods of T. S. to the defendant, who in conſideration of ſo much money paid to him by the plaintiff, promiſed to deliver them to T. S. the right owner*, but did not; adjudged, that either the deliverer or the owner might bring the action, but they cannot join where the conſideration was not joint. Hardr. 321. Hill. 14 & 15 Car. 2. in the exchequer, Bell v. Chaplin.

But if the conſideration be ſeveral; as for example, in conſideration of 10 *s. paid by one, and* 10 *s. by another*, there they muſt ſever in the action. Ibid.

Ibid. 212. Jones ſaid, he remembered this caſe to be ſo adjudged; but Scroggs Ch. J. ſaid he then was, and yet is, againſt the opinion of that judgment; and Jones J. ſaid that he never was ſatisfied with it.

20. *If you will marry me I will pay your children ſo much.* An action being brought by the children was adjudged not maintainable. 2 Lev. 211. cites Hill. 22 & 23 Car. 2. C. B. Novies (or Norris) v. Pine.

2 Jo. 103. S. C. cited Arg. but it was ſaid that judgment of nil capiat was not entered, and the court here were of opinion that it ought not.

2 Lev. 210. S. C. adjudged accordingly in B. R. and ſays that error was immediately brought, and that Trin. 31 Car. 2. the judgment was affirmed in the exchequer-chamber.

21. Aſſumpſit, for that the father of his wife was ſeiſed of lands ſince deſcended on the defendant as heir, and *the father in his lifetime being about to fell* 1000 *l. worth of timber to raiſe a portion for his* ſaid *daughter*, the ſaid *defendant promiſed the father, that in conſideration he would forbear to fell the timber he would pay the ſaid daughter* 1000 *l.* &c. It was moved in arreſt of judgment, that the father, and not the ſon-in-law and his wife, ought to have brought the action. The court ſaid, it might be another caſe if the money had been to have been paid to a ſtranger; but there is ſo near a relation between father and child, and it is a kind of debt to the child to be provided for, ſo that the plaintiff is plainly concerned; and per tot. cur. judgment for the plaintiff. Vent. 318.

Mich. 29 Car. 2. and 332. Mich. 30 Car. 2. B. R. Dutton v. Poole. Raym. 302. Trin. 31 Car. 2. in the exchequer, S. C. and judgment affirmed. ——— 2 Jo. 102. S. C. in B. R. and the court held the action well maintainable by the plaintiff; for the benefit belongs to the daughter, and ſhe may releaſe it. ——Freem. Rep. 471. pl. 646. S. C. adjornatur. ——— 3 Keb. 786. pl. 38. 814. pl. 34. 830. pl. 62. 836. pl. 71. B. R. the S. C. adjudged for the plaintiff niſi.

22. Cuſtom that none ſhall *trade in a town* beſides perſons free of the gilda-mercatoria there; quære if valid in any place, except London? but if it is, the action ought to be brought by *the guild*. 1 Salk. 204. pl. 2. Paſch. 4 Annæ B. R. Mayor of Winton v. Wilks.

(Z. 2) What ſhall be ſaid to be within the Promiſe.

1. A. Promiſed his daughter's huſband that he *would give her as good a portion at his death as to any of his children.* Doderidge and Jones thought that this promiſe ſhall have no retroſpect to what A. had given to any child before the promiſe, but ſhould extend only to what he ſhould afterwards give; and Doderidge ſaid that to make other conſtruction would be doing violence to the words, for then the word (daret) ſhould be taken for (dediſſet.) But Whitlock held that the plaintiff ſhould have according to the beſt gift in this caſe, whether the ſame was before or after the promiſe, and that the intention is ſuch. Adjornatur. Poph. 183. Mich. 2 Car. B. R. Arnold v. Dickſon. [338]

2. If one promiſes *to repay his ſon's tutor* in the univerſity *all that he ſhall expend for his ſon*, and afterwards the ſon dies, the father ſhall be obliged to repay the tutor *money expended* by him *for the ſon's funeral*; per Jones J. to which Doderidge J. agreed expreſsly. Palm. 560. Trin. 4 Car. B. R. Arg.

3. Aſſumpſit, *in conſideration ſhe would put her daughter to be inſtructed in needlework. The defendant promiſed to pay for a year's board*; and the plaintiff averred that *ſhe did put her daughter, &c. for three quarters of a year.* It was moved in arreſt of judgment, that here is a variance between the promiſe and the agreement; and that the promiſer might imagine the daughter could not be taught in leſs time than a year. But the court held, that if there is any variance in the agreement, it is for the advantage of the defendant, (viz.) to pay leſs than he ought; for *the meaning* of it *is, that he would pay for her board not exceeding a year*; and if the daughter had been there but a month, and then had died or run away, the defendant would be chargeable for it within this aſſumpſit. Sid. 225. pl. 19. Mich. 16 Car. 2. Game v. Gunſton. Lev. 142. Keyme v. Goulſton, S. C. adjudged for the plaintiff. ——Keb. 792. pl. 49. Came v. Gunſton, S. C. adjornatur. —Ibid. 802. pl. 71. S. C. adjudged for the plaintiff.

4. An *agreement* was made to *pay 2 s. for every quire of paper his clerk ſhould copy out*; there can be no apportionment for odd ſheets, and for that reaſon a judgment was reverſed. All. 9. Paſch. 23 Car. B. R. Needler v. Gueſt. Sty. 12. S. C. and judgment ſtayed. — S. C. cited and agreed per cur. Sid. 226. Mich. 16 Car. 2. B. R. in pl. 19.

(Z. 3) Aſſumpſit. Declaration. How the Conſideration ought to be ſet forth.

1. CASE, for that one *B. was indebted to him in* 10 *l. for work*, &c. *and died inteſtate, and that defendant adminiſtred*, and that the *defendant did promiſe that if the plaintiff would forbear till Michaelmas, he would pay him*, and ſhews that he did forbear the debt, &c. After verdict, it was objected that the conſideration was uncertain, becauſe the plaintiff did *not ſet forth what ſhould be paid, nor to whom, but generally that the defendant would pay him*; and that the conſideration was that parceret indefinitely. Sed non allocatur; for it ſhall be intended of the debt, which is the ſubjecta materia; and that it was alleged generally, that he forbore, and did not ſhew how. But by Doderidge J. iſſue ſhall not be taken whether he forbore, or not, but you ſhall ſhew how he ſued you. 2 Roll. Rep. 488. Hill. 22 Jac. B. R. Gardner's caſe.

2. Aſſumpſit was, that *in conſideration that the plaintiff daret diem ſolutionis, the defendant ſuper ſe aſſumpſit*; and becauſe he doth *not ſay in facto, that he had given day*, it was adjudged that no ſufficient conſideration was alleged; *but* if the conſideration were *quod cum indebitatus*, &c. the ſame had been a good conſideration without any more; for that implies a conſideration in itſelf. Godb. 13. pl. 20. Paſch. 24 Eliz. B. R. Anon.

3. The count was, *that W. the defendant's brother on his deathbed called the defendant, whom he had made his executor, and deſired him to pay the plaintiff's debt in two months time*; *and that in conſideration thereof he promiſed.* The court held that there was no good
[339] conſideration ſet forth; for it is *not ſaid that in conſideration that W. made the defendant his executor*, &c. 3 Le. 129. pl. 181. Trin. 28 Eliz. C. B. Palmer v. Waddington.

3 Le. 91. pl. 131. Paſch. 26 Eliz. C. B. the S. C. in totidem verbis.

4. The count was, that in conſideration that *quædam pars domus, &c. was in decay, and that the plaintiff would repair the ſame, defendant promiſed to pay*, &c. and declared that eandem partem domus prædictæ reparavit. It was moved that quædam pars domus was too general in the count, and that he ought to have *ſhewed ſpecially what part in certain*, as hall, chamber, &c. Sed non allocatur. 2 Le. 53. pl. 72. Mich. 29 Eliz. Merry v. Lewis.

5. Aſſumpſit, in *conſideration that at the requeſt of the defendant he would deliver as many quarters of malt to J. S. to his uſe as he would receive or have before 1ſt Auguſt, the defendant promiſed to pay tales denariorum ſummas, &c. before the ſaid 1ſt day of Auguſt*, and *alleges he delivered ſo many quarters, each of ſuch value.* Though he doth not promiſe any ſum certain, but tales denariorum ſummas, without ſaying what, yet it was held good; for per Wray, when the plaintiff *ſhews the value of every quarter*, it is intended he ſhould pay according to the rate. And judgment for the plain-

plaintiff. Cro. E. 149. pl. 18. Mich. 31 & 32 Eliz. B. R. Royle v. Bagſhaw.

6. Aſſumpſit, for that *in conſideration he by his ſervant had delivered to the defendant two bills of* 300 *French crowns, amounting to* 80 *l. to be received at Roan* in Normandy *to his uſe*, the *defendant promiſed to pay him* 61 *l.* It was moved that there is no conſideration; for it *appeareth not how he ſhall recover them*, if he be denied payment, *nor that they were bills made to the plaintiff, nor what benefit he may have by them.* But adjudged in C. B. to be a good conſideration, and well alleged; and the court of B. R. held ſo too. Sed adjornatur. Cro. E. 155. pl. 37. Mich. 31 & 32 Eliz. Perſon v. Hickled.

Upon moving this matter again, it was aſſigned further for error, that it was *not all alleged for what the money contained in the bills was due, nor to whom*; and that it might be they were bills made to the defendant himſelf, and due to him, and ſo no conſideration. And judgment was reverſed. Cro. E. 170. pl. 7. Hill. 32 Eliz. B. R. Penſon v. Hickbed, S. C. ——— 4 Le. 99. pl. 203. S. C. adjornatur.

7. Aſſumpſit. The plaintiff declares, that *in conſideration the defendant ſhould enjoy ſuch goods*, &c. *he would pay* the party 25 l. The jury upon non aſſumpſit found, that he promiſed to pay, if he enjoyed ſuch goods, &c. and it was adjudged for the defendant, becauſe the plaintiff *declared of an abſolute promiſe*, and the jury *found a conditional promiſe*. Cro. E. 149. pl. 19. Mich. 31 & 32 Eliz. B. R. Muſtard v. Hopper.

Le. 173. pl. 241. S. C. the judgment was ſtayed.

8. The count was, that in conſideration the plaintiff *reſpectuaret the defendant pro ſolutione debiti prædicti per ſpatium unius ſeptimanæ tunc proximè ſequentis* to pay the debt to the ſaid plaintiff *modo ſequenti, viz. one moiety within one week after, and the other moiety at the end of the ſaid week*, and counted that he did forbear by the ſpace of a week. It was objected that the conſideration was not ſufficient, *without ſaying that he had forborn for a week next following*, as laid in the count. Sed non allocatur; for it ſhall be intended. It was alſo objected, that the declaration is *repugnant*, by ſetting forth that the conſideration was the *forbearing for a week, and that he promiſed to pay within a week.* Sed non allocatur; for the week in the aſſumpſit ſhall be conſtrued to be the week after the week in the conſideration. 2 Le. 112. pl. 149. Trin. 32 Eliz. B. R. Brown v. Ordinacre.

9. Aſſumpſit, for that the *defendant was poſſeſſed of divers goods of the plaintiff's, and in conſideration the plaintiff would forbear the goods the defendant promiſed to deliver them within* 6 *months.* It was ſaid there was no conſideration; for he does *not ſhew what goods they were*, and ſo uncertain. But per cur. there needs not any certainty to be ſhewn of them; for he is not to recover the goods in ſpecie, but damages for them. And adjudged for the plaintiff. Cro. E. 387. pl. 10. Paſch. 37 Eliz. B. R. May v. Alvarez.

[340]

10. J. S. was indebted to T. the plaintiff in 100 l. and *in conſideration that T. would abate* 10 *l. of the debt, and forbear the* 90 *l. reſidue till Michaelmas*, the defendant *promiſed to pay the* 90 *l. then, if J. S. did not*; and alleged that he abated the 10 l. and forbore the 90 l. till Michaelmas. It was demurred, becauſe he did

Goldſb. 146. pl. 65. S. C. but S. P. does not appear.

not ſhew how he abated him the 10 *l. ſo as the court might take conuſance whether it was a ſufficient diſcharge;* and of that opinion was the whole court. Cro. E. 477. pl. 5. Trin. 38 Eliz. B. R. Thornton v. Kemp.

Mo. 539. pl. 707. S. C. but S. P. does not appear.

11. In conſideration the plaintiff would relinquiſh ſuch a ſuit the defendant promiſed, &c. After judgment for the plaintiff, it was aſſigned for error, that the plaintiff ought to have *averred that the action which he was to diſcharge was actionable*, which not being done was held to be error, and the judgment reverſed in the exchequer chamber. Cro. E. 561. pl. 18. Paſch. 39 Eliz. Roſs v. Moor.

12. Aſſumpſit, *in conſideration he would permit the defendant to enjoy ſuch lands for a year, he promiſed to give the plaintiff* 10 *l. for that year;* and alleges in fact that the defendant enjoyed it by his permiſſion; but becauſe it was *not ſhewed what right or title he had to the land to licence the defendant* to enjoy it, it was holden there was no good conſideration or cauſe of action. Cro. E. pl. 28. Mich. 43 & 44 Eliz. C. B. Clerk v. Palladie.

13. Aſſumpſit againſt an executor, *for that his teſtator was indebted* 33 *l. to the plaintiff, and in conſideration the plaintiff would forbear to ſue him till he the defendant ſhould get execution upon ſuch a judgment, he promiſed to pay* the money *upon requeſt.* It was objected, that it did *not appear the teſtator was indebted, or that the defendant had aſſets.* But adjudged that the action is grounded upon the promiſe of the defendant, and it ſhall be intended that he was indebted, otherwiſe the executor would not promiſe. Cro. J. 593. pl. 14. Mich. 18 Jac. B. R. Davis v. Warner.

Godb. 412. pl. 490. S. C. adjudged, that plaintiff nil capiat per billam.

14. The defendant *promiſed to give the plaintiff* 40 *l. to cure him of the pox; however, he promiſed to give him* 10 *l. for his endeavour to cure him.* And in an action brought for this 10 l. the *plaintiff ſet forth that he endeavoured to cure him, but alleged no place where.* Upon a traverſe to the endeavour, and iſſue joined, the plaintiff had a verdict; but the judgment was arreſted. 2 Roll. Rep. 312. Paſch. 21 Jac. B. R. Paine v. College.

S. C. cited Raym. 9. Arg.

15. The plaintiff declared upon a *promiſe to pay him ſuch fees as ſhould be due to him as his attorney in the proſecuting a ſuit for him in C. B.* and ſuch money as he ſhould lay out in ſoliciting a ſuit for him in chancery. Upon non aſſumpſit pleaded, the plaintiff had a verdict, and upon error brought the error aſſigned was, that the plaintiff did *not ſhew particularly what ſums* of money *he had laid out for the defendant, nor to whom paid.* But adjudged that it was not neceſſary ſo to do; and that if he ſhould bring any other action for his fees, or money laid out, the defendant might plead this recovery in bar. Sty. 428. Trin. 1654. Banks v. Prat.

16. A. and B. agreed to *run a horſe-race, and the winner to have of the other* 200*l.* The count was, *whereas the plaintiff had promiſed to perform on his part, the defendant had promiſed to perform on his.* This was adjudged to be good, and ſufficiently certain. Hard. 103. Paſch. 1657. in the exchequer, Ernely v. Falkland (Ld).

17. In

17. In conſideration the *plaintiff would forbear to take his courſe for the monies the defendant promiſed that he would pay them*, it was objected that the words are uncertain, and that he ſhould have ſaid (his courſe in law), and not generally (his courſe.) But Roll Ch. J. held the conſideration certainly enough ſet forth, though the Latin be not very proper; and judgment for the plaintiff, niſi, &c. Sty. 264. Paſch. 1651. King v. Weeden. [341]

18. Aſſumpſit, for that the *plaintiff and H. were bargaining for an horſe*, and the *defendant promiſed that if they agreed on the price he would pay the money*, and that he agreed for ſo much, but defendant has not paid it. It was aſſigned for error, that here was no conſideration; for it is not that he ſhould ſell or deliver the horſe, ſo the plaintiff hath no loſs, nor the defendant any benefit; but judgment was affirmed; for it ſhall be *intended after a verdict, that upon this promiſe the horſe was delivered*; and that the promiſe was the inducement thereto. 1 Lev. 103. Paſch. 15 Car. 2. B. R. Foſter v. Holyman. Keb. 512. pl. 87. S.C. adjornatur. ——Ibid. 627. pl. 106. S. C. and judgment affirmed.

12. In aſſumpſit the plaintiff declared, that in conſideration *that he had done the defendant multum & gratiſſimum ſervitium*, he promiſed to pay the plaintiff 10 l. and alſo in conſideration that he had done him *multa beneficia*, he promiſed, &c. It was moved in arreſt of judgment, that neither of theſe conſiderations were ſufficient, eſpecially the laſt, becauſe there *ought to have been ſome ſervice particularly expreſſed*. And the court for that reaſon held it merely void, and judgment quod querens nil capiat, &c. Vent. 27. Paſch. 21 Car. 2. B. R. Moor v. Lewis. Sid. 413. pl. 13. Cluſſe v. Moor, S. C. and judgment ſtaid. ——See 2 Keb. 488. pl. 32. and 507. pl. 82. S. C.

20. Aſſumpſit, for that the defendant *promiſed to give him ſo much pro opere ſuo facto*. It was moved in arreſt of judgment, that here is nothing to found an aſſumpſit upon; for (opus factum) may be any neighbourly kindneſs, and ſo the declaration too general; but adjudged that *it is the ſame as pro labore ſuo*, which hath been held good, and being *after a verdict, it ſhall be intended that ſuch labour as implied a conſideration was given in evidence*. Sid. 425. pl. 9. Mich. 21 Car. 2. Ruſſel v. Collins. Mod. 8. pl. 26. S.C. adjudged for the plaintiff. —Vent. 44. Ruſhden v. Collins, S. C. adjudged accordingly.— 2 Keb. 552. pl. 36. S.C. adjudged for the plaintiff. And the court ſaid this is not like to the words *pro multis beneficiis*, which has been ruled ill and uncertain.

21. In action *againſt an heir on the bond of his anceſtor, ſetting forth, that the defendant, in conſideration the plaintiff would forbear to ſue for ſuch a time, promiſed to pay* him; the plaintiff ought to *ſhew that the anceſtor was bound*, or otherwiſe he cannot have judgment; and it ſhall not be intended after a verdict. Vent. 159. Mich. 23 Car. 2. B. R. Barber v. Fox. 2 Sand. 136. S. C. accordingly.— See tit. Heir (K. 2) pl. 13. and the notes there.

22. Caſe, &c. for that the *plaintiff pretended a title to certain goods in the poſſeſſion of S. P. and claimed them to be his own, and intending to remove them, the defendant, in conſideration that the plaintiff would ſuffer them to continue there, promiſed to ſee them forthcoming*, and not imbezzled, &c. It was objected that here was no good conſideration, becauſe the plaintiff did *not ſet forth any property* in the goods, but only that he pretended to, and claimed, them as his own. Sed non allocatur; for after a verdict it ſhall be

be intended that he proved that they were his own. Vent. 211. Paſch. 24 Car. 2. B. R. Evans's caſe.

Skin. 409. pl. 4. Hebbert v. Corſthorp, S. C. Exception was overruled; for opere & labore is a matter which is not debt founded upon a ſpecialty.——Carth. 276. S. C. and judgment affirmed.

23. In aſſumpſit, the error aſſigned was, that it was *pro opere & labore, without ſhewing what.* Sed non allocatur; for it is enough to ſhew that it was upon a ſimple contract upon which this aſſumpſit can ariſe; and the court will not intend it to be an illegal conſideration. 12 Mod. 50. Hill. 5 W. & M. Hibbord and Coulthrop.

[342] (Z. 4) Declaration in Indebitatus Aſſumpſit. Not ſaying how much for each, or for what.

Noy. 146. in S. C. ſays it was adjudged in Mich. 7 Jac. B. R. IVERST v. INGRAM, that he ought to ſhew how he became indebted, viz. for merchandizes, or for ready money. ——An *aſſumpſit* to pay a ſum *pro diverſis mercimoniis venditis*, is good, *without mentioning the particular ware* in the declaration; *but* an *indebitatus aſſumpſit is not* good, *without ſome* general or ſpecial *conſideration mentioned* in the declaration. Jenk. 196. pl. 3.

1. IN caſe on an indebitatus exiſtit of an aſſumpſit, the plaintiff demurred becauſe it was *not ſhewn how, and for what things he was indebted.* And the court were clearly of opinion againſt the plaintiff without argument. Noy 146. Hill. 5 Jac. Tyrwhite v. Kinaſton.

Error on a judgment in indebitatus aſſumpſit for ſo much money due and unpaid, and reverſed, becauſe not *ſaid upon what account.* Show. 347. Paſch. 4 W. & M. Porter v. James.——S. P. For if it is for *rent, or by ſpecialty, or by record*, a general aſſumpſit lies not. But if it had been, that being indebted *for divers wares ſold*, or the like contract, it had been well enough. Cro. J. 206. pl. 2. Paſch. 6 Jac. B. R. affirmed in error in cam. ſcacc. Woodford v. Deacon.—The *difference* is, where it is *the ground of the action*, and where it is *only inducement to* the action. In the laſt caſe it is good without ſhewing how. Cro. J. 548. Auſtin v. Bewley.——Jenk. 330. pl. 59. S. C.——Cro. J. 213. Buckingham v. Coſterdine.——Cro. J. 642. Mayor v. Harte.

Yelv. 175. S. C. but S. P. does not appear.

2. Aſſumpſit, for that he was *indebted in* 40 *l. for diverſe ſums of money to him lent, and for divers wares before had, and for certain ſums of money to A. ad inſtantiam defendentis paid for the debt of the defendant, he promiſed to pay*, &c. It was moved that it *not* being *ſhewn how much he was indebted for each cauſe*, is too general. Sed non allocatur; for that is not material, it being that he was indebted ſo much in toto. Cro. J. 245. pl. 3. Trin. 8 Jac. B. R. Rooke v. Rooke.

Jenk. 292. pl. 37. 9 Jac. S. C. adjudged for the plaintiff, and affirmed in error.

3. Aſſumpſit *for that the defendant was indebted to the plaintiff in* 30 *l. the defendant, in conſideration that the plaintiff had given day to the defendant for* 6 *weeks, did aſſume to pay*, &c. this is a good declaration, *without ſhewing for what the defendant was indebted;* for the debt is not in queſtion. But *where the debt in itſelf is the only conſideration* of the promiſe, *it muſt appear* to the court; *but here the forbearance makes the conſideration*, and the debt is allowed in the promiſe being actual, and alſo found by implication in the verdict. Hob. 18. pl. 32. Mich. 9 Jac. Woollaſton v. Webb.

Hob. 88. pl. 118. Trin. 9 Jac.

4. A. and B. *account together for reckonings between them, B. is found indebted* 100 *l. to A.* and *upon this B. aſſumes to pay it* to A. at

at a certain day, and does not pay it; upon this A. brings an aſſumpſit. The defendant *pleads non aſſumpſit*. It is found for the plaintiff; he has judgment, and affirmed in error; for the account confeſſes the debt, and the verdict alſo proves it. Jenk. 297. pl. 50.

Brinſley v. Partridge, S. C. the error aſſigned was, becauſe it was *not ſhewn for what the money upon the ſaid account was due*, whether for money received or lent, or for wares bought and ſold.

Aſſumpſit, for that *upon infimul computaverunt, the defendant was found indebted to the plaintiff in 20 l. and in conſideration thereof promiſed to pay*, &c. *without ſpecifying the particlar matters and cauſes*. Per tot. cur. in regard the account may be for divers matters and cauſes, and ſeveral matters may be included therein which in pede compoti are reduced to a certain ſum, it is a ſufficient ground to maintain aſſumpſit thereupon; and judgment for the plaintiff. Cro. C. 116. pl. 9. Trin. 4 Car. B. R. Homes v. Savil.——Het. 106. Trin. 4 Car. Holms v. Chenie, S. C. adjornatur.——Ibid. 113. S. C. adjudged for the plaintiff.——Litt. Rep. 148. S. C. but adjornatur to ſearch precedents.——Palm. 441, 442. Trin. 2 Car. Goodwin v. Willoughby, S. P.——Lat. 141, 142. S. C. & S. P.——Poph. 177. S. C. & S. P.——Noy 81. S. C. & S. P.

5. Debt will not lie upon a general indeb. aſſ. *without ſhewing the particulars*, by reaſon of the inconvenience which might follow by forcing the defendant to be ready to give anſwer to the plaintiff to the generality, and therefore the action ſhould be ſpecial for the particular things. Godb. 186. pl. 268. Paſch. 10 Jac. C. B. Gray's-Inn-Bakers v. Occould.

[343]

6. Aſſumpſit, for that the defendant, in conſideration he was indebted to the plaintiff in 10 l. *for agiſtment of beaſts, and for wheat and other wares by him had and received*, promiſed to pay, &c. After judgment for the plaintiff it was aſſigned for error, that *no certain cauſe was aſſigned of the debt*; but judgment was affirmed; for though it be not ſufficient to ſay generally that he was indebted, becauſe it might be for rents upon leaſes, or debts upon ſpecialties, yet this is certain enough; for as well the wares as the paſturing and wheat are perſonal things, for which aſſumpſit may lie, and may be turned into damages, and requires not ſo much certainty as if it were an action of debt upon the very contract. Hob. 5. Trin. 10 Jac. in the exchequer-chamber. Gardiner v. Bellingham.

Roll. Rep. 24. pl. 1. Bellinger v. Gardiner, S. C. and judgment affirmed per omnes. But Tanfield ſaid that if the declaration had been *pro diverſis aliis rebus*, he thought it would not be good.—See Sid. 182. pl. 2. Paſch. 16 Car. 2. B. R. Cooke v. Samburne.

7. Aſſumpſit, for that *J. S. being indebted to the plaintiff, for which he purpoſed to ſue him.* The *defendant in conſideration he would forbear for a reaſonable time, promiſed to pay* the debt *if J. S. did not*; here, though it is *not ſhewed how J. S. came to be indebted to the plaintiff, nor what certain time he did forbear*, yet the declaration was good; for by requeſting forbearance he took ſpecial notice of the debt what it was, and the court ſhall determine what is a reaſonable time, and the plaintiff having forbore 8 years is a reaſonable time; and judgment for the plaintiff. 3 Bulſt. 206. Trin. 14 Jac. Lingen v. Broughton.

Roll. Rep. 379. pl. 38. S. C. The action was brought againſt executor for a debt due from his teſtator, and he promiſed payment if plaintiff would forbear a reaſonable time, and judgment accordingly for the plaintiff.——Mo. 853. pl. 1167. S. C. adjudged for the plaintiff.

8. Caſe, for that B. *indebitatus fuit* to him in ſo much, and he had arreſted B. and in conſideration the plaintiff at C.'s requeſt would diſcontinue this ſuit, he would pay the debt; but did *not ſhew*

Cro. J. 396. pl. 2. Therne v. Fuller, S. C. & S. P.

agreed by all the juſtices, becauſe the debt is collaterally due by another,

ſhew the cauſe of the debt. Coke Ch. J. thought it well enough in this caſe, becauſe the *action is grounded on a collateral promiſe,* and the indeb. exiſtit is *an inducement only;* quod fuit conceſſum per Crooke. Roll. Rep. 379. pl. 37. Paſch. 14 Jac. B. R. Thorne v. Fuller.

though it is true that againſt the party himſelf an aſſumpſit lies not upon a general allegation, quod indeb. aſſumpſit, without ſhewing how he was indebted, viz. for wares ſold, or money lent, or ſuch good cauſe. ——— Jenk. 337. pl. 82. S. C. & S. P.

9. In aſſumpſit, for that the *defendant was indebted to him in* 20*l. in conſideration whereof he promiſed to pay,* &c. After verdict and judgment for the plaintiff it was reverſed niſi, &c. becauſe *the cauſe of the debt and aſſumpſit were not ſhewn*; but it was urged that it might be otherwiſe if the promiſe had been to pay on a certain day; for thereby it is agreed that there is ſuch a debt, and the certainty of the day of payment is conſideration ſufficient; to which diverſity Chamberlaine agreed. Palm. 171. Paſch. 19 Jac. B. R. Barker v. Barker.

10. Aſſumpſit, *for that the defendant was indebted to him* 40*l. & ſic indebitatus exiſtens in conſideratione inde aſſumpſit ſolvere upon requeſt.* The plaintiff did *not ſhew for what cauſe he was indebted,* ſo as the defendant knew not what to anſwer, and therefore the declaration was holden not good, and it is not a promiſe in conſideration of forbearance, or a ſpecial promiſe. Adjudged for the defendant. Cro. J. 642. pl. 1. Mich. 20 Jac. B. R. Mayor v. Harre.

[344] 11. Aſſumpſit. *Quod cum indebitatus fuit to him in* 15*l.* in conſideration thereof the defendant promiſed to pay it; it was moved that this general indeb. aſſ. is not good *without ſhewing for what cauſe;* and it was agreed on the other ſide that the declaration had not been good if the defendant had demurred to it; but having *pleaded non aſſumpſit,* and found againſt him, it ſhall be *intended that he aſſumed for ſuch a debt as lies in aſſumpſit.* But many precedents being alleged on both ſides, it was ordered that they be ſearched; and mean time curia adviſare vult. Cro. C. 6. pl. 2. Paſch. 1 Car. C. B. Holme v. Lucas.

12. Aſſumpſit, for that *in conſideration the defendant was indebted to him in* 7*l. he promiſed to pay it.* Reſolved the declaration was not good, becauſe he doth *not ſhew any cauſe of the debt,* viz. *by bond or otherwiſe;* and though it be found againſt the defendant upon non-aſſumpſit, yet the declaration being ill, the verdict doth not help it. Adjudged for the defendant. Cro. C. 31. pl. 2. Paſch. 2 Car. C. B. Foſter v. Smith.

* Lat. 219. Mich. 3 Car. Phuter v. Gunter, ſeems to be S. C.

13. If one *promiſes to pay a debt in conſideration of the debt only,* there *the particular cauſe of the debt muſt be ſhewn;* but *otherwiſe* it is, *if the plaintiff declares that the defendant indebitatus aſſumpſit ſolvere, in conſideration of forbearance of ſuit or payment,* there the particular debt need not be ſhewn, but it is good. Arg. And this difference was agreed by Germin, and he cited * Futter and Conie's case. Adjudged that indebitatus aſſumpſit ſolvere in conſideration of forbearance, is good; for there the debt

debt is only inducement, and the ground of the action is the forbearance. Palm. 561. Trin. 4 Car. B. R.

14. Aſſumpſit, &c. for that the *defendant was indebted to him in* 20 *l. pro præmio on a policy of aſſurance*, &c. and upon a demurrer to the declaration it was objected, that the plaintiff ought to *ſhew a certain conſideration what the præmium was, or how it became due.* Sed non allocatur; for it is as good as an indebitatus aſſumpſit pro quodam ſalario, which has been adjudged good. 2 Lev. 153. 27 Car. 2. B. R. Fowk v. Pinſack. 3 Keb. 575. pl. 9. Penlacks v. Fouks, S. C. adjudged for the plaintiff niſi.

(Z. 5) Declaration in Indebitatus Aſſumpſit. Too general, &c.

1. B. Being *indebted to the plaintiff* in 32 l. *and arreſted* C. the *defendant in conſideration that the plaintiff at his requeſt ad tunc & ibidem, would deſiſt from further proſecuting the ſuit againſt B. and would remit to him his coſts, promiſed to pay that ſum at Michaelmas next, or then to give ſecurity to pay the ſame in 6 months*, and the plaintiff had forborn to proſecute, and the defendant had not paid it nor given ſecurity; exceptions taken to the declaration becauſe the conſideration, *aſſenſit & contentus fuit to forbear*, is no ſufficient conſideration, for he may forbear one day and proſecute the next, ſed non allocatur; for *it is an abſolute forbearance of proſecution that is implied in the words.* It was adjudged for the plaintiff, and that judgment affirmed. Cro. J. 396. pl. 2. Paſch. 14 Jac. B. R. Thorne v. Fuller. Roll. Rep. 379. pl. 37. S. C. but S. P. does not appear. —Jenk. 337. pl. 82. S. C. & S. P. accordingly.

2. Caſe for that the *defendant was taken in execution upon a ca. ſa.* de debito & damnis unde convictus fuiſſet, *and promiſed the plaintiff that if he would conſent that the ſheriff ſhould let him go at large he would pay*, &c. and ſhews that he conſented, &c. It was objected that the declaration did *not ſhew in what court or in what action the conviction was*; for it might be in ſuch a court, or action where a ca. ſa. would not lie. But adjudged for the plaintiff; [345] for by Doderidge, it is the *conſent* to let him go at large which *is the conſideration* of this action, and the conviction is only an inducement to it; and Whitlock J. ſaid there was difference between debt and action on the caſe. 2 Roll. Rep. 495. Hill. 22 Jac. B. R. Cole v. Routh.

3. Indebitatus aſſumpſit *pro diverſis rebus & mercimoniis.* Adjudged that (rebus) is well enough. Jud' pro quer. Freem. Rep. 357. pl. 451. Mich. 1673. Okington v. Tompſon.

4. Indeb. aſſumpſit for *phyſic, wares*, &c. *provided and delivered for the daughter of the defendant, and at his requeſt.* It was moved in arreſt of judgment that this was a collateral promiſe and ſo no debt, and conſequently the declaration ſhould be ſpecial; but adjudged well enough, the phyſic being provided and delivered *for* and *not to* the daughter, which after verdict ſhall be intended to be delivered to the father for his daughter. Raym. 67. Hill. 14 & 15 Car. 2. B. R. Stonehouſe v. Bodville.

The reporter ſays, nota, the declaration was for tithes with ſaying deliberat' or ſold, and yet it was held good, as indebitatus pro equo; for (pro) implies a ſale. Ibid.

5. Indeb. aſſ. *for tithes without ſhewing a ſpecial contract* was held good *after verdict* becauſe the jury have found it, and a ſpecial contract ſhall be *intended*. Sid. 223. pl. 11. Mich. 16 Car. 2. B. R. Wright. v. Berle.

S. P. admitted Hob. 5. in caſe of Gardiner v. Bellingham.

6. In action on the caſe on aſſumpſit a *general indebitatus* is not good; as here it was laid for 20 l. in conſideration *de conſimili ſumma antehinc debit. & inſolut'* &c. and verdict for the plaintiff; but judgment arreſted, becauſe the declaration *ſhews not how it was due*, and it might be by ſpecialty. And then caſe lies not, Sid. 182. Paſch. 16 Car. 2. B. R. Cook v. Samburn.

Indeb. aſſ. for goods *implies vendit' & deliberat'*. Lev. 141. Mich. 16 Car. 2. B. R. Wright v. Beale.

7. Indebitatus *for goods* had from plaintiff, *without ſaying ſold*, and that moved for exception, but over-ruled; for per Holt it would lie for rent or bond. 12 Mod. 308. Mich. 11 W. 3. Moiſy's caſe.

8. Plaintiff declared for *goods and merchandizes to the defendant per eundem the plaintiff* before that time *ſold and delivered*, &c. and did *not ſay the goods of the plaintiff*. But the court was of opinion that the word *indebitatus* did *neceſſarily import* that they were the goods of the plaintiff. Arg. 10 Mod. 331. cites Trin. 12 Ann. B. R. Hicks & Cockum.

9. Plaintiff counted that the defendant was *indebted to him* 10 *l. for the uſe of a coach-horſe of the plaintiff's, delivered by him to the defendant*. It was objected that this delivery did not neceſſarily import a debt; for poſſibly the defendant might be to pay nothing for the uſe of him; but the court were of opinion, that ſuch a delivery muſt be intended as did create a debt. Arg. 10 Mod. 331. cites it as Trin. 1 Geo. Athorpe v. Jones.

(Z. 6) Declaration in Indebitatus Aſſumpſit for Money received to the Plaintiff's Uſe.

See (N. 2)

1. ASſumpſit *in conſideration the defendant had received* 24 *l. of ſeveral perſons to the plaintiff's uſe, he promiſed to pay it on ſuch a day;* it was moved in arreſt of judgment that the declaration was ill, becauſe it is *not expreſly alleged of what perſons* he received the money; but adjudged good becauſe it is a conſideration executed, and ſo not traverſable. Moor 854. pl. 1198. Trin. 14 Jac. B. R. Babington v. Lambert.

Roll. Rep. 391. pl. 11. Beckingham and Lambert v. Vaughan S. C. and S. P. accordingly by Coke and Haughton; and judgment for the plaintiff.

2. Indeb. aſſ. declared for 50 l. *received* of the plaintiff *by the hands of one T. B. by the appointment and to the uſe of the defendant.* And becauſe it might be money lent which defendant received to his own uſe, though he was to make good the value to the plaintiff, the court will preſume (it being after verdict) that it appeared ſo to the jury at the trial. Mod. 42. Hill. 21 & 22 Car. 2. B. R. Noſworthy v. Wildman.

2 Keb. 615. pl. 63. S. C. and judgment affirmed.

3. Indeb. aſſ. was brought *by the aſſignee of commiſſioners of bankrupts of one L. for money received* to the plaintiff's uſe. It was held on the trial that the declaration ought to be *ſpecial*, it having been received to the bankrupt's uſe. 2 Show. 238. pl. 236. Mich. 34 Car. 2. B. R. Middleton v. Whitehead.

(Z. 7) Declaration in Aſſumpſit. Quantum Meruit.

1. A. Promiſed to pay for his board ſo much as ſhould be reaſonable. The plaintiff *alleged a demand, but not of any ſum certain, nor gave any notice*, yet it was good enough. Roll. Rep. 286. in pl. 2. cited as adjudged in B. R. Murrey v. Egliſton.

2. One who profeſſed phyſick and chirurgery brought an action upon the caſe, and declared upon a promiſe of the defendant to give him tantum quantum mereret *for* his labour and counſel in and about the *curing of him of a fiſtula, and ſets forth the particulars how and in what manner, and when he cured him of* it, *and that he deſerved* 100 *l.* It was adjudged that the declaration that meruit 100 *l.* was good, and the action did well lie for it. Cro. J. pl. 4. Paſch. 13 Jac. B. R. Shepherd v. Edwards.

3. In caſe the plaintiff counted *that at the requeſt of the defendant he had*, &c. *and the defendant promiſed to pay him for them quantum ea bona ſeparalia valerent*, and *averred that they were all worth ſo much*, &c. *without ſhewing the value of each particular parcel*; and held well enough, becauſe damages only are to be recovered in this action; but per Doderidge, it would be otherwiſe in detinue. 2 Roll. Rep. 96. Trin. 17 Jac. B. R. Sir John Sanders's caſe.

4. Alſo the plaintiff *ſhewed that among other things he made for the defendant a cloak lined with velvet*, but did *not ſhew of what ſtuff the cloak was*, viz. whether a cloth cloke, or velvet, or ſilk, &c. for it might be a paper cloke; ſed non allocatur. 2 Roll. Rep. 99. Trin. 17 Jac. B. R. Sir John Sanders's caſe.

[347] 5. Aſſumpſit for that *plaintiff was poſſeſſed of lands in M. for diverſe years, of the leaſe of J. S. and that there was a communication betwixt A. and W. the defendant for his eſtate and intereſt, W. in conſideration the plaintiff would procure the ſaid J. S. to licence A. to aſſign his leaſe and intereſt to him promiſed to pay all his charges, and ſo much as he deſerved for the obtaining thereof, not exceeding* 44 *s.* and alleged that he procured J. S. to grant the licence, and that he deſerved 20 s. It was objected that the promiſe was uncertain, to pay quantum meruit, for it cannot appear what he deſerved; but the court held it good and certain enough, and he ſhall make a demand what he deſerved, and if he demands too much, the jury ſhall abridge it according to their diſcretion. Adjudged in C. B. and judgment affirmed. Cro. J. 618. pl. 3. Mich. 19 Jac. B. R. Hall v. Walland.

6. Caſe for that the defendant being *a coachman, did by careleſs driving his coach break a pipe of wine of the plaintiff's which lay in the ſtreet, ſo that much wine run out and was loſt, and the defendant being arreſted for it promiſed that if he would forbear to ſue him he would pay him as much as he was damnified*; it was moved in arreſt of judgment, becauſe the plaintiff had *not averred how much the wine was worth which was ſpilt*, and ſo he could not tell what ſatisfaction to make, neither did he allege that he required the defendant to make ſatisfaction; but per Glyn Ch. J. both parties ſaw the wine, and the

the defendant is bound to take notice of the damage without being given by the plaintiff, and the jury have made it certain. And judgment for the plaintiff. Sty. 458. Trin. 1655. Fowke v. Preſcot.

7. Aſſumpſit, *for that the plaintiff, at the defendant's requeſt, had mended ſuch a boat, and divers other boats for him, he promiſed to pay him for his labour and charges tantum quantum meruit;* and averred that he deſerved 30 l. It was moved in arreſt of judgment, becauſe he *alleged that he amended divers boats, and ſhews not what;* ſo that by ſuch uncertainty the defendant could not know how much to pay. But reſolved that the defendant might take notice himſelf how many boats he deſired to have repaired. Cro. C. 573. pl. 14. Hill. 13 Car. B. R. Canway v. Aldwyn. S. C. cited Arg. Raym. 9, 10.

8. A quantum meruit ſetting forth that he had provided *diverſa veſtimenta & omnia materialia adinde ſpectant'* was held good without ſhewing the certainty of the things provided, for which he demands recompence. 2 Saund. 373. Trin. 22 Car. 2. Tate v. Lewen. 2 Keb. 810. pl. 9. Mich. 23 Car. 2. B R. adjudged for the plaintiff.

9. Quantum meruit for wares ſold, *alleging notice of the value, but did not ſay where,* to which the defendant demurred; and per cur. the notice is not traverſable, for he that buyeth muſt know the value, and may tender ſo much as he thinks it is, and to go on for the reſt; and judgment for the plaintiff in two cauſes. 3 Keb. 610. pl. 63. Hill. 27 & 28 Car. 2. B. R. Lomax v. Boyl.

10. Aſſumpſit, for that *in conſideration he had found the defendant ſufficient meat, drink,* &c. *for divers months laſt paſt, he promiſed to pay him as much as he deſerved,* &c. It was moved in arreſt of judgment, that the declaration was ſhort and *uncertain as to the time or number of months*; but adjudged that the uncertainty as to the time can do no more hurt than the uncertainty as to the things, which has been often adjudged not to vitiate; and that it is ſufficient to aver how much he deſerved. 2 Salk. 557. pl. 1. Mich. 12 W. 3. B. R. Snow v. Firebraſs. 12 Mod. 434. S. C. held it well, it being after verdict. And judgment for the plaintiff.

11. When a quantum meruit *and indebitatus is brought for the ſame thing,* you muſt aver the ſame perſon to be different perſons, and multiply that ſame perſon as often as you multiply your declaration; per Holt Ch. J. 7 Mod. 149. Hill. 1 Ann. B. R. Hart v. Longfield.

(Z. 8) Assumpsit. Declaration. Averment of Performance of the Consideration.

1. J. S. the plaintiff counted that *A. was indebted to him in* 303 *l.* and that B. the *defendant, in consideration that J. S. would take B's own bond without surety, and not sue it till Michaelmas, and forbear the money in the mean time, promised to pay it.* After verdict an exception was taken, that *the consideration was not alleged to be performed on the plaintiff's part*; and the court being of that opinion judgment was staid. Dal. 94. pl. 17. 15 Eliz. Rogers v. Snow.

Assumpsit, for that he being authorized to put in suit a bond of 1600 l. given for his appearance to the coroner, had undertaken not to put the same in suit; and whereas the plaintiff had an outlawry against A. for 400 l. that if he would permit the defendant to take the benefit of that outlawry, he would pay to the plaintiff 400 l. and averred that he permitted the defendant to take the benefit of that outlawry, &c. It was moved in arrest of judgment, that the plaintiff had *averred the performance only of one consideration*, whereas two are set forth. But adjudged that the *undertaking not to sue amounted to a promise* not to sue, and so not necessary to aver the performance, it being only *promise against promise*. Lev. 20. Hill. 12 & 13 Car. 2. B. R. Bennet v. Attell.

2. When in a declaration in an action on the case, *two or more considerations are laid*, and are *not collateral*, but pursuant; *as if* I owe you 100 l. and I say, that *in consideration that I owe you* 100 *l. and in consideration that you shall give me* 10 *l. I promise to pay unto you the said* 100 *l. which I owe you*; if you bring an action upon the case against me for the 100 l. and lay in your declaration both considerations, *although you do not pay me the* 10 *l. yet the action lieth. But where the considerations are* not pursuant, but *merely collateral*, and do not depend the one upon the other; *as in consideration that you are of my council, and you shall ride with me to York, I promise to give you* 100 *l.* there both considerations ought to be performed, or otherwise the action doth not lie. 2 Le. 72. in pl. 96. cited Arg. by Egerton solicitor-general, as a difference taken by the justices in 19 Eliz.

3. Assumpsit, for that the *defendant was possessed of a lease for years, the reversion to the queen, in consideration of* 10 *l. by the plaintiff to him in hand paid, and* 10 *l. to be paid to him upon the procuring of a new lease*, the defendant *promised to surrender his lease, and procure a new lease to the plaintiff before such a time.* It was moved in arrest of judgment, because he doth *not say he was ready to pay the other* 10 *l. at the time.* Sed non allocatur; for the defendant was to procure the lease first. And the plaintiff had judgment. Cro. E. 249. pl. 12. Mich. 33 & 34 Eliz. B. R. Lacy v. Lacy.

4. Assumpsit, for that the *defendant was indebted to him in* 10 *l. and promised if the plaintiff would forbear him one week he would pay it*; and *saith he did forbear him one week*, but doth *not say for one week following.* This was assigned for error. Sed non allocatur, for it cannot be otherwise intended; and the judgment was affirmed. Cro. E. 272. pl. 3. Hill. 34 Eliz. in the exchequer, Tenancy v. Brown.

5. Assump-

5. Aſſumpſit, for that M. *leſſee for life, the reverſion to the defendant, had granted to the plaintiff a rent of* 10*l. out of it; in conſideration that the plaintiff promiſed to relinquiſh the rent, the defendant promiſed to pay him* 30*l.* Upon motion in arreſt of judgment it was reſolved that the declaration was not good, becauſe he *ſhewed not how he relinquiſhed the rent*, for it might be by word, which is no diſcharge of it. Cro. E. 292. pl. 4. Hill. 35 Eliz. B. R. Gregory v. Nevil.

6. Aſſumpſit, *in conſideration the plaintiff, at the defendant's requeſt, would ſurceaſe ſuch a ſuit, the defendant promiſed to ſeal him a bond when required;* and that he did ſurceaſe the ſuit, &c. but did [349] *not allege that he ſurceaſed the ſuit at the defendant's requeſt, nor that the requeſt to ſeal was by the plaintiff.* But per cur. as to the firſt it ſhall be intended, for it is for the defendant's benefit; and as to the ſecond it ſhall be intended that it was by the plaintiff, or by his ſervant for him, if the contrary be not ſhewn. Cro. E. 299. pl. 10. Paſch. 35 Eliz. C. B. Okes v. Kirby.

7. Aſſumpſit, *in conſideration the plaintiff would be bail for him, the defendant did aſſume*, &c. and *ſaith de facto that he became bail, but* ſaith *not before whom*, it was holden by the court a good cauſe to ſtay judgment. Cro. E. 352. pl. 8. Mich. 36 & 37 Eliz. C. B. Pipe's caſe.

8. Where *part of a conſideration is good, and part is not good*, the party ought to allege performance of that which is material and valuable. But where a conſideration conſiſts of 2 or 3 parts, and *every part is valuable*, there of neceſſity he muſt ſhew performance of every part thereof; per tot. cur. Cro. E. 759. Paſch. 42 Eliz. C. B. in pl. 29.

9. Aſſumpſit, for that it was *agreed between the plaintiff and one Z. that the ſaid Z. ſhould leaſe a certain houſe to one W. for* 7 *years; and that W. during the ſaid term ſhould repair the houſe with tile and glaſs only;* and that thoſe and other covenants ſhould be put into the deed, *and that the plaintiffs ſhould be bound in a bond of* 100*l. for performance of covenants;* but *a covenant being put into the deed that W. ſhould be bound to all manner of reparations, W. refuſed to ſeal the ſame, and the plaintiff refuſed to ſeal the bond; and further ſhews that* in the ſaid houſe there was *a great wall*, part whereof *was* ruinous, and *likely to fall during the ſaid term; and that the defendant, in conſideration that the ſaid W. would ſeal the ſaid indenture, and that the plaintiffs would ſeal the ſaid bond, did aſſume to maintain the ſaid wall durante præd. termino* 7 annorum, &c. and *avers that the ſaid W.* the ſaid indenture, *and the plaintiff* the ſaid bond *did thereupon ſeal*; *and* in fact ſays, *that the ſaid wall*, at ſuch a time during the ſaid term, *did fall*, &c. Exception was taken becauſe it was *not expreſsly averred that Z. did demiſe the ſaid houſe;* and if there was no demiſe, it was not poſſible for the defendant to repair it during the term, it not appearing that there is any term. And the whole court held the exception good; for *for any thing that appears, the indenture was ſealed only on the part of the leſſee*, and not on the part of the leſſor; and then there is no leaſe, and conſequently no covenants, and ſo no breach. And judgment for the defendant.

Cro. J. 119. Scairo v. Saprany, Paſch. 4 Jac. in the exchequer-chamber, S. C. but S. P. does not appear.

defendant. Yelv. 18. Mich. 44 & 45 Eliz. B. R. Soprani and Barnardi v. Skurro.

In aſſumpſit the plaintiff declared, that *in conſideration he would become bound to the defendant by obligation, with ſufficient ſurety for the payment of* 11 *l. at a day, the defendant aſſumed to deliver him an horſe*; and the plaintiff avers, that he offered to be bound to the defendant, &c. and did *not ſay by obligation with ſufficient ſurety*. On non aſſumpſit the plaintiff had a verdict, but could not have judgment; for he ſhould have tendered the obligation ſealed, and have ſet down the ſum, that the court might judge if it were ſufficient for the 11 l. and the ſurety ſhould have been named. Hob. 69. pl. 80. Trin. 13 Jac. Auſtin v. Jervoyſe.——Hob. 77. pl. 98. S. C. adjudged againſt the plaintiff, though it was expreſsly in the conſideration laid only that he ſhould be bound for the payment.——Brownl. 11. S. C. adjudged accordingly.——S. C. cited Vent. 99. in caſe of Catterel v. Marſhall.

10. Aſſumpſit, &c. for that *in conſideration of* 10 *s. paid and* 20 *l. more to be paid ſuch a day and place*, &c. *and in conſideration the plaintiff the ſame day and place would bring a ſufficient man to be bound to the defendant for payment, he promiſed that the plaintiff ſhould have ſuch a wood to his own uſe; and alleged that he brought B.* Adjudged for the defendant, becauſe the plaintiff ought firſt to *ſhew that B. was ſufficient*, ſo that it might appear to the court, &c. *and alſo* ſhould have alleged in fact *not only that he brought B. to be bound, but that he was bound in fact, or offered himſelf to be bound*; for perhaps the plaintiff might bring him to be bound, and when he came to the place he might refuſe. Yelv. 49. Mich. 2 Jac. B. R. Allen v. Randall.

[350]

Conſideration to *lend* 20 *l. in gold*, if plaintiff declares of part being lent or paid *in ſilver*, though the ſubſtance is performed, yet not being performed according to the letter, it is not good; per tot. cur. Yelv. 87. in caſe of Dorrington v. Eaſt.

11. In aſſumpſit the conſideration was to *procure* 6 *l. to be lent for a year*. The plaintiff counted that he procured 3 l. at one time, and 3 l. at another. This is no performance, and the count is not good. Yelv. 87. Paſch. 4 Jac. B. R. Dorrington v. Eaſt.

12. In an aſſumpſit the plaintiff declares, that *in conſideration* that *he would ſeal and deliver a releaſe to J. S. &c. the defendant would pay* to *him* 5 *l.* and *avers that he had made the releaſe, &c. and by the appointment of the defendant had delivered it to B. to the uſe of J. S.* And it was adjudged that he had not well purſued and performed the conſideration. But otherwiſe if it had been *by the appointment of J. S.* himſelf. Noy 18. Tanfield v. Green.

13. Aſſumpſit, for that his *father was ſeiſed of the manor* of D. *and* of divers *lands, &c. in D. in fee, and in conſideration that the plaintiff, together with his father, ſigillaret quandam indenturam per quam his father barganizaret, &c. the ſaid manor and lands, the defendant aſſumed to pay*, &c. *and alleges that the plaintiff ſuch a day ſigillavit indenturam præd'*, &c. Judgment was given for the plaintiff in C. B. but reverſed in B. R. becauſe diverſa terras & tenementa in D. are uncertain, and comprehend not all his lands in D. and therefore the plaintiff *ought to have ſhewed particularly what lands were compriſed within the indenture*. Yelv. 110. Mich. 5 Jac. Mordant (Ld.) v. Walden.

14. *Another reaſon* of reverſal was, that the plaintiff had not laid the performance of his part certainly, becauſe *(indenturam prædictam)* cannot be good; for (prædictam) *muſt refer to ſome certainty*

tainty before, whereas no certainty is before; for (quandam indenturam) mentioned at firſt is uncertain, it being the ſame thing as if he had ſaid (unam indenturam), and then the (prædictam) could not be good; but he *ſhould have ſhewn certainly that he had ſealed ſuch a certain indenture per quam the father and the plaintiff, barganizaverunt*, &c. *and ſo de verbo in verbum, as laid in the premiſes of the declaration*, but if this had been a perfect indenture in date, nomination of the parties, and limitation of the land, it would have been well to have ſaid that he ſealed (indenturam prædictam), becauſe it appears by the premiſes to have been a true and perfect deed in facto, whereas here it is only a pretended indenture. Yelv. 111. Mich. 5 Jac. B. R. Ld. Mordant v. Walden.

15. Aſſumpſit, in conſideration the *plaintiff had promiſed to marry the defendant within a fortnight, the defendant promiſed to marry the plaintiff within a fortnight*, and ſhe *avers that ſhe was ſemper parata & obtulit ſe*; but does *not ſay within a fortnight*. Per curiam, it is well enough without ſaying obtulit ſe at all, becauſe ſhe was ſemper parata. And Wylde J. ſaid, the man is ducere uxorem. Freem. Rep. 347. pl. 431. Mich. 1673. Holcroft v. Dickenſon.

16. W. bought a quantity of gum of D. and paid him for it; and at the ſame time D. affirmed that he had another quantity then upon the ſea, and to be in London in May next, and as good as the other, whereupon W. the plaintiff promiſed D. the defendant, that if it exceeded not 2000 weight he would, in 4 months after delivery, pay for it ſo much; and D. in conſideration thereof promiſed to deliver the ſame when it ſhould come to London, and that it ſhould be as good as the firſt. Upon error brought in the exchequer-chamber, it was objected that the declaration was not good, in *not averring that the gum delivered was the ſame as was upon the ſea, nor that it came to the port of London, nor that it did not exceed* 2000 *weight*; for other gum would not be within the promiſe, and though it was ill, and not merchandizable, that is not material, it not being within the promiſe, and it was his folly to accept of it, and ſhall not be aided by any intendment; and all [351] the judges and barons were of that opinion, and reverſed the former judgment. Cro. J. 235. pl. 6. Hill. 7 Jac. B. R. Weſton v. Dyke.

17. The plaintiff *declared that he with his own money bought for the defendant, and at his requeſt, ſeveral wares for him, which were tranſported to Ireland, and the defendant promiſed to repay him*, &c. It was moved in arreſt of judgment, that the plaintiff did *not aver that the wares ſo bought came to the uſe of the defendant, neither* did he aver *that when they were delivered to the defendant he promiſed then to pay* the money; but per tot. cur. the plaintiff has juſt cauſe of action, and the declaration is good, and judgment was given for the plaintiff. Bulſt. 169. Trin. 9 Jac. Moor v. Moor.

18. Aſſumpſit, *in conſideration the plaintiff would make a leaſe to the defendant of lands for* 21 *years, at the yearly rent of* 10*l. the defendant promiſed to give him a horſe*; and ſhews *that he made* him *a leaſe* of the lands, but that he had not given him the horſe, but

ſaid

ſaid nothing of any rent reſerved upon this leaſe; and this being moved in arreſt of judgment, the whole court held clearly, that by this leaſe thus made, without any rent reſerved, he hath not purſued the contract, and ſo not intitled himſelf to the action; and judgment againſt the plaintiff. 3 Bulſt. 35. Paſch. 13 Jac. Lea v. Adams.

Mo. 866. pl. 1197. S. C. held accordingly by 3 juſtices, and though he did *not allege that he moved the king, or preferred any petition*, &c. yet it ſeems good enough, and the going at his own coſts is a charge and endeavour.—— Brownl. 7. S. C. adjudged accordingly.

19. Aſſumpſit, for that the *defendant had committed a felony, and* thereupon *requeſted the plaintiff to do his endeavour to procure a pardon for him*, and *alleged that he endeavoured by all the means he could, and did many days labour, and do his endeavour* to that purpoſe, viz. *in riding and journeying at his own charge from London to R. where the king was, and ſo to and from Newmarket, to obtain a pardon*, &c. After verdict it was moved, that nothing appears done but riding up and down, and ſo the declaration not good; and of that opinion was Warburton J. but the other judges held for the plaintiff, and ſo he had judgment; for the iſſue found for the plaintiff is a proof that he did his endeavour according to the requeſt, and it was neither required or promiſed to obtain a pardon; and he laid expreſsly in general, that he did his endeavour to obtain it, viz. in equitando, &c. to obtain; and if upon the trial he could have proved no riding nor journeying, yet any other effectual endeavour, according to the requeſt, would have ſerved. Hob. 105. pl. 129. Mich. 13 Jac. Lampleigh v. Brathwaite.

Roll. Rep. 173. pl. 6. Anon. ſeems to be S. C. adjudged for the plaintiff.

20. Aſſumpſit, for that the *defendant having a friend ſick in the plaintiff's houſe*, which was *an inn, ſaid to the plaintiff, provide for him ſuch neceſſaries as he ſhall want, and I will pay you;* and *avers that he provided neceſſaries* for him amounting to 15 l. &c. It was moved in arreſt, that he did *not ſhew what neceſſaries* in particular; but the general allegation was held good, and judgment per tot. cur. for the plaintiff. 3 Bulſt. 31. Paſch. 13 Jac. Cripps v. Boynton.

21. Aſſumpſit, for that in conſideration the plaintiff would *deliver all the corn in ſuch a barn*, the defendant did aſſume and promiſe, &c. and *avers that he did deliver all the corn in the barn*; but does *not ſhew that there was any, or how much corn there*, which the court agreed he ſhould have done; but it ſeems it is aided by the ſtatute of jeofails, there being matter ſufficient, as Haughton ſaid; and Doderidge and Crooke ſaid, that this iſſue of non-aſſumpſit admits that there was corn there, and this is found by the verdict for the plaintiff; but they all ſaid that if the defendant had demurred the plea had not been good. It was adjudged for the plaintiff, and afterwards affirmed upon a writ of error. Roll. Rep. 382. pl. 3. Trin. 14 Jac. B. R. White's caſe.

[352]

S. C. cited Poph. 206. —S. C. cited 2 Show. 28. pl. 18. Mich. 30 Car. 2. B. R. in

22. O. was *indebted* 10 *l. to the plaintiff for ſeveral treſpaſſes*, which the plaintiff at the defendant's requeſt was content to accept of; *and in conſideration that the plaintiff at the defendant's requeſt, would diſcharge the ſaid O. of the ſaid debt, and permit him to carry out of the plaintiff's houſe certain goods of the ſaid O. he promiſed to pay the plaintiff the* 10 *l. ſuch a day*; and *alleged that he did*

acquit

acquit O. and ſuffered him to carry his goods, &c. It was holden the declaration was not good, becauſe *not ſhewed how he acquitted him*; and though the conſideration to permit him to carry away the goods had been a ſufficient conſideration in itſelf, and was well alleged, yet being joined with another conſideration which is good, if alleged to have been performed, but that not being done, makes the whole declaration ill; and adjudged for the defendant. Cro. J. 503. pl. 14. Mich. 16 Jac. B. R. Leneret v. Rivet.

the caſe of PRIDEAUX v. RAWLINS, S. P. but upon the caſe of LANGDEN v. STOKES, Cro. C. 383. which was a later authority, and directly contrary, the court held it well enough, without ſhewing how, whether by releaſe or otherwiſe, eſpecially being after a verdict; but that perhaps it might have been otherwiſe upon a demurrer to the declaration; and judgment was affirmed. ——2 Jo. 125. Hill. 31 & 32 Car. 2. B. R. the S. C. adjudged accordingly; for being after verdict it ſhall be intended a ſufficient diſcharge was proved, as was neceſſary upon the iſſue of non-aſſumpſit.

23. Aſſumpſit, in conſideration the plaintiff would *marry his couſin at his requeſt, to give him* 20 *l.* and alleges in facto, that ſuch a day he married her, but did *not ſay that he married her* * *at the defendant's requeſt*; yet held good; for having alleged that he married her, it ſhall be intended at defendant's requeſt. Cro. J. 404. pl. 3. Trin. 14 Jac. B. R. Berisford v. Woodrooff.

3 Bulſt. 235. S. C. but S. P. does not appear. ——Roll Rep. 355. pl. 7. and 433. pl. 29. S. C. but S. P. does not appear.——7 Mod. 144. Hill. 4 Ann. S. C. and S. P. cited by Holt Ch. J. as held to be well in itſelf, without any requeſt or help of a verdict.

Aſſumpſit, for that the defendant *promiſed if the plaintiff at the inſtance of the defendant would marry his daughter, he would pay him* 20 *l.* and *avers that he married the daughter, but* did *not ſay ad inſtantiam defendentis*. But adjudged that he having married her, it ſhall be intended * ad inſtantiam defendentis without ſuch averment. Cro. C. 194, 195. pl. 5. Trin. 6 Car. B. R. Poynter v. Poynter.—S. C. cited by Holt Ch. J. 7 Mod. 144.

A. was bound in a bond *for J. S. who died inteſtate. B. took out adminiſtration. M. the widow of J. S. promiſed B. that if he would, at the inſtance of the plaintiff, relinquiſh the adminiſtration, and ſuffer M. to adminiſter, ſhe would ſave B. harmleſs from the bond.* In caſe brought by B. he counted accordingly, and that he relinquiſhed and ſuffered M. the defendant to adminiſter, but that ſhe had not ſaved him harmleſs of the ſaid bond. After verdict it was moved that the declaration was not good, becauſe it did *not ſhew that B. had relinquiſhed the adminiſtration* * *at the inſtance of M.* the defendant, *but generally that he had relinquiſhed it*, which might be without the inſtance of the defendant; and ſo judgment in C. B. was reverſed. Jo. 441. pl. 1. Mich. 15 Car. B. R. Leate's caſe.——Mar. 55. pl. 86. S. C. by the name of Clark v. Spurden. Adjornatur.———S. C. cited 7 Mod. 143. Arg. and ibid. 144. by Holt Ch. J. who cites the conſideration to be, that the plaintiff ſhould procure B. to renounce adminiſtration; ſo that there *is an act to be done by B. to intitle himſelf to an action*; for if he does nothing, though the other renounces, he has no cauſe of action; for the agreement was not to do ſo; and ſo if the other renounced adminiſtration generally, but if B. did procure him to do ſo.

24. Aſſumpſit, in conſideration the plaintiff *would go with the defendant to ſell ſuch timber, and to do other particular acts, the defendant promiſed*, &c. The plaintiff *alleges that he went with him, and helped him to ſell the timber, & quod ſemper paratus fuit apud C. to perform alia præmiſſa*, &c. It was the opinion of the court, that the conſideration being futurely to be performed, ought to be preciſely alleged to be performed, otherwiſe action will not lie, and the allegation that paratus fuit to perform it, is not ſufficient; eſpecially as Doderidge ſaid, paratus apud C. when the acts were to be done at B. And adjudged for the defendant. Cro. J. 583. pl. 3. Mich. 18 Jac. B. R. Pain v. Baſtwick.

25. Caſe, for that there *was a diſcourſe of a marriage between the plaintiff and the ſon of the defendant* on ſuch a day and place; and that *the defendant then promiſed, that if her father would give the ſon*

120 *l. in marriage, and ſhe married him, he would ſettle* 20 *l. per annum on her for a jointure upon requeſt;* and *avers that on ſuch a day and place he did* * *marry her, and that her father gave her* 120 *l. in marriage*; (but did *not ſay* poſtea, nor the time *when he gave it.*) It was moved in arreſt of judgment, that there were 3 things precedent to the ſettling the jointure (viz.) marriage, payment of the 120 l. and the requeſt to ſettle the jointure; and it is not ſufficient to allege that the money was given in maritagio, becauſe it is uncertain; for money given before, or at the time, or after the marriage, may properly be ſaid to be given in maritagio, therefore he ſhould have ſet forth the time when the money was given; for in this caſe it was parcel of the contract, and for this reaſon the judgment was ſet aſide. 2 Roll. Rep. 488. Hill. 22 Jac. B. R. Willet v. Mold.

Win. 73. S. C. but S. P. does not appear.

26. Aſſumpſit, *in conſideration the plaintiff would accept of* 12 *l. in diſcharge of all reckonings and accounts betwixt the plaintiff and T. E. and would ſeal and deliver a general acquittance to the uſe of the ſaid T. E. as ſhould be required, the defendant promiſed to procure T. E. when he returned to N. to ſeal and deliver a general acquittance to the plaintiff,* and *alleges that he accepted of the* 12 *l. and ſealed and delivered a general acquittance to J. N. to the uſe of T. E. and that T. E. returned to N.* & licet ſæpius requiſitus, the defendant had not procured T. E. to make the general acquittance. It was moved in arreſt, that alleging the delivery of a general acquittance *without ſhewing any,* ſo as it may appear to the court to be ſufficient, was not good, and ſo the conſideration not ſufficiently alleged to be performed; and alſo becauſe it is ſaid he delivered to *J. N.* the acquittance to the uſe of T. E. who *is a ſtranger,* and perhaps will not deliver to T. E. and for theſe reaſons Crooke J. held the declaration not good; but the other juſtices e contra, and adjudged for the plaintiff, it being after verdict upon non-aſſumpſit, wherein he denied the promiſe, but not the performance of the conſideration. But Ld. Hobart ſaid, if he had *demurred becauſe he did not ſhew the acquittance,* perhaps it might have been otherwiſe. Cro. C. 19. pl. 12. Mich. 1 Car. C. B. Farrer v. Engliſh.

27. Caſe, for that he was poſſeſſed of ſuch goods in London, and that *in conſideration of* 2 *s. the defendant at London promiſed, that if the plaintiff would deliver the goods to him to carry them aboard ſuch a ſhip,* &c. *and averred that he did deliver the goods* to the defendant, but that he had not carried them aboard; but did *not ſhew when or where he delivered the goods* to the defendant, but ſaid only deliberavit. Per Jones J. it is only an inducement to the promiſe, and ought not to be ſhewed ſo preciſely. Godb. 404. pl. 484. Paſch. 3 Car. B. R. Mole v. Carter.

Hutt. 89. Trin. 3 Car. S. C. The court gave judgment for the plaintiff; and Richardſon Ch. J. who at firſt doubted, now con-

28. Aſſumpſit, for that there *being a controverſy concerning right of common in a certain place there incloſed by P.* and *who brought an action of treſpaſs againſt H. one of the tenants claiming common, for entering the ſaid cloſe,* the *defendant, in conſideration of a jugg of beer, and that he would defend the ſaid ſuit in maintenance of the title to the common, promiſed to pay,* &c. *and ſhewed that he pleaded not guilty to that action of* treſpaſs, *and that the jury found for him.* The defendant pleaded that the now plaintiff non defendit ſectam, in mainte-

maintenance of the common, which was found againſt him. It was moved for the defendant, in arreſt of judgment, that he *ought to have pleaded ſuch a plea by which the title of the common might have come in queſtion;* but by his pleading not guilty he had diſclaimed the matter of the common; and of that opinion were the court; but adjornatur. Het. 4. Paſch. 3 Car. C. B. Humbleton v. Buck.

curred, and ſaid that he was fully ſatisfied.— Litt. Rep. 38. HAMBLETON'S caſe, S. C. All the court held that the plaintiff had well performed the conſideration, *the words not being general but particular, that he ſhall maintain the title againſt P.* for the promiſe was after the action brought, and the plaintiff [defendant] is not to preſcribe what he ſhall plead, but he ſhall defend the ſuit. Then P. not being owner of the ſoil, as appears by the evidence in B. R. but the king, *he cannot plead better than not guilty; becauſe a ſpecial juſtification for the common would admit P. as owner of the ſoil;* and ſo if his pretence of common ſhould fail, he ſhould be puniſhed for a treſpaſs * where he ought not, P. being an intruder upon the king; beſides the jury have found that it was in maintenance of the title of common expreſsly; and judgment was entered for the plaintiff.

*[354]

39. In caſe the plaintiff *declares that as he was a doing certain buſineſs for the defendant, the defendant ſaid to him, do it, and I will repay you whatſoever you lay out.* And *ſhews that he had expended 4 l. but* does *not ſhew particularly circa quid;* And for that cauſe it was held naught. Het. 122. Mich. 4 Car. C. B. Hutchinſon v. Cheſter.

30. The defendant did *promiſe that he would make ſuch a conveyance of certain lands,* and *pleaded that he had made it, but did not ſhew* the place *where it was made;* and the court was clear of opinion that he need not, for it ſhall be *intended upon the land.* And ſo in caſe of performance of covenants, it is not needful to ſhew the place where, &c. Mar. 22. pl. 51. Paſch. 13 Car. Vaughan v. Vaughan.

31. In caſe on a promiſe made *by C. to pay a debt owing by J. S. if he would forbear to ſue J. S. the plaintiff averred forbearance hitherto;* exception was taken that he had *not alleged how long* he had forborn, ſo as it might appear to the court, whether he had forborn a convenient time or not. But adjudged that the conſideration was good, and the averment ſufficient; for that it appears upon record how long the forbearance was, and therefore no particular averment neceſſary. Hardr. 5. pl. 5. Trin. 1655. in the exchequer, Barnehurſt v. Cobbot.

32. Aſſumpſit for that the defendant, *in conſideration the plaintiff would deliver certain goods to the defendant's ſon ſuch as he ſhould deſire, promiſed to pay for them,* and *avers that he delivered certain goods to the ſon,* &c. but did *not ſay that they were ſuch goods as the ſon deſired;* but adjudged that the acceptance was an actual deſire. and that is more than a verbal one. Sty. 163. Mich. 1649. B. R. Johnſon v. Abington.

33. Plaintiff counted that whereas he *at the inſtance and requeſt of the defendant had taken pains to reconcile differences betwixt the defendant and J. S. and others, the defendant promiſed to pay him* 100 *l.* at a certain day. It was moved in arreſt of judgment that he did *not ſhew what pains* he had taken, and ſo it cannot be known whether his pains were ſufficient to ground the promiſe upon. And further, that he does *not ſhew who thoſe others were beſides J. S.* whom he took pains to reconcile differences between. But theſe exceptions were over-ruled without ſpeaking to. Sty. 465. Mich. 1655. B. R. Hardreſs v. Prowd.

34. In action upon the caſe *in conſideration the plaintiff would forbear* 100 *l. due by the teſtator by* 12 *months next following, the defendant would pay*, &c. The plaintiff *avers that he did forbear a tempore aſſumptionis* 12 *months*, which is well; contra if it had been *uſque* 12 *months*. Judgment for the plaintiff after verdict. 1 Keb. 574. pl. 31. Mich. 15 Car. 2. B. R. Jackman v. Hatton.

35. Action upon the caſe, that whereas the *defendant's father was bound to the plaintiff in ſeveral bonds, and he intended to ſue the defendant as ſon and heir*; he *in conſideration the plaintiff would forbear to ſue, and deliver thoſe bonds, the defendant promiſed to pay.* It was moved in arreſt of judgment, that the whole conſideration being * executory, and in nature of condition precedent, it is *not ſufficient to ſay he did forbear and was ready to deliver up the bonds* only, but that he did deliver them actually, or offered ſo to do, and the defendant refuſed; which by Keeling is ill, and not the whole that is in his power to do, which the court agreed. Judgment ſtaid. 1 Keb. 872. pl. 21. Paſch. 17 Car. 2. B. R. Crewe v. Slowly.

* The *plaintiff promiſed to build a houſe*, and the *defendant promiſed to pay him* 80 *l. for his labour*; Hale Ch. J. and Rainsford J. held that the plaintiff *muſt aver that he had built the houſe or was hindered by the defendant*, for in this caſe the word *pro* makes the condition precedent; but Twiſden J. contra. But adjornatur, and afterwards being moved again, and Twiſden J. retaining his former opinion, the court gave judgment for the plaintiff, by reaſon that Hale Ch. J. and the other juſtices then held that the plaintiff having *declared that paratus fuit & obtulit ad performandum*, &c. was a ſufficient † averment after verdict. 2 Saund. 350. Trin. 23 Car. 2. Peters v. Opie.——2 Lev. 23. Opy v. Peters S. C. adjudged accordingly for the plaintiff per tot. cur. it being after verdict.——Vent. 177. S. C. adjornatur.——Ibid. 214. S. C. adjudged accordingly by reaſon of the verdict.——2 Keb. 811. pl. 12. S. C. adjornatur.——Ibid. 837. pl. 69. S. C.——3 Keb. 45. pl. 20. S. C. but no judgment.——4 Mod. 189. cites S. C.

Aſſumpſit for that *in conſideration he would uſe his ſkill and pains, and provide medicines for and cure J. S. of the piſick, the defendant promiſed to pay what he deſerved*, and *laid another promiſe at the ſame time, in conſideration as aforeſaid, but ſomewhat varying from the firſt*, and *averred that he had beſtowed his pains and cured J. S. accordingly.* It was moved in arreſt of judgment, becauſe the plaintiff had *made no averment of the cure upon the firſt promiſe*, and entire damages being given, it was ill for the whole. But the court held, that ſince he had averred it on the ſecond promiſe, ſo that it *appeared on the record that the cure was done*, it aided the omiſſion of it in the firſt, eſpecially after a verdict. Vent. 44. Mich. 21 Car. 2. B. R. Lee v. Edwards.——Mod. 14. pl. 38. S. C. adjudged niſi, &c. but Twiſden J. ſaid, *if it had reſted on the firſt promiſe it had been naught*, but now it lies on the whole record, whether he had cured her or not.——Sid. 428. pl. 15. S. C. and held good after verdict, eſpecially in this caſe; becauſe both the promiſes were made on the ſame day; but by Twiſden J. though the promiſes had been ſuppoſed to be on ſeveral days yet it would be aided by ſuch general verdict.——Lev. 280. S. C. adjudged for the plaintiff; for it ſhall be intended after verdict, that it is the ſame perſon, the ſame malady, and the ſame cure; and it is but the ſame cauſe of action laid ſeveral ways, as is uſual in aſſumpſits.——2 Keb. 559. pl. 55. S. C. adjornatur.——Ibid. 566. pl. 71. adjudged for the plaintiff.

† [355]

36. Where an aſſumpſit is brought *on a promiſe of marriage, a tender muſt be averred.* 2 Keb. 283. pl. 52. Mich. 19 Car. 2. B. R. Kingman v. Grenvill.

37. *A. was indebted to C. the plaintiff, and being about to ſell land to pay the debt, B. the defendant, in conſideration that C. would forbear to ſue A. till he had ſold the land, promiſed to pay.* The plaintiff *averred that A. had ſold, but not that he did forbear*; and the court held it ill; and thereupon the plaintiff's counſel prayed a nil capiat per billam for expedition. And it was granted. 2 Keb. 618. pl. 3. and 639. pl. 65. Paſch. 22 Car. 2. B. R. Friend v. Curtis.

38. Aſſumpſit, &c. for that *he being ſued in B. R. retained the defendant to be his attorney, who in conſideration of* 30 *s. paid to him, and that the plaintiff would enter into a bond with ſufficient penalty to ſave the defendant harmleſs, promiſed to get bail filed for him*, &c. and averred

Lev. 297. S. C. ſtates it that the bond was to be with ſuf-

averred that he did give the defendant a bond with a great and ſufficient penalty, &c. Upon non aſſumpſit the plaintiff had a verdict and judgment. It was aſſigned for error, that the plaintiff did *not ſet forth of what penalty the bond was, that it might appear to the court to be ſufficient.* The court held that the exception would have been good upon a demurrer, but being after verdict, and ſince the Oxford act of jeofails, the plaintiff had judgment. Vent. 99. Mich. 22 Car. 2. B. R. Catterel v. Marſhall.

ficient ſureties. The court held that it ſhould be ſhewn what the penalty was, and of what ſufficiency the ſureties were, in caſe

the bond had been for payment of money; but that in this caſe it being to ſave againſt uncertain damages and coſts of ſuit, ſo that the court cannot judge of the ſufficiency, he need not ſhew it in the declaration, but it ought to come upon the evidence on non aſſumpſit; and the court which tries the cauſe ſhall judge of the ſufficiency of the penalty and ſureties; and therefore affirmed the judgment. ——— Mod. 70. pl. 23. S. C. and judgment affirmed, it being after a verdict. 2 Keb. 692. pl. 28. S. C. and judgment affirmed.

39. The defendant was bound in an obligation for payment of money, and part thereof being ſaid not to be paid, the defendant promiſed that *if he did not make it appear before J. S. that this part was paid, he would pay it.* The defendant pleaded that he made it appear to J. S. that the part was paid. The plaintiff demurred, and had judgment in C. B. becauſe he did *not ſhew how he made it appear;* and in error the judgment was affirmed in B. R. for the ſame reaſon. 2 Lev. 125. Hill. 26 & 27 Car. 2. B. R. Wilſon v. Done.

Freem. Rep. 114. pl. 136. Wilſon v. Dove, S. C. adjudged in C. B. by 3 juſt. but Atkins e contra; and Vaughan ſaid that if he had

pleaded that he made it appear to J. S. and that he was ſatisfied with it, it might have been well enough. ——— 3 Keb. 183. pl. 26. 293. pl. 87. 424. pl. 22. S. C.

40. Caſe for that the defendant in conſideration the plaintiff would *forbear to ſue* him promiſed to pay, &c. then he *avers that he did extunc totally* * *forbear*, but did *not ſay hucuſque*. Sed per tot. cur. it ſhall be intended a total forbearance. 2 Mod. 24. Paſch. 27 Car. C. B. Edwards v. Robarts.

A like caſe was this term, where the conſideration was as before, and the *averment* was *that he forbore 7 months*; and being moved in arreſt of judgment by ſerjeant Baldwyn, becauſe it is not ſaid *hucuſque*, which implies that after the 7 months he did forbear, it was notwithſtanding held good, it *being a reaſonable time*; and the rather becauſe if the action had been brought within the 7 months, and the plaintiff had averred that hucuſque he forbore, it had been good enough. Quere. 2 Mod. 24. Paſch. 27 Car. 2. C. B. in Edwards and Roberts's caſe.

* [356]

41. In aſſumpſit *to ſurrender copyhold lands*, exception was taken becauſe it was *not averred that the plaintiff ſurrendered them according to the cuſtom of the manor, nor ſhewed the ſurrender itſelf, that the court might judge of the validity thereof*, but becauſe it *was ſaid a ſurrender according to the agreement*, and verdict on non aſſumpſit it is well enough. 3 Keb. 625. pl. 7. Paſch. 28 Car. 2. B. R. Danwood v. Godfcall.

42. Aſſumpſit *in conſideration the plaintiff would conſent and not hinder the defendant to marry ſuch a woman, he promiſed to pay the plaintiff* 20 *l.* Upon a demurrer, the defendant had judgment becauſe the plaintiff did *not ſhew where or in what place* he did conſent; for it is an affirmative as well as a negative, viz. to conſent and not to hinder. 2 Lev. 227. Trin. 30 Car. 2. Chapman v. Fothergile.

43. Aſſumpſit to *pay* 20 *l. after ſuch a marriage* had *between the plaintiff's nephew and the defendant's niece, in conſideration that the*

2 Show. 95. pl. 9. Kirby v. Tower-

ſon, S. C. and the queſtion was upon the word (poterat) it being uncertain, but becauſe he had laid a particular act of perſuaſion, it was held good, being after verdict; and judgment for the plaintiff. ——— Mo. 595. pl. 808 Paſch. 35. Eliz. S. P. agreed to be *good enough in* action on the *caſe*, which is only matter of the conſideration which is not traverſable. *But otherwiſe* it is *in the condition of an obligation or covenant*, where one binds himſelf to do his furtherance, he ſhall there ſhew particularly how he had done his furtherance.

plaintiff, at the ſpecial inſtance and requeſt of the defendant, would endeavour and labour to perſuade the nephew to marry the niece, did promiſe to pay, &c. *and averred that he omnibus modis quibus poterat conatus fuit*, &c. but did *not allege* in particular *how and in what manner* he did his endeavour, &c. The whole court ſeemed to agree that the declaration is good, but perſuaded the plaintiff to go to a new trial, becauſe the damages given being 40 l were too great for ſo ſmall a matter. Raym. 400. Trin. 32 Car. 2. B. R. Aglionby v. Towerſon.

44. The count was, that in conſideration the *plaintiff would deliver the defendant's cattle out of pound*, he promiſed to pay him or ſave him harmleſs; and averred that *pro deliberatione inde an action was brought againſt him, and a recovery*, but did *not expreſsly aver that he had delivered the cattle*. The court held this not ſufficient, though after a verdict; for it was the ſubſtantial part and ground of the action. And judgment was ſtayed. 2 Show. 329. pl. 338. Mich. 35 Car. 2. B. R. Well v. Thompſon.

Show. 50. Jackſon v. Miles, S. C. adjudged for the defendant.

45. Aſſumpſit, for that *in conſideration the plaintiff would deliver to the defendant*, &c. *he promiſed to pay*, &c. and *averred that he did deliver*, &c. but did *not ſay where*. And upon a demurrer to the declaration it was held ill, becauſe this being an executory conſideration, it is traverſable. 1 Salk. 22. pl. 1. 1 W. & M. in C. B. Sexton v. Miles.

46. The count was, that the defendant, in conſideration the plaintiff, at the ſpecial inſtance of the defendant, would *forbear to arreſt his ſon, aſſumed to pay him ſo much as the ſon ſhould be indebted to the plaintiff upon the balance of the account to be ſtated between the ſon and the plaintiff*. The plaintiff *averred that an account was ſtated of all debts owing by the defendant's ſon to the plaintiff*; and that upon that account the ſon was found indebted to the plaintiff in 20 l. and that he forbore to arreſt, &c. It was objected that the averment is only of an account of debts due by the ſon to the plaintiff, whereas if an account had been ſtated of all debts due on both ſides, the plaintiff might have been found debtor to the
[357] ſon; and ſo the plaintiff had not entitled himſelf to the action. But per cur. it being after verdict, they will not intend any thing due from the ſon to the plaintiff. And judgment for the plaintiff. Ld. Raym. Rep. 357. Mich. 10 W. 3. Waters v. Glaſſop.

7 Mod. 143. Booth v. Johnſon S. C. accordingly, and ſo affirmed a judgment in C. B.

47. Aſſumpſit, for that in conſideration the defendant *would receive A. B. and C. into his houſe ut hoſpites, and find them meat, drink, and all neceſſaries, he promiſed to pay the plaintiff as much as he deſerved*; but did *not allege that he received them ut hoſpites*, which is a ſpecial receiving. It was objected that it ought to be preciſely alleged, and that an exact performance was neceſſary. But the court held it ſufficient; and if they had been received ut hoſpites, it ought to be ſhewed by the defendant, with a traverſe of their being received as ſuch. And finding them meat and drink ſhall be intended

tended a gueſting them till the contrary appears. 1 Salk. 25. pl. 10. Paſch. 1 Ann. B. R. Gould v. Johnſon.

48. Where one thing is to be the conſideration of the other, though there are mutual promiſes, performance muſt be *averred*; per Holt Ch. J. 1 Salk. 112. pl. 1. Trin. 2 Ann. Colonel v. Briggs.

49. Plaintiff declared, that *in conſideration he, at the inſtance of the defendant, would buy for him tanta pruna quanta in ea parte poſſet, and bring them to Billingſgate-Wharf, he promiſed to pay* 8 *s. per buſhel*; *and ſhews that he bought* ſuch a quantity, *and brought them to the wharf ready to be delivered to the defendant, and tendered them; and that the defendant did not receive them.* After a judgment for the plaintiff in C. B. it was aſſigned for error that the plaintiff did *not aver that the quantity bought was all he had or could have bought.* But adjudged that he need not; for prunes are *bona peritura*, and to be ſold immediately; and it was not their intention that the plaintiff ſhould ſtay till he got together all he might have bought; beſides, this is proper to be inſiſted on at the trial: and judgment affirmed, eſpecially it being after verdict. 6 Mod. 302. Mich. 3 Ann. B. R. Scrimſhaw v. Weſtly.

(Z. 9) Aſſumpſit. Declaration. Averment of Performance of the Conſideration, where the Promiſes are mutual.

1. IN aſſumpſit, *if the conſideration be executory*, the *declaration ought to contain the time and place where it was made, and* after it ought to be *averred in facto, when it was performed or executed* accordingly; *but* if it be *by way of a reciprocal agreement*, then the plaintiff may count that in conſideration that he promiſed to do a thing for the defendant, the defendant had promiſed to do another thing for him; and there the *declaration need not contain time or place* for the conſideration, or otherwiſe that it is performed and executed. But if, in the firſt caſe, *where it is executory*, this is alſo [*there is*] *an averment that it is executed*, there *if the defendant pleads non aſſumpſit generally*, and does not plead the ſpecial matter, *he cannot after take exception* to that count *for the default aforeſaid*, where he pleads ſpecially to it. Agreed by all the juſtices. 2 Brownl. 137. Mich. 9 Jac. C. B. Holcroft v. French.

2. Aſſumpſit, declaring that *in conſideration N. promiſed to deliver the defendant* to his own uſe *a cow*, the *defendant promiſed to deliver him* 50 *s.* Adjudged for the plaintiff in both courts, that the plaintiff need not aver the delivery of the cow, becauſe it is promiſe for promiſe.* Note here the promiſes *muſt be at one inſtant*; for elſe they will be both nuda pacta. Hob. 88. pl. 117. Hill. 12 Jac. Nichols v. Raynbred.

*[358] Jenk. 296. pl. 47. S. C. ſays, the writ ought to aver the mutual aſſumpſit.—Holt Ch. J. ſaid he agreed this caſe to be good law; for there is a *poſitive agreement* that one ſhall deliver a cow to the other, and that the other ſhall give him ſo much money; and therefore the action lies for either ſide, without performance of his promiſe. 12 Mod. 460. Paſch. 13 W. 3. in the caſe of Thorpe v. Thorpe.——*But if* by the agreement A. were to *deliver B. a cow, and that for it B. were to deliver him a horſe*, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring

bring his action; and upon this diverſity the books are reconcileable; per Holt. Ch. J. 12 Mod. 460. in the caſe of Thorp v. Thorp.

An agreement was, that the defendant ſhould pay ſo much money 6 months after the bargain, the plaintiff transferring ſtock. The plaintiff, at the ſame time, gave a note to the defendant to transfer the ſtock, the defendant paying, &c. And per Holt Ch. J. if either party would ſue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one muſt aver and prove a transfer or a tender, and the other a payment or a tender, for transferring in the firſt bargain was a condition precedent; and though there be mutual promiſes, yet if one thing be the conſideration of the other, there a performance is neceſſary to be averred, unleſs a certain day be appointed for performance. 1 Salk. 112, 113. pl. 1. Trin. 2 Ann. Callonell v. Briggs.

3. Caſe, for that *in conſideration the plaintiff promiſed to pay* 100 *ducats to the defendant to go ſuch a voyage before ſuch a day, the defendant promiſed to repay ſo many if he did not go* accordingly, and alleged *he did not go*; and for not repaying them the action is brought, but did *not aver that he delivered the ducats to the defendant*, which was moved in arreſt of judgment to be the conſideration of the action. But Coke Ch. J. held it good, it being a promiſe of both parts, and that if he had not performed it the defendant might have brought his action. And judgment for the plaintiff. Roll. Rep. 336. pl. 50. Hill. 13 Jac. B. R. The Spaniſh Ambaſſador v. Gifford.

4. But if a man, *in conſideration of a future thing to be done by the plaintiff, aſſumes to do a thing*, there in action upon the caſe he *ought to aver the performance* of it, becauſe he has no remedy for it; per Coke Ch. J. Roll. Rep. 336. Hill. 13 Jac. B. R. in pl. 50.

5. Aſſumpſit, for that it was mutually agreed *that the plaintiff ſhould before Lady-day convey to the defendant*, &c. all her intereſt and title to the real eſtate of P. deceaſed; *and that in conſideration thereof the defendant ſhould before that time pay to the plaintiff* 25 *l.* &c. and then lays mutual promiſes, viz. that in *conſideration the defendant had promiſed to perform the agreement on her part, the plaintiff promiſed to perform*, &c. *on her part.* It was moved in arreſt of judgment, that the plaintiff ought to have averred the performance of his part firſt, becauſe the defendant's part of the agreement was promiſed to be performed in conſideration of the plaintiff's performing his part. But it was anſwered, that the defendant's agreement depends not on the plaintiff's performing any act, but is, that in conſideration the plaintiff agreed to one thing the defendant agreed to do another thing; and the conſideration is no other than the reciprocal promiſe of the one to the other, which is executory, and upon which the parties have mutual remedies; and it is a general rule that *where the defendant hath a remedy for the conſideration of a promiſe, the conſideration* in ſuch caſe *needs not to be averred to be performed.* And judgment afterwards for the plaintiff. Hardr. 102. Paſch. 1657. Gibbons v. Prewd.

So where plaintiff agreed to ſurrender copyhold lands to the defendant, and that defendant ſhould pay, &c. and *in conſideration the plaintiff had aſſumed to perform the agreement on his parol, the defendant agreed to perform the agreement on his part*, the whole court held that here being mutual promiſes there needed

6. Where there is a promiſe againſt a promiſe, there *needs no averment*; as where *A. agrees to take B.'s ſon apprentice*, and *B. agrees to give A. a bond to pay* 40 *l.* this is a promiſe againſt a promiſe; and in an action for not giving the bond, the plaintiff need not aver his having taken the ſon apprentice. Lev. 87, 88. Mich. 14 Car. 2. B. R. Anon.

needed no averment of performance, and therefore the plaintiff in this caſe having made an ill averment where no averment was neceſſary, it ſhall not hurt. Lev. 293. Trin. 22 Car. 2. B. R. Beany v. Turner. ——S. P. becauſe it is the counter-promiſe and not the performance that raiſes the conſideration. Per cur. 4 Mod. 186. Paſch. 5 W. & M. in B. R. in caſe of Knight v. Keech.

* 7. Aſſumpſit, *for that he had purchaſed a leaſe of lands then in poſſeſſion of the defendant, who, in conſideration that the plaintiff had promiſed to pay him* 60 *l. promiſed the plaintiff to deliver up the leaſe upon the payment of the money, and alſo to deliver him poſſeſſion of the lands* 1 *April next*, and aſſigned for breach that he had not delivered him the poſſeſſion of the lands on the ſaid 1 April. It was moved in arreſt of judgment, that though here was a promiſe againſt a promiſe, yet the leaſe being to be delivered upon payment of the money, the plaintiff ought to aver that he had paid it; for otherwiſe he is not to have the leaſe delivered to him. And to this the court agreed, but held that the delivering poſſeſſion of the land, is another thing, and diſtinct, and to be done at another time; and herein is the breach alleged, and this ought to be done whether the money be paid or not; but if the breach had been for not delivering the leaſe, then the objection had been good; but the breach being for not delivering poſſeſſion of the land, judgment was given for the plaintiff. Lev. 70. Mich. 14 Car. 2. B. R. Oliver v. Evans.

Keb. 333. pl. 1. Oliver v. Yeams, S. C. judgment ſtayed. ——Ibid. 342. pl. 15. Oliver v. Eams, S. C. adjudged for the plaintiff.

8. Caſe for *that the defendant's ſon having got the plaintiff's daughter with child*, of which ſhe was delivered; *and that the plaintiff intending to proſecute the ſon, it was agreed between the plaintiff and defendant, that if the plaintiff would promiſe to keep the child for* 6 *years, and not proſecute the ſon, then the defendant would pay to the plaintiff* 10 *l.* And ſo lays mutual promiſes, and *averred, that he had maintained the child*, &c. *but that the defendant had not paid the* 10 *l.* Upon demurrer, it was objected that the plaintiff did *not aver that he promiſed to maintain the child for* 6 *years*, which is a condition that precedes the whole agreement; but per cur. the mutual promiſe of the plaintiff mentioned to be in conſideratione, &c. was ſufficient averment to this purpoſe, without other averment. And the plaintiff had judgment. Lutw. 222. Hill. 36 & 37 Car. 2. Stinton v. Yates.

9. Promiſe againſt promiſe gives mutual remedies, and *averment of performance is not neceſſary*. Comb. 256. Paſch. 6 W. 3. C. B. Mansfield v. Stephens.

Ld. Raym. Rep. 664, 665. Paſch. 13 W. 3. S. P. by Holt ch. juſtice.

10. If *A. promiſes to deliver a horſe, and B. promiſes* 20 *l.* the 20l. is to be paid for the horſe, and *the delivery of the horſe is to be preſumed* purſuant to the promiſe; for though an aſſumpſit is founded upon the promiſe, yet an act to be done purſuant to ſuch promiſe is the ground of the aſſumption; per Holt Ch. J. Comyns's Rep. 99. Paſch. 13 W. 3. B. R. in caſe of Thorpe v. Thorpe.

11. Where it is a condition precedent, the *doing it muſt be averred* to maintain an action; per Holt Ch. J. and cites Jo. * 318. where the executor of A. brought an action of the caſe againſt B. declaring that in conſideration A. in his life-time did *promiſe to aſſure* certain *lands to B. before Michaelmas next, B. promiſed to pay* him ſo much money *for the land*; ſo the aſſurance was to

So A. agrees to deliver B. a hawk at Midſummer, for which he agrees to pay him a horſe at Michaelmas,

there if a hawk be not delivered at Midſummer, there ſhall be no horſe delivered at Michaelmas, nor any remedy for it; per Holt Ch. J. 12 Mod. 462. cites D. 76. pl. † 3.

to be made before Michaelmas, and the money was to be paid for the land, and conſequently after Michaelmas; for A. had time till Michaelmas to make the aſſurance, and becauſe the aſſurance was to have been made firſt, and the money by the agreement to be paid *for the land*, though there were mutual promiſes, yet it was adjudged the action would lie for the money, without making the aſſurance firſt; and ſaid this caſe, as it is there reported, is intricate, and requires conſideration to make this conſtruction upon it, but upon examination it is a full authority in point. 12 Mod. 462. Paſch. 13 W. 3. per Holt in delivering the opinion of the court, in caſe of Thorpe v. Thorpe.

——[† But it is miſ-printed, and ſhould be pl. 30.]

* This is miſ-printed, and ſhould be Jo. 327. 328. Dike v. Ricks. ——Cro. C. 335, 336. S. C.

[360] (Z. 10) Aſſumpſit. Declaration. What is a good ſetting forth of the Promiſe.

1. THE writ is good, *that the defendant, for a certain ſum agreed upon between them, promiſed without expreſſing what ſum.* Br. Action ſur le Caſe, pl. 108. cites it as agreed 11 H. 6. 55.

So where the plaintiff declares that *in conſideration of one thing*, the

2. Aſſumpſit, for that the defendant *promiſed to do ſuch a thing*, and upon non aſſumpſit pleaded, it was *found that he promiſed to do that thing and another.* It was reſolved againſt the plaintiff. Cro. E. 79. pl. 42. Mich. 29 & 30 Eliz. B. R. King v. Robinſon.

defendant aſſumed, &c. and the *jury found that the promiſe was in conſideration of that thing and another thing*, he hath failed of his aſſumpſit. Cro. E. 79. in pl. 42. S. C.

Cro. E. 147. pl. 10. S.C. by Wray, Shute, and Clench accordingly; but Gawdy

3. In action on the caſe the *plaintiff ought not to vary from his caſe*, ſo that in the caſe of the *promiſe grounded on 2 conſiderations*, and plaintiff *declares on one only*, he ſhall never have judgment; per Wray J. Le. 299. pl. 410. Hill. 31 Eliz. B. R. in caſe of Simms v. Weſtcoate.

e contra, and cited the 32 H. 8. Br. Verdict 90. But Wray ſaid that book was no law, and the contrary had been adjudged in this court. And the principal caſe was aſſumpſit, &c. *in conſideration the plaintiff would marry the defendant's daughter, he promiſed to give him 20 l. and to procure him all the corn growing on ſuch lands, and to provide the wedding dinner.* The defendant confeſſed the promiſe of 20 l. to the plaintiff, ſo as he would procure a leaſe of certain lands for his daughter's life; and traverſed the other promiſes. The jury *found the promiſe of 20 l. but nothing elſe*; ſo that the jury have not found the ſame promiſe. And afterwards judgment was given againſt the plaintiff. Le. 299. pl. 410. Hill. 31 Eliz. B. R. Simms v. Weſtcot.

4. Aſſumpſit, in conſideration of forbearance for a certain time, *to pay the debt* (being 10 l.) *at 2 ſeveral days.* It was moved in arreſt of judgment, that it is *not declared by what portions* the 10 l. ſhould be paid. But per tot. cur. the plaintiff had judgment to recover. 3 Le. 235. pl. 322. Mich. 32 Eliz. B. R. Brewin v. Mansfield.

Het. 120. S. C. [though taken in as of Mich. 4 Car. C. B.] adjornatur.

5. Aſſumpſit, for that the plaintiff, 1 *Nov.* 31 *Eliz. delivered to the defendant* 3 *cloaths.* The *defendant, in conſideration thereof, promiſed to pay* 30 *l. one moiety within a year, the other moiety within the ſecond year* following. It was *found the delivery was* 1 *Aug.* 31 *Eliz.*

This is not the aſſumpſit upon which the plaintiff declared, and therefore adjudged for the defendant. Cro. E. 660. pl. 6. Paſch. 41 Eliz. B. R. Mundy v. Martin.

6. The count was that *ſuper ſe aſſumpſit*, but *ſays not to whom, nor* ſays *& eidem querenti fideliter promiſit*; yet the promiſe being *to enter into a bond to the teſtator*, it was held as ſufficient as if it had been ſuper ſe aſſumpſit prædicto the teſtator; for it is tantamount: and ſays it was ſo reſolved in the caſe of * MICHAL v. JOHNS. But if it had been *ſuper ſe aſſumpſit to enter into a bond of* 20 *l.* and ſhews not to whom, there perhaps all had been uncertain and void. Cro. E. 847, 848. Mich. 43 & 44 Eliz. B. R. Coulſton v. Carr.

Noy 38. S. C. mentions the count as of a promiſe to pay, &c. without ſaying to whom, &c. And that judgment was given for the plaintiff. ——— * See (U) pl. 61.

7. The count was that defendant *aſſumpſit, that the arrears of a certain annuity ſhould be paid modo & forma ſequenti, viz. that he with two* † *others ſhould be obliged*, &c. It was held a ſufficient aſſumpſit to be obliged, though it came after the viz. But Fenner e contra. Cro. E. 847, 848. pl. 1. Mich. 43 & 44 Eliz. B. R. Coulſton v. Carr.

Noy 38. S. C. but S. P. does not appear. † [361]

8. Aſſumpſit, for that *in conſideration he would marry the defendant's niece, he promiſed to give with her in marriage, as before he had agreed to give with her in marriage to J. S.* and *alleged that the defendant had agreed* (but did *not ſay with whom*) *to give J. S.* 1000 *l.* if he would marry his ſaid niece. This being moved in arreſt of judgment, Fenner and Yelverton held the exception good, and that it is material and traverſable; but Gawdy and Popham e contra clearly; for that ſuch agreement is but collateral, and only an inducement to the promiſe, which is the principal cauſe of the action; and if the defendant would have pleaded in this caſe, that he did not agree to give J. S. 1000 l. then the plaintiff by his replication might have made the agreement certain as to the perſon with whom it was made. Yelv. 17. Mich. 44 & 45 Eliz. B. R. Alſop v. Sytwell.

If J. S. in conſideration of 1000 l. *agrees to pay all the debts of J. D.* and J. S. declares that he agreed to pay all J. D.'s debts, and that in conſideration thereof the defendant *promiſed to give him* 1000 *l.* this is good, *without ſaying with whom the agreement was made, or what debts particularly he has paid*, yet the payment of the debts is matter traverſable; for if the defendant alleges any debt in ſpecial not paid, the plaintiff by way of replication may make it certain; per Gawdy and Popham. Yelv. 17, 18. Mich. 44 & 45 Eliz. B. R. in caſe of Alſop v. Sytwell.

9. Aſſumpſit, &c. in conſideration the plaintiff would marry the daughter of the defendant *ſuper ſe aſſumpſit*, and did not ſay the defendant *ſuper ſe aſſumpſit*; and this was objected in arreſt of judgment; but it was inſiſted that it muſt neceſſarily be intended that the defendant promiſed, becauſe queritur verſus, &c. and he is there named. But all the court held it to be ill; for a declaration ought to contain the ſubſtance, or otherwiſe it is not good; and no matter of ſubſtance ſhall be ſupplied by intendment, nor ſhall the verdict help it; wherefore it was adjudged quod querens nihil capiat per billam. Cro. E. 913. pl. 1. Hill. 45 Eliz. B. R. Law v. Sanders.

Noy 50. S. C. This was moved in arreſt of judgment, and it was ſtaid. ——— S. C. cited 2 Ld. Raym. Rep. 899. Trin. 2 Ann. and Powell J. ſaid that the declaration in this caſe was adjudged ill, becauſe *there were* 3 *perſons mentioned in the count*, and then non conſtat which of the 2 beſides the plaintiff made the promiſe, and therefore it is uncertain. ——— 5 Mod. Arg. cites S. C. and ſays the defendant's daughter was the laſt of the 3 named, and the words ſuper ſe aſſumpſit immediately following might relate to her, which was the reaſon of the judgment.

In

In *quantum meruit for ſeveral horſes lent by the plaintiff to the defendant at his requeſt*, the *count was that ſuper ſe aſſumpſit*. Exception was taken for *not ſaying who promiſed*; ſed non allocatur; for it *muſt be intended the defendant* promiſed; and judgment pro plaintiff, the *debt being created by law; but if* it were *collateral*, the promiſe to and by whom muſt be poſitively averred. 2 Keb. 715. pl. 97. Mich. 22 Car. 2. B. R. Symball v. Cook.——S. C. cited Lutw. 238. by Powell J. as a caſe in point with the principal caſe there, which was adjudged for the plaintiff. Trin. 13 W. 3. Remington v. Taylor.

Aſſumpſit, &c. for that the defendant being indebted to him in 20 l. for goods ſold, in conſideration thereof *ſuper ſe aſſumpſit*, and did *not ſay that the defendant promiſed*. After a judgment by default adjudged for the plaintiff, becauſe there is nobody elſe upon the record to promiſe but the defendant; but if there had been two defendants, it might have been uncertain to whom to apply the promiſe. 1 Salk. 26. pl. 13. Trin. 2 Ann. B. R. Shore v. Brown.——3 Salk. 17. S. C. per cur. accordingly.——2 Ld. Raym. 899. Sheer v. Brown, S. C. and judgment affirmed by 3 juſtices, abſente Holt.

S. C. cited Arg. Hardr. 223. that if the count does not expreſs to whom the promiſe was made, it ſhall be intended to be to the plaintiff.

10. In aſſumpſit the plaintiff counted of a promiſe *to deliver* 20 *fodders of lead*. Exception was taken, becauſe it was *not ſaid to whom* the lead ſhould be delivered. Sed non allocatur; for it ſhall be intended to be to him to whom the promiſe was made, which was the plaintiff. Cro. J. 287. pl. 3. Mich. 9 Jac. B. R. Somerfall v. Barnaby.

[362]

11. Aſſumpſit, for that he *having ſold and delivered certain wares to J. S. at the requeſt of the defendant, he promiſed that in conſideration the plaintiff would truſt the ſaid J. S. for the wares, not exceeding* 100 *l. he would pay* for the ſame *when required*; and the plaintiff *alleged in fact, that ſuper inde fiduciam dedit to the ſaid J. S. and delivered the goods to him, which did not exceed* 100 *l.* After verdict for the plaintiff it was objected, that the words fiduciam dedit ſuper inde might mean as well before as after the promiſe made, and by intendment may be taken either way; beſides he ought to have alleged that J. S. who was the principal creditor, had not paid for the wares; for if he had, then this action would not lie againſt the defendant; but adjudged that the word *ſuper inde muſt relate to the promiſe*, and that *if J. S. had paid the money the defendant ought to have ſhewed it*; per tot. cur. adjudged for the plaintiff. 2 Bulſt. 74. Hill. 11 Jac. Craſk v. Johnſon.

Poph. 181. Sharp v. Ruſt, S. C. adjudged for the plaintiff. Mich. 2 Car. B. R.——Lat. 151. S. C. and the court held it well enough.——Ibid. 272. Sharp's caſe, S. C. adjudged accordingly.——Cro. C. 77. pl. 8. Trin. 3 Car. in the exchequer-chamber, Rolte v. Sharp, S. C. and judgment affirmed.

12. Plaintiff counted that *if the defendant would deliver certain wares to the defendant's daughter he would pay* for them, but did *not ſay to whom* he would pay. But the court held that this ſhall be intended of payment to the plaintiff. Noy 83. Sharp v. Rolt.

A. promiſed B. *to deliver ſo many lead of, &c. at ſuch a place*. It was moved in arreſt of judgment, that the aſſumpſit was to deliver, but does *not ſay to whom*. But Walter Ch. B. held this exception not good; for when one promiſes another to pay or deliver any thing, and ſays not to whom, *the law will intend it*; and he remembered a caſe in 36 Eliz. where one promiſed to deliver 10 quarters of peas at ſuch a houſe, and did not ſay to whom, yet it was adjudged good; for there, and ſo here, he is to deliver it at his peril at ſuch a place, though none be there to receive it; and if no place be, then to the perſon, though it be not ſaid to whom it ſhall be delivered, and the delivery at the place mentioned indemnifies him; beſides in the principal caſe the declaration is, that they were to be delivered at ſuch a place to the uſe of the plaintiff, which makes it much the ſtronger. Litt. Rep. 85. Trin. 4 Car. in the exchequer. Howard v. Approbert.

13. Aſſumpſit for that the defendant *in conſideration of a marriage*, &c. *inter alia*, *promiſed to pay* ſo much; after a verdict for the plaintiff, the judgment was ſtayed, becauſe the whole *promiſe being*

being intire, it *muſt be wholly ſet forth*. All. 5. Hill. 22 Car. B. R. Powell v. Waterhouſe.

14. Caſe, for that the defendant *aſſumed to pay the plaintiff* 84 *l. out of the freight of a ſhip*. It was moved in arreſt of judgment, becauſe the plaintiff had *not averred that there was any money due for the freight* of the ſhip; per Roll Ch. J. it is a parcel of the promiſe that the money ſhould be paid out of the freight, and that it ought to have been avowed; and likewiſe the plaintiff ought to have laid a demand made of the money to be paid out of the freight. Sty. 220. Trin. 1650. B. R. Chace v. Lovering.

15. It did *not appear* by the declaration *to whom the aſſumpſit was made*, but it was only ſaid *ſuper ſe aſſumpſit*; and this being moved in arreſt of judgment, the court ruled a nil capiat per billam. Sty. 255. Hill. 1650. B. R. Coleman v. Blunden.

16. Aſſumpſit for that *in conſideration quod procuravit* [*procuraret*] *J. S. to ſurrender ſuch an houſe the defendant would pay him* 10*l. when he ſhould be required*, but did *not ſay ſuper ſe aſſumpſit to pay*; after a verdict for the plaintiff the judgment was ſet aſide for this reaſon. Sid. 246. pl. 8. Paſch. 17 Car. 2. B. R. Buckler v. Angell. Raym. 123. Buck v. Angel, S. C. Twiſden J. thought the declaration not good; but Keeling thought it only matter of form; but judgment was ſtayed until, &c.——Keb. 878. pl. 30. S. C. adjudged per curiam præter Keeling.——Lev. 164. S. C. and the judgment ſtayed; for here was no promiſe, and therefore non aſſumpſit was no iſſue.——S. C. cited and S. P. where the count was of goods ſold and delivered, and judgment reverſed in error. 2 Ld. Raym. Rep. 1516. Hill. 1 Geo. 2. B. R. Lea v. Welſh.

17. Indeb. aſſ. in an inferior court alleged that defendant was indebted to him for goods ſold, and being ſo indebted, did aſſume infra juriſdictionem curiæ. Hale Ch. J. thought it good enough, for the *indebitatus is but the inducement to the action, but the aſſumpſit is the ground of it*; for this is not an action of debt but action on the caſe, and the alleging the indebitatus is only to ſhew that it is not a debt upon a judgment, nor an obligation, nor a rent; ſo that if he had ſaid indebitatus for goods generally, it had been good enough. Twiſden and the practicers affirmed the practice for 10 years to be otherwiſe; but Hale and Wilde never knew it ſo for many more years; and Hale took a difference, that if he had ſaid *wares ſold at ſuch a place* he *ſhould have ſaid infra juriſdictionem curiæ*; but if no place appear, and the *aſſumpſit* be *alleged infra juriſdictionem curiæ*, it is well enough. Adviſare volunt. Freem. Rep. 104. pl. 112. Mich. 1673. B. R. Anon. [363]

18. Aſſumpſit, &c. for that the *defendant being excommunicated at the proſecution of the plaintiffs (church-wardens) for not paying a tax towards the repair of the church, and in conſideration that the biſhop at the inſtance and requeſt of the ſaid defendant would abſolve him, he promiſed to pay the money to the plaintiffs*, &c. It was moved in arreſt of judgment, that here was no conſideration on the part of the plaintiffs to raiſe this promiſe; but judgment was given for them; for it cannot be intended but that the biſhop abſolved him at their requeſt, and would not have done it but on account of the promiſe 2 Lev. 119. Corny and Curtis v. Collingwood S. C. but ſtates it of the *excommunication of the defendant's mother*, and that the

defendant promiſed, and judgment for the plaintiffs.

miſe to pay the money to them. Vent. 297. Trin. 28 Car. 2. B. R. Curtis & al' v. Collingwood.

—— Freem. Rep. 284. pl. 328. S. C. exception was taken, becauſe it was *not alleged that they were church-wardens at the time of the promiſe* made, whereby it might appear that they had a right to demand the money, and ſo they may be as mere ſtrangers. But had it been in conſideration that the plaintiffs conſentirent, or would not obſtruct it, or that the biſhop at their inſtance would abſolve it, it would have been well enough; per Twiſden; ſed nunc dubitaverunt; and adjornatur. Afterwards judgment was given for the plaintiff.

19. In indeb. aſſ. the words *in conſideratione inde* were *left out*; and held well enough, for it being well alleged that he was indebted, the law raiſes the promiſe, and they could not but intend it to be in conſideration of that debt. 2 Show. 180. pl. 178. Hill. 33 & 34 Car. 2. B. R. Tyler v. Bendlowe.

5 Mod. 305. Gatehouſe v. Row, S. C. and the plaintiff had judgment, it being after verdict.— Plaintiff declared upon a ſpecial agreement between him and the defendant, that the plaintiff ſhould convey to him an houſe, &c. and that the defendant ſhould pay the plaintiff 135 l. Then he lays mutual promiſes, cumque etiam, in conſideration that he (the plaintiff) had by leaſe and releaſe conveyed eidem Joſepho (the defendant) the ſaid houſe, ſuper ſe aſſumpſit to pay the money, &c. It was moved in arreſt of judgment that the declaration was ill, becauſe the plaintiff did not ſet forth that the defendant ſuper ſe aſſumpſit; but adjudged for the plaintiff by 3 juſtices; contra Blencow, that thoſe words cumque etiam might be conſtrued moreover, and conjoin the 2d promiſe to the perſon rightly named in the firſt promiſe; beſides this was after a verdict, which cures want of form; per Treby Ch. J. Lutw. 233. Hill. 9 W. 3. Stanhope v. Butler.

20. Aſſumpſit, *quod cum the defendant was indebted to him in 5 l. for money lent, and promiſed to pay; cumque etiam at the requeſt of the defendant the plaintiff found horſe-meat for J. S. ſuper ſe aſſumpſit*; and ſays *not that the defendant ſuper ſe aſſumpſit.* It was aſſigned for error, that J. S. might as well be the perſon promiſing as the defendant; and the promiſe is the giſt of the action; and an incertainty in that cannot be cured by intendment after verdict. Sed per cur. it being *ſaid poſitively at firſt, that the defendant ſuper ſe aſſumpſit*, and then cumque etiam, &c. the *ſame nominative ſhall go to all the promiſes*; and by reaſon of the word (etiam) it cannot be intended of a promiſe by *J. S.* for he *had not promiſed before.* Judgment after verdict affirmed. 2 Salk. 663. pl. 4. Mich. 8 W. 3. B. R. Roe v. Gatehouſe.

21. Plaintiff *counted that* the defendant *the 6th of May* 1695, *in conſideration that* the *plaintiff had provided him diet for* 120 *weeks tunc præterit' promiſed to pay him* 7 *s. per week, and* that the defendant *poſtea*, viz. *the 6th of May* 1695, *in conſideration that the plaintiff had found him diet for* the ſpace of 120 *weeks then paſt, promiſed* to pay the plaintiff *tantum quantum mereret* for the ſaid weeks; and moved in arreſt of judgment that the defendant is *twice charged for the ſame thing*, the 120 weeks in the quantum meruit being not ſaid to be others from thoſe in the ſpecial promiſe, as it is uſually ſaid in thoſe caſes. But the court held that though (aliis) be generally ſaid, yet ſeeing it did *not appear they were the ſame* (for there is no preciſe time laid when theſe 120 weeks were) they will not intend them ſo as to deſtroy a promiſe otherwiſe well laid; and therefore the plaintiff had judgment. 12 Mod. 157. Mich. 9 W. 3. Weſt v. Cole.

[364]

1 Salk. 24. pl. 8. but S. P. does not appear.

22. In debt, one never lays a promiſe but only the debt; but in aſſumpſit there is a contract in law to pay what you received to another's uſe; and though a promiſe be laid ever ſo expreſs, yet if you

you do not *ſhew the cauſe* of the promiſe it will not bear an aſſumpſit, though you give ever ſo juſt a debt in evidence; becauſe it may be debt by ſpecialty, or a rent, whereof aſſumpſit does not lie, if it be not for forbearance of the payment after it is due. So it will not be enough to ſay, that the defendant being indebted to you in ſo much money, he *promiſed to pay* you, even after verdict. Per Holt Ch. J. 12 Mod. 511. Paſch. 13 W. 3. B. R. in caſe of Palmer v. Stavely.

(Z. 11) Aſſumpſit. Declaration. What is good ſetting forth of the Promiſe in a Quantum Meruit. And in what Caſes a Quantum Meruit lies.

1. IN *indeb. aſſ. & quantum meruit*, there was *judgment by default*, and a writ of inquiry and entire damages given. Upon a writ of error in B. R. it was objected that one of the promiſes was ill; for it was in conſideration that the plaintiff would let the defendant have meat, drink, &c. he promiſed to pay quantum rationabiliter *valerent*, when it ſhould be (*valebant*) at the time of the promiſe; but the judgment was affirmed. 3 Mod. 190. Hill. 3 Jac. 2. B. R. Bowyer v. Lenthall.

2. The conſideration may create a debt though that debt be not reduced to a certain ſum, as where the plaintiff *found meat and drink* for the defendant *at his requeſt*. 2 Vent. 282. Hill. 2 & 3 W. & M. in C. B. Webb v. Moore.

3. Quantum meruit lies for ſerving as a commiſſioner on a *commiſſion to examine witneſſes*. 1 Salk. 330. pl. 1. Mich. 3 W. & M. in B. R. Stockhold v. Collington.

4. The *very taking up goods* implies a contract to pay for them what they are worth. Cumb. 426. Trin. 9 W. 3. B. R. in a note in caſe of Hayward v. Davenport.

5. *Curate* being removeable at the will of the parſon, cannot preſcribe for a *penſion*, but his remedy muſt be by quantum meruit. 2 Salk. 506. Hill. 10 W. 3. B. R. Birch v. Wood.

6. Quantum meruit, *for that at the defendant's requeſt he had done ſuch and ſuch ſervices for him, the defendant promiſed*, in conſideration thereof, *to pay him quantum mereretur*, as much as he ſhould deſerve. It was moved in arreſt of judgment, that the conſideration being paſt, it ſhould have been *quantum merebatur*, or meritus fuiſſet. Holt Ch. J. aſked, if the preſent tenſe of the potential or conjunctive mood be the ſame with that of the indicative, as in the caſe of quod recuperat, in all judgments, which, if tranſlated, muſt be made (do recover), why ſhall not the præter-imperfect tenſe of both moods be the ſame? And if this had been merebatur, you had allowed it good. And the merit is not paſt when the work is done, but continues till ſatisfaction. And the plaintiff had judgment. 7 Mod. 106. Mich. 1 Ann. B. R. Clerk v. Yewdall. [365]

7. Aſſumpſit,

2 Ld. Raym. Rep. 1223. S. C. adjudged for the plaintiff. The reporter ſays, the queſtion ſeems to him to be, whether the plaintiff ought not to have purſued the intent and meaning of the promiſe in his declaration.

7. Aſſumpſit, for that the defendant, *in conſideration the plaintiff would provide him meat and drink, he promiſed to pay as much as the plaintiff habere meruit.* It was moved in arreſt of judgment that meruit ſhould have been *meruerit.* But judgment for the plaintiff; for per cur. they muſt take the words of the declaration to be the very words of the promiſe; and then the court ought not to purſue a grammatical ſenſe, which makes the promiſe void, but to conſtrue it ſo as to make the parties mean ſomewhat. 2 Salk. 558. pl. 3. Hill. 4 Ann. Moverly v. Ley.

8. In *caſe* the plaintiff declares, that the *defendant being indebted* to the plaintiff *in* 10 *l. for horſe meat*, in conſideration thereof *promiſed to pay* to the plaintiff *as much as he ſhould deſerve.* After verdict for the plaintiff, it was moved in arreſt of judgment, *that a ſum certain could not be a conſideration for an uncertainty.* Suppoſe the jury had given 11 l. 10 s. that could never be a good conſideration for more. But per cur. it is well enough, and the plaintiff has *election* to bring his action upon either. 11 Mod. 134. pl. 15. Trin. 6 Ann. B. R. Squire v. Yendon.

(Z. 12) Aſſumpſit. Breach. How to be aſſigned of the Promiſe.

1. ASſumpſit, for that he was *indebted to J. S. in* 40 *s. the defendant, in conſideration that he had delivered* 40 *s. to him, did promiſe to* pay it, and *diſcharge him againſt J. S.* and alleges that he had not diſcharged him, but *ſuffered him to be ſued for the* 40 *s. by the executor of J. S.* but doth *not allege that J. S. was dead.* After judgment for the plaintiff this was aſſigned for error; but the court held it to be well enough, for that the plaintiff directly alleged that he had not diſcharged him, and the other matter is but circumſtance; and the judgment affirmed. Cro. E. 98. pl. 3. Paſch. 30 Eliz. B. R. Coke v. Barrow.

Le. 123. pl. 167. Dellaby v. Haſſels, S. C. adjudged accordingly.

2. Aſſumpſit, *in conſideration the defendant retained the plaintiff to go to Paris upon his occaſions, the defendant promiſed to give him ſo much as would content him.* In aſſumpſit the plaintiff alleged that he went thither, and was content to take 25 l. which he requeſted the defendant to pay, but he refuſed. It was holden by the court that the action did well lie, though the plaintiff *ſhewed not time nor place when he gave notice of his content*; for the place is not material nor iſſuable. And adjudged for the plaintiff. Cro. E. 132. pl. 8. Paſch. 31 Eliz. B. R. Debavoy v. Haſſal.

Le. 123. pl. 168. S. C. by Gawdy accordingly, but no mention of judgment.

3. Aſſumpſit, for that *in conſideration he had paid to the defendant* 40 *l. for the debt of J. M. his ſon, the defendant promiſed to deliver him all the bonds, &c. wherein the ſon ſtood bound to him.* It was moved in arreſt of judgment, that the plaintiff had *not averred that the defendant had bonds in which the ſon was bound to him.* Gawdy, J. ſaid that he need not allege what the deeds were, becauſe he is

not

not to recover the bonds, &c. but damages for detaining them. And the plaintiff had judgment. Cro. Eliz. 133. pl. 11. Paſch. 31 Eliz. B. R. Muſket v. Cole.

* 4. Aſſumpſit, in conſideration the *plaintiff had ſued the defendant, and were at iſſue, the defendant, in conſideration he would ſurceaſe his ſuit, promiſed* him to aſſign him ſuch a leaſe, and *to pay him his coſts of ſuit;* and alleged he had ſurceaſed his ſuit, but that the defendant had not aſſigned his leaſe, nor paid his coſts of ſuit. It was moved in arreſt of judgment, becauſe he did *not allege what coſts he expended.* The court held it not good for that cauſe, if the defendant had demurred upon it, but taking iſſue upon it, he ſhall not now take advantage of it. And ſo the plaintiff had judgment. Cro. E. 276. pl. 4. Paſch. 34 Eliz. B. R. Fox v. Goodſon.

5. Aſſumpſit, *in conſideration that the plaintiff would ſurceaſe his ſuit* againſt the defendant in chancery, *he promiſed to ſave the plaintiff harmleſs from all actions* which might be brought againſt him, for or *concerning a leaſe aſſigned by him to the plaintiff*, and averred that he did forbear to proceed, and that a ſtranger had brought an action on the caſe againſt him in B. R. ratione dimiſſionis præd. and that the defendant had not ſaved him harmleſs. After verdict and judgment for the plaintiff, it was aſſigned for error becauſe the plaintiff did *not ſet forth certainly what action was brought againſt him, or that it was brought for a matter in eſſe at the time of the promiſe made.* And for theſe reaſons the judgment was reverſed. Moor. 705. pl. 985. Morſe v. Roſſe.

Cro. E. 869. in pl. 2. cites S. C. as adjudged Trin. 32 Eliz. C. B. —— Aſſumpſit *for that he was bound in obligation of* 300 *l. the defendant promiſed to ſave him harmleſs; and although he was impleaded upon that bond, and a recovery had by due courſe of law, the defendant had not ſaved him harmleſs.* The defendant aſſigned for error, becauſe it is *not alleged how he impleaded him, and recovered,* but generally implacitaſſet & recuperaſſet. Sed non allocatur; for that is ſufficient, *without ſhewing the record.* Cro. J. 10. pl. 14. Paſch. 1 Jac. B. R. Foſter v. Clement.

6. Aſſumpſit, for that the *defendant had diſtrained 6 oxen of H. the plaintiff for a quit-rent due to the bailiffs of B. the defendant, in conſideration that H. had paid the money for the redemption of the cattle, aſſumed upon requeſt, to ſhew to H. or to ſuch other perſon or perſons as he ſhould name, a ſufficient record to charge the ſaid lands with the ſaid quit-rent;* and *alleges that he appointed B. to ſee the ſaid record, and requeſted the defendant to ſhew it to B. but that he had not ſhewed to the ſaid B. any ſufficient record to charge his lands.* It was moved in arreſt of judgment, that the ſufficiency of the ſaid record will by this means be referred to the lay-gents, whereas the plaintiff might have pleaded that he did not ſhew any record, and ſo the jury might have inquired of it. Sed non allocatur; for though the plaintiff might have laid the breach generally, as that he ſhewed not any record, yet as it is laid it is good enough, it being moſt proper to lay the breach as the promiſe was. Yelv. 38. Mich. 1 Jac. Heyford v. Reeve.

7. Aſſumpſit, for that the *defendant was poſſeſſed of* 17 *todd of wool, and there was a colloquium between them for* 15 *todd of the ſaid* 17 *todd, to be choſen by the plaintiff*, &c. The *defendant, in conſideration of* 6 *l. to be paid at ſuch a day, &c. promiſed to deliver to the plaintiff prædict.* 15 *todd* of wool; *and avers, that although he was ready to pay, &c. yet the defendant had not delivered* the

But if the communication had been as before, and then he had declared upon a pro-

miſe to deliver 15 todd generally, *without ſaying* (*præd*') and the promiſe is found, the plaintiff ſhall have judgment; for *the colloquium might be conditional, and the promiſe abſolute*; per Popham. Yelv. 76. per cur. in S. C.

the ſaid 15 todd, &c. It was moved in arreſt of judgment, becauſe he doth *not ſhew that the plaintiff had made any election of the 15 todd*, which is quaſi a condition precedent, and an act firſt to be performed by the plaintiff, before the defendant was obliged by his promiſe to do any thing; quod fuit conceſſum per tot. cur. And by Popham this is much enforced by the word (*præd.*) which *cannot refer to any other thing but to the communication, by which the plaintiff of his own ſhewing ought to make an election*; and ſo it appears to be his own default. Adjudged againſt the plaintiff. Yelv. 76. Mich. 3 Jac. B. R. Rayney v. Alexander.

* *So if it appears the defendant hath ſold one of the todds before election*, this had deſtroyed the election of the plaintiff, and made the promiſe abſolute. *So if the defendant would not ſuffer the plaintiff to ſee the wool*, that he might make his election; for this will excuſe the act on the part of the plaintiff to be performed, and have been a default in the defendant; per Popham. Yelv. 76. Mich. 3 Jac. in caſe of Raynay v. Alexander.

Yelv. 168. Brenley v. Todd S. C. adjudged for the plaintiff. —— Noy 135. Brumley v. Todd S. C. adjudged for the plaintiff.

8. Aſſumpſit, for that the defendant *in conſideration the plaintiff would marry his couſin, promiſed he would give him* 100*l.* and ſaid he married her ſuch a day and place. It was moved in arreſt of judgment, becauſe it was *not ſhewn that he had given the defendant notice of the marriage*. But a precedent in point between MORLEY AND HODGES in the exchequer chamber being ſhewn, where judgment was affirmed, the court reſolved it was good enough; for it is a neceſſary intendment, that when after the marriage he requeſted the money, that notice was given of the marriage. Cro. J. 228. pl. 4. Mich. 7 Jac. B. R. Bradley v. Toder.

Yelv. 175. Rock v. Rock, S. C. adjudged accordingly. — S. C. cited 7 Mod. 145. by Holt Ch. J. who ſaid it was againſt all reaſon; for if it was the next, then by their own confeſſion the action lay; but if it were not the next, then there was another journey before, and then too the action was well brought. —— S. C. cited, and denied to be law. 2 Ld. Raym. Rep. 839. Mich. 1 Ann.

9. Aſſumpſit, for that the *defendant being indebted to the plaintiff in* 40*l. for wares, &c. promiſed to pay ante inceptionem proximi itineris of the plaintiff to London*; and *alleged that on the* 23*d day of February following incepit iter ſuum to London*, but did *not ſay proximum*, for which cauſe it was held ill; for the duty grew upon the commencement of his next journey. And adjudged for the defendant. Cro. J. 245. pl. 3. Trin. 8 Jac. B. R. Rook v. Rook.

2 Bulſt. 37. S. C. adjudged for the plaintiff; per tot. cur. clearly. For by this omiſſion the declaration is not good.

10. Aſſumpſit, *for that the plaintiff ſuffered the defendant to occupy a houſe, the defendant promiſed to ſave the plaintiff harmleſs, and alſo to pay* 2 *d. for every farthing-worth of damage the plaintiff ſhall ſuſtain, &c. and declared that by negligence of the defendant the houſe was burnt down, and that he had not ſaved him harmleſs, nor paid the* 2 *d. for every farthing-worth of loſs*, &c. It was moved in arreſt of judgment, becauſe he did *not ſhew how many farthings damage he ſuſtained*, and therefore nil capiat per billam was entered, per tot. cur. for the court cannot intend but that the jury have given damages as well for the not ſaving harmleſs as for the farthing-worths of the loſs. Yelv. 220. Paſch. 10 Jac. B. R. Coveney v. Wooden.

11. Plaintiff counted that *defendant entered into a ſtatute not to aſſign over his leaſe, which being forfeited by his aſſigning the leaſe, he promiſed to pay the plaintiff* 20*l. in conſideration he would forbear to ſue* him. It was moved that here was no conſideration, becauſe it does *not appear that the ſtatute was forfeited, it not being ſhewn by*

what conveyance he had aſſigned, but only in general that he had aſſigned over without ſhewing how. But it was held good, and judgment for the plaintiff. 2 Bulſt. 262. Mich. 12. Jac. Simpſon v. Powell.

12. The count was, that the defendant being *indebted* to him *in* 100 *l.* in conſideration of forbearance till ſuch a day, *promiſed to pay* 50 *l. at one day, and* 50 *l. at another*, and *averred that he had not paid the* 100 *l. modo & forma.* It was moved in arreſt of judgment, becauſe he had *not averred the non-payment of each* 50 *l. at the ſeveral days ſeverally.* But Coke Ch. J. thought it well enough after verdict. And judgment for the plaintiff. Roll. Rep. 404. pl. 32. Trin. 14 Jac. B. R. Pete v. Tongue.

12. Aſſumpſit, for that *in conſideration of a ſum of money paid to the defendant, he promiſed to take the plaintiff's ſon apprentice for ſeven years, and to find him meat, drink, and cloaths*, &c. durante termino prædicto; and aſſigns the breach in not finding him meat, &c. durante termino apprenticii; but did *not aver* in his declaration *that he put him apprentice, or that the defendant accepted him as apprentice;* and this being moved in * arreſt of judgment, the declaration was held ill, and judgment for the defendant. Cro. J. 406. pl. 1. Mich. 14 Jac. Talkorn v. Wrigg.

3 Bulſt. 221. Talkern v. Wright, S. C. adjudged for the defendant clearly, though at firſt they inclined to be of opinion for the plaintiff.

13. Aſſumpſit, for that he *bargained with B. to ſell and deliver him* 150 *ſtone of wool for* 114 *l. to be paid at a day to come, and that the defendant in conſideration he would deliver the ſaid wool to B. became ſide juſſor for the ſaid B. aſſumendo*, &c. *to the plaintiff to pay*, &c. It was moved in arreſt of judgment, becauſe he *grounds his declaration upon the aſſumpſit*, whereas there is no aſſumpſit but that he became ſide juſſor; and then it *ought to have been ſhewed that the principal had not paid it, being demanded*, and ſo have alleged default in him, *and afterwards a demand of the ſurety;* and of that opinion were all the court (abſente Mountague,) wherefore judgment was for the defendant. Cro. J. 500. pl. 9. Mich. 16 Jac. B. R. Bateſby v. Brookſbeck.

*[368]

14. In aſſumpſit the count was of a *promiſe to pay at Lady-day, vel circiter illud tempus;* and alledged that it was not paid at the day, nor within 40 days after. Notwithſtanding the uncertainty of circiter, judgment was given for the plaintiff; becauſe it appeared that the money was not paid when the ſuit was commenced. Noy 16. Taylor v. Charey.

S. C. cited Raym. 10.

15. The defendant promiſed 1ſt of March *to deliver the plaintiff* 20 *quarters of barley the next ſeed-time, without ſhewing when the ſeed-time was;* but the action not being brought till half a year after the promiſe, and the ſeed-time being between the promiſe and the action, judgment was given for the plaintiff. Godb. 350. pl. 445. Trin. 21 Jac. B. R. Totnam v. Hopkins.

16. Aſſumpſit againſt an executor, for that J. S. the *teſtator promiſed the plaintiff, who had married his daughter, that he would give him as good a portion as he ſhould give to any of his children; and alleged that J. S. gave to ſuch a daughter ſo much*, &c. It was moved in arreſt of judgment, becauſe the plaintiff did *not ſet forth the time when J. S. gave ſo much to ſuch child*, and it may be that he gave

Aſſumpſit, for that T. the *teſtator, in conſideration the plaintiff would marry S his daugh-*

ter, promiſed to give him in marriage as much as he gave in marriage with any other daughter; and *alleged* he married S. and *that T. had* 3 *daughters, viz. E. A. and the ſaid S. and that T. gave in marriage to J. S. who married A.* 100*l. and a bond of* 100*l. to pay him* 50*l. more after his deceaſe, if A. or any iſſue of her body were then living*; *and* aſſigns the breach *that T. paid him only* 40*l. in his life-time, and that he requires of the defendant, who had aſſets, the* 60*l. and a bond for the payment of* 50*l. more, and averred that A. had iſſue alive.* It was moved in arreſt of judgment, that the promiſe to give as much as to any other daughter extends only to money given, and not to the bond. But if it did extend to the bond, then it ought to have been averred that S. or ſome iſſue of her body was alive, and not that A. had iſſue alive; and of this opinion were all the court, but chiefly for the 2d point; but as to the firſt they differed, wherefore it was adjudged for the defendant. Cro. C. 186. pl. 5. Paſch. 6 Car. B. R. Cule v. Thorn's Executors.

it before he made the promiſe to the plaintiff, and then the promiſe quod daret would not extend to it; per Whitlock J. this may be intended; but Jones and Doderidge e contra, that a declaration ſhall not be taken by intendment. Lat. 203. Mich. 2 Car. Almot v. Pickton.

Jo. 228. Puncher v. Kingſton, S. C. adjudged for the plaintiff; and if ſhe had ſuch a portion, the defendant might have pleaded it.

17. Aſſumpſit, for that *the defendant having diſcourſe with the plaintiff for the marriage of one M. affirmed that her portion was* 600*l. and in conſideration he would marry her, and promiſe to ſettle ſuch lands for her jointure, promiſed the plaintiff to pay him* 100*l. & firmam faceret to him the ſaid portion of* 600*l.* and that he at his requeſt married her, and that the defendant had not paid, nec firmam faceret to him the ſaid 600l. It was moved in arreſt of judgment, becauſe *not ſhewed that he might not have the ſaid portion, or that M. had not ſuch a portion.* But the court held the declaration good; for it * purſues the words of the aſſumpſit in the breach alleged, and theſe words tantamount, that he would warrant he ſhould have ſuch a portion, with his wife. Adjudged for the plaintiff. Cro. C. 202. pl. 5. Mich. 6 Car. B. R. Pilchard v. Kingſton.

* Aſſumpſit, &c upon a *promiſe* made *to return certain horſes by ſuch a day in as good plight as they were at the lending, or to pay* 10*l. for every* † *horſe ſo damnified*; and the breach aſſigned was that *one of the horſes was not returned till after that time, and the other not* returned *at all*; and this was adjudged no good aſſignment, becauſe it did *not purſue the whole promiſe*, which was to return them by ſuch a day, or pay 10l. per horſe; and ſo judgment in the marſhalſea was reverſed. Sid. 440. pl. 8. Hill. 21 Car. 2. B. R. Wright v. Johnſon.

† [369]

18. In aſſumpſit it was agreed per tot. cur. that where there is a mutual promiſe, viz. *A. promiſeth B. to do ſuch a thing, and B. promiſeth A. in conſideration thereof to do another thing*; if *A. brings action againſt B. and alleges a breach in non faciendo, and ſaith that he is ready to do that thing which he promiſed, but that the other refuſed to accept of it*, the breach is well laid, and the action well lieth; for it was idle, and more than the plaintiff was compelled to do, to ſhew that paratus eſt to do a thing which he promiſed; ſo that if there were a breach upon the part of the defendant, it is ſufficient; and if there was a breach upon the plaintiff's part, the defendant ought to bring his action for it. And the *difference* was taken by Bramſton, where the *promiſe* is *conditional*, and where *abſolute*, as in our caſe; and agreeing with this difference, it was ſaid at the bar and bench, that it was adjudged. Mar. 75. pl. 114. Mich. 15 Car. Thorp's caſe.

19. The count was, that in conſideration *of a marriage to be had between the plaintiff's ſon and defendant's daughter, and of ſettling ſo much land on him upon the marriage, he promiſed, that within ſuch*

time

time after the marriage had, he and his son should be bound per scriptum suum debita juris forma fiend' to the plaintiff to pay 3000*l. for a marriage portion.* It was moved in arrest of judgment, that the *breach assigned is, that they did not give security per scriptum suum obligatorium,* which agrees not with the assumpsit; for they might give security by a judgment, which is not scriptum suum, and yet it is debita juris forma factum. Roll Ch. J. held, that for laying the promise it is not necessary to pursue the very words but the substance of it, so as it may appear to the court that there is cause of action, and that there is no variance in the substance, and that *the promise will extend to a judgment, statute, or recognizance,* but cannot be intended of a parol promise. And judgment for the plaintiff, nisi, &c. Sty. 143. Mich. 24 Car. B. R. Tracy v. Poole.

20. Assumpsit, *in consideration the plaintiff would marry the defendant's sister, he would give his sister* 300*l. for her marriage-portion, on his marriage with her.* It was objected that the breach was not well assigned; for the plaintiff declared on a promise made to him to give him 300l. in marriage with his sister, and the *breach assigned was in not paying the* 300*l. to him,* and so doth not answer the promise; for if the money be paid to the wife, which for aught appears may be done, the promise is not broken; but adjudged, that since the husband is to give the acquittance, the money is to be paid to him, and the verdict found that it was not paid, so the plaintiff had judgment, nisi. Sty. 393. Mich. 1653. B. R. Bedwell v. Fenwick.

21. Assumpsit, for that the defendant *promised, in consideration the plaintiff would forbear to protest a bill of exchange drawn upon the defendant, that he would pay the money when he should come next to London.* It was moved in arrest of judgment, because the plaintiff did *not shew that he came to London,* but shewed that he died at Plymouth, and came not to London; but adjudged it is not material; for the payment of the money was a duty, and a good consideration, the money to be paid being for money received beyond sea. Sty. 416. Hill. 1654. B. R. Pinchard v. Fowkes.

22. Case, for that *the defendant, in consideration the plaintiff would marry such a woman, did promise, that upon his marriage with her, he would pay him* 50*l. and also give him yearly one firkin of eggs, and a flitch of bacon during the life of the plaintiff.* The plaintiff had a judgment on nil dicit, and upon a writ of enquiry great damages were found. It was moved in arrest of judgment, 1. That it doth *not appear for what breach the action is brought,* whether for the not paying the 50 l. or the eggs and bacon; *nor* is it *averred in what year the defendant was to begin to pay the eggs and bacon.* But per Roll Ch. J. it shall be intended to begin within the year next after the marriage shall take effect. *Nor* doth it *appear for how many years the eggs and bacon were unpaid;* and the promise was made anno 1647. and the writ of enquiry was executed anno 1653. But Roll Ch. J. over-ruled the exceptions, and to the last answered *the record is hucusque,* and so it is certain enough; therefore let the plaintiff have his judgment, nisi, &c. Sty. 404. Hill. 1654. Greenling v. Bawdit. [370]

23. If 2 *breaches are aſſigned*, and the *one is well aſſigned and the other not*, yet the action lies well enough; per Roll Ch. J. Sty. 412. Hill. 1654. in caſe of Dorman v. Snagg.

24. In aſſumpſit the count was, that the defendant's teſtator, *in conſideration the plaintiff would marry M. promiſed to leave him half of his eſtate at his death*, and that he thereupon married her, *and yet he did not leave him half his eſtate at his death*. Exception was taken, that (half of his eſtate) might be intended both of real and perſonal, and of eſtates in reverſion as well as in poſſeſſion, and that the plaintiff only *ſays that teſtator died worth* 3000 *l. in poſſeſſion, and did not leave him half of that eſtate*; whereas it may be, that he left him part of his real eſtate, or eſtate in reverſion, to the full value of half his whole eſtate. But Glyn Ch. J. diſallowed the exception, and gave judgment for the plaintiff. Sty. 463. Mich. 1655. B. R. Culliar v. Jermin.

25. The defendant, *in conſideration the plaintiff would build ſuch an iron mill, promiſes to repay what he ſhould diſburſe, and alſo that if the plaintiff would forbear his monies he would pay him* 13 *l.* 8 *s. being the full of his diſburſements, or cauſe the ſaid ſum to be paid when the ſaid mill ſhould firſt knock*. The plaintiff alleges that the mill hath knocked, &c. Exception was taken, becauſe the plaintiff *ſaid that the defendant hath not paid him*, which is no denial, but that the defendant may have cauſed him to be paid. Sed non allocatur. 2 Sid. 33. Mich. 1657. B. R. Wood v. Rowd.

26. Caſe upon a *promiſe to re-deliver* to him *ſome rings, or to pay him* 18 *l. in money*, and *aſſigned the breach, that the defendant had not re-delivered the rings, but* did *not ſay that he had not paid the* 18 *l.* and this was held ill, though after a verdict for the plaintiff; for the 18 l. might be paid, and if ſo, then the plaintiff has no cauſe of action. Hardr. 320. pl. 14. Mich. 14 Car. 2. in the exchequer. Anon.

Keb. 669. pl. 62. S. C. adjudged for the plaintiff.

27. Aſſumpſit, *in conſideration of money and ſo many veſſels of ale delivered by the plaintiff to J. S. he the defendant promiſed, that he would warrant to the plaintiff all that J. S. owed for the ſame*. After judgment in the marſhalſea it was aſſigned for error, that the plaintiff had *laid the breach for non-payment* of the money, whereas it ſhould be for not warranting. But the court held that the firſt is well enough. Sid. 178. pl. 12. Hill. 15 & 16 Car. 2. B. R. Baxter v. Jackſon.

28. Aſſumpſit, for that *in conſideration he would teach and preach to the people of ſuch a pariſh, he would give the plaintiff* 3 *l. per annum*; and he ſets forth that he did teach and preach, and was vicar there for 3 years, and *aſſigned the breach in non-payment for* 5 *years*. He alſo declared upon *another agreement to give him* 40 *s. per annum from the* 30*th of May for two years, and aſſigned the breach of two years ending on the* 31*ſt of May*. Upon a demurrer the plaintiff had judgment; for though he was vicar he was not bound to preach, and though the agreement was for 2 years, and the breach aſſigned was for 2 years and a day, it is good; for if the 2 years ended on the 30th of May, they were ended on the 31ſt. Sid. 409. pl. 2. Paſch. 21 Car. 2. B. R. Tayler v. Gay.

29. Af-

29. Assumpsit *against an executor upon a promise to pay him* 50 *s. when the defendant should have received money;* and *avers that the defendant hath received money*, but hath not paid it. It was moved in arrest of judgment, because it doth *not appear how much money the defendant hath received;* and perhaps he hath not received so much as 50 s. And though the promise is general, yet the breach ought to be laid so as to be adequate to the consideration; and also because it *was not shewn of whom, and when and where* he received the money, because it is traversable. The court agreed that there was good cause to demur to the declaration, but after a verdict they would intend he had received 50 s. And for the other exception they held, that the benefit of it was waived by taking the general issue. Mod. 169. Mich. 25 Car. 2. C. B. Anon.

30. Assumpsit, &c. for that the defendant, *in consideration the plaintiff would deliver such goods into the shop of T. S. as he should require, he would see him paid.* It was moved in arrest of judgment, that the plaintiff had *not averred that T. S. had not paid for the goods;* for the promise which the defendant made, to see that the plaintiff should be paid, is no more than that he would pay him if T. S. did not. But the court resolved that a promise to pay, and to see him paid, is all one, and the averment not necessary. Vent. 43. Mich. 21 Car. 2. B. R. Robinson v. Pulford.

2 Keb. 563. pl. 66. Pulford v. Robinson, S.C. And per cur. this is evidence, and need not be averred; for the defendant is here a principal, and not a surety. And judgment for the plaintiff.

31. Assumpsit, for that the *defendant was possessed of the 6th part of a ship, and* it was *agreed that he should, by writing, sell his interest to the plaintiff for* 600 *l. and that the plaintiff should pay* 20 *l. in hand, and the residue upon executing the said writing; and that in consideration the plaintiff had paid the* 20 *l. and assumed to perform the agreement on his part, the defendant promised to perform it on his part*, prædictus tamen the defendant non performavit agreamentum suum, &c. Resolved that this being upon a mutual promise, the breach is well enough *assigned in the words of the promise*, especially after verdict. And judgment for the plaintiff. 3 Lev. 319. Mich. 3 W. & M. in C. B. Keech v. Knight.

4 Mod. 188. Pasch. 5 W. & M. in B. R. Knight v. Keech, S.C. and the judgment in C. B. was affirmed.—Carth. 271. S. C. in B. R. it being urged that though the promise is general, yet the breach must be particularly shewn to intitle the plaintiff to his action, and to give the defendant an opportunity of making and applying his defence. But per cur. this might be good matter on a *demurrer*, but the plaintiff in the original action was helped by the *verdict*; for it shall be intended that some particular breach was given in evidence to the jury; otherwise the plaintiff could not have got a verdict.——Comb. 204. Knight v. Leach, S. C. in B. R. and judgment affirmed without difficulty, it being after verdict.——Skin. 344. pl. 13. S. C. in B. R. and judgment affirmed.

32. A. in consideration of 70 l. paid by B. promised to *deliver* 25 *quarters of corn on or before the* 18*th January following, on board B.'s ship in such a place.* B. alleged that he *brought his ship* on the said 18th day of January to the said place, and defendant did not deliver to him, &c. Held the declaration good enough, without saying that there was *no delivery before the* 18*th;* for though B. had election to do it before, yet not without the plaintiff's *concurrence;* for he must be there and accept, because a *tender in the mean time* is not sufficient to excuse a delivery on the 18th; for that being the ultimate

1 Salk. 140. pl. 6. Harman v. Owden, S. C. adjudged for the plaintiff, being after a verdict. And Holt Ch. J. held upon great considera-

tion that this was good without the verdict; for ultimate time appointed for the doing it, the one ought to be there to tender, and the other to accept. 12 Mod. 421. Mich. 12 W. 3. Hammond v. Oaden.

the plaintiff was to bring the barge, and the defendant was to deliver the corn into it, ſo as both parties muſt concur; ſo that the laſt day being the time appointed when the one is to deliver and the other to accept, it ſhall not be intended that the plaintiff was there ready with his barge to receive the corn before that time, but it is clearly helped by the verdict; for if there had been an actual delivery it might have been given in evidence upon non aſſumpſit, and then the jury could not have found for the plaintiff. —— Comyns's Rep. 89. pl. 59. S. C. accordingly by Holt. Ch. J. who delivered the opinion of the court. —— Ld. Raym. Rep. 620. S. C. and Holt Ch. J. delivered the opinion * of the court, that the plaintiff ought to have judgment after verdict. And Holt himſelf thought it would have been good without verdict.

*[372]

(A. a) What ſhall be a good Bar, or Diſcharge of an Aſſumpſit. And pleading thereof.

Cro. J. 483. pl. 19. Hurford v. Pile, S. S. adjudged for the plaintiff; for Haughton J. ſaid that a man may diſcharge an aſſumpſit *made to himſelf*, but *not* one made *by himſelf*.

[1. IF *J. S. is in execution* for 10 l. *at the ſuit of J. D.* and *J. N.* comes to J. D. and *promiſes* him *that if he will ſuffer J. S. to go at large, that he himſelf will ſee him ſatisfied*, to which *J. D. agrees*; though *J. N. afterwards*, and *before J. D. has done any thing* by force of the promiſe, comes to J. D. and forbids him to deliver him [out of cuſtody] and that he will not ſtand to his promiſe, but *revokes it*, yet this is not any bar in an action upon the caſe upon the promiſe. Paſch. 16 Jac. B. R. between HARFORD AND PILE, per curiam upon a demurrer.]

An aſſumpſit *before action brought*, may be diſcharged by parol, but not after action brought.

2. In caſe on aſſumpſit the defendant *pleaded that after the promiſe the plaintiff had diſcharged* him of it. Adjudged a good plea. 2 Le. 214. pl. 270. Trin. 30 Eliz. B. R. Coniers v. Holland.

4 Le. 106. pl. 219. 28 Eliz. B. R. Steward's caſe.

A promiſe cannot be *releaſed by parol*; but if *concord* be pleaded in ſatisfaction of the promiſe, it is a good bar, but it muſt not be pleaded in diſcharge of it by way of releaſe; per Haughton J. 2 Roll. Rep. 188. Trin. 18 Jac. B. R.

Aſſumpſit, &c. the defendant pleaded that before any breach the plaintiff at ſuch a place *exoneravit eum*. Upon demurrer it was objected that he ought to ſhew how; but reſolved that this being a *verbal promiſe, might be diſcharged by word before any breach*. And judgment for the defendant. Cro. C. 383. pl. 14. Mich. 10 Car. B. R. Langden v. Stokes. —— S. C. cited 2 Show. 28. in pl. 18.

Aſſumpſit, for that *in conſideration of ſo much money he promiſed to deliver ſo many livres* * [*books*] *within a fortnight*, &c. The defendant *pleaded that within that fortnight*, (viz.) *on ſuch a day, he delivered 25 livres, and then the plaintiff diſcharged him* (the defendant) *to deliver any more till farther order, and he had not given any farther order*. Upon demurrer this was adjudged a good plea, becauſe a promiſe before it is broken, may be diſcharged by parol. Raym. 42. Mich. 13 Car. 2. B. R. Cook v. Newcomb. —— * Keb. 158. Cook v. Newman, ſeems to be S. C. And per cur. the plea is good.

3. If A. is bound *to make a new pale, having the old for his labour*, in ſuch caſe if the *old is taken from him* he is not bound to make the new; per Fenner J. Goldſb. 156. pl. 84. Hill. 43 Eliz. cites 9 E. 4. 20. 15 E. 4. 2, 3.

So if the horſe had been ſick, and died without any default or negligence

4. Plaintiff *lent his horſe to the defendant to ride to Y. who promiſed to re-deliver him ſuch a day*; but in the mean time J. S. who was *the real proprietor vi & armis & contra voluntatem* of the defendant, took the horſe from him. And by Fenner and Yelverton, this is a diſcharge of the promiſe, by reaſon of the prior property in

in J. S. and ſo is quaſi an eviction of the horſe out of the poſſeſſion of the defendant. Yelv. 22. Mich. 44 & 45 Eliz. B. R. Shelbury v. Scotford.

of the defendant, he ſhall be diſcharged; for the re-

delivery becomes impoſſible by the act of God. Jo. 179. pl. 2. by 3 juſtices (abſente Dodderidge) Trin. 4 Car. B. R. Williams v. Lloyd. —— Palm. 548. Williams v. Hide, S. C. adjudged by 3 juſtices for the defendant; but Hide Ch. J. ſaid that if he had been ſtolen in default of the defendant it had been otherwiſe.

5. The *acceptance of a bond* is a diſcharge of an aſſumpſit upon a contract; but if upon the contract the agreement was, that the buyer ſhould pay 13 l. in hand, and give the plaintiff bond for the reſidue; and in conſideration that the plaintiff would ſuffer the buyer to have the goods, and for 6 d. given in earneſt J. S. aſſumes; ſo that the bond is purſuant, and part of the contract and agreement, and does not deſtroy it. And judgment accordingly. Noy 140. Oldfield's caſe.

[373]

6. Aſſumpſit to the *huſband of executor*, in conſideration of forbearance, to put a bond in ſuit, to pay, is *determined* by the death of the wife executor. Yelv. 84. Hill. 3 Jac. B. R. Lea v. Minne.

7. Defendant *promiſed that if the plaintiff would marry his niece he would give her* 200 *l.* and ſhews he did marry her, &c. but upon the evidence it appeared this *marriage was* 4 *years after ſuch promiſe* made, &c. *and in this time many diſcharges were* proved to have been *made by the defendant to his ſaid niece, that ſhe ſhould not marry the plaintiff*; and if ſhe did he would give her nothing, and other diſlikes; yet direction was for the plaintiff, becauſe it might be that upon the firſt promiſe their affections were ſet, &c. and no juſt exceptions were taken after this promiſe made to revoke it. Clayt. 29. pl. 51. 10 Car. Bull. v. Keighly.

The reporter ſays it ſeems much inconvenience may be in this; for if after 4 years, why not after 10 or 20 years, may ſuch promiſe be made uſe of, which would

be hard, &c. and note, the iſſue was non aſſumpſit; and this admitted in evidence, and cites 10 E. 4. 6, where it is holden that a contract ſhall be taken out of hand, or elſe it vaniſhes into nothing. Ibid.

10 In caſe the plaintiff *declared upon a quantum meruit for* 40 *s. and upon an indeb. aſſ. for* 40 *s.* the defendant confeſſed the promiſes, but *plead that he accounted for ſeveral ſums, and that upon the foot of the accompt, he was found to be indebted to the plaintiff in* 3 *s. and no more, and that the plaintiff in conſideration that the defendant promiſed to pay the ſaid* 3 *s. diſcharged him of all demands.* Upon demurrer, the defendant had judgment; for per cur. if 2 perſons being mutually indebted to the other, and upon account the one is found in arrear ſo much, and there be an expreſs agreement to pay what was the balance, and each of them to ſtand diſcharged of all other demands, this is a good diſcharge in law, and the parties ſhall not reſort to their original contract, and that a promiſe might be diſcharged by parol, but not after it is broken, for then it is a debt. But North Ch. J. ſaid, that *if there was but one debt betwixt them*, their entering into an account for that would not determine the contract. Mod. 205. 208. pl. 36. Trin. 27 Car. 2. C. B. Milward v. Ingram.

2 Mod. 43. S. C. it was objected that it was *not ſaid that the plaintiff promiſed, in conſideration that the defendant ad inſtantiam of the plaintiff had promiſed*; but per cur. though it was not ſaid ad inſtantiam of the plaintiff that he promiſed, *yet it was actune & ibidem*, and ſo ſhall

be intended that the defendant made the promiſe at the inſtance of the plaintiff. And judgment was given for the defendant. —— Freem. Rep. 195. pl. 200. S. C. the reporter ſays he heard by Mr. Townſend

Townſend that judgment was given for the defendant by reaſon of the account. ——S. C. cited Arg. 12 Mod. 537. but ibid. 538. Holt Ch. J. ſaid, that if there are 2 *dealers*, and *without coming to an account*, they *agree to be clear againſt one another*, it would not be well without coming to an account; and that the caſe quoted out of 1 Mod. and 2 Mod. was the firſt of this kind, and by his conſent ſhould be the laſt.

2 Mod. 259. S. C. it was objected that here was no time agreed for payment of the 5 l. and therefore it was due immediately on requeſt; and not being paid, the promiſe is broke, and the parol diſcharge cannot be pleaded. And of that opinion were all the court. And judgment for the plaintiff, niſi, &c.——Freem. Rep. 230. pl. 239. S. C. reſolved the plea not good; and here the cauſe of action accrued at leaſt upon the requeſt, and ſo he ſhould have pleaded the diſcharge before the requeſt.

11. Caſe for that *in conſideration he would deliver the defendant a horſe, he promiſed to deliver to the plaintiff another horſe, or 5 l. upon requeſt*; and avers that he did deliver the horſe to the defendant, and had requeſted him, &c. The defendant *pleaded that the plaintiff had diſcharged him of this promiſe before the action brought, but ſays not how*; upon demurrer, it was admitted that if he had pleaded a diſcharge before the requeſt made, it had been good without ſhewing how he was diſcharged; but *after the requeſt a verbal diſcharge is not ſufficient*; and judgment for the plaintiff, niſi. Mod. 262. pl. 14. Trin. 29 Car. 2. C. B. Edwards v. Weeks.

[374]

12. A debt due by promiſe is not diſcharged *by account*. 3 Lev. 237. Mich. 1 Jac. 2. C. B. Mayor, &c. of Scarborough v. Butler.

13. *Payment after the day in ſatisfaction* of money due on a note, is no good plea in an indebitatus aſſumpſit; but it is good by way of diſcharge. 4 Mod. 250. Mich. 5 W. & M. in B. R. Perry v. Odingſell.

14. Indebitatus aſſumpſit *for ſeveral things due to the plaintiff*, the defendant *pleaded* in bar *that he gave a note of* 20 *l. to the plaintiff in full ſatisfaction of the debt*, &c. And upon a demurrer to this plea the plaintiff had judgment, becauſe a note thus given is no diſcharge of a debt or duty. 8 Mod. 290. Trin. 10 Geo. 1725. Springate v. Chadwicke.

(A. a. 2) Aſſumpſit. Plea. Good. And how to be pleaded in Aſſumpſit.

1. TReſpaſs upon the caſe becauſe the *defendant aſſumed at London to cure the horſe of the plaintiff* of a certain malady, and *that he neglected it ſo much that the horſe died*; the *defendant ſaid that he aſſumed to cure it at N. in the county of O. which he did accordingly*, abſque hoc *that he aſſumed at London modo & forma* prout, &c. Per Markham, he ought to traverſe the negligence. But per tot. cur. the plea is good, and ſo it ſeems that he may traverſe the one or the other; but *quære* inde. Brooke ſays, it ſeems that he may ſay that he cured the horſe, and after he died of another diſeaſe, abſque hoc that he died by the negligence of the defendant, quære. Br. Traverſe per, &c. pl. 77. cites 19 H. 6. 49.

2. Upon aſſumpſit *to make a ſufficient houſe*, and did not, he may *traverſe the aſſumpſit, or ſay that he made the houſe well and ſufficiently*. Br. Ibid.

3. Treſpaſs upon the *caſe quod cum the defendant had ſuch goods of the delivery of the plaintiff, the ſaid defendant for* 10 *s*, &c. *ſuper ſe aſſumpſit*, and the ſame plaintiff promiſit *ad ſalvo cuſtodiend'*, &c. *and did not do it* ad damnum, &c. And per Fitz. J. and Shelly J. *non habuit ex deliberatione is no plea*. Br. Traverſe per, &c. pl. 341. cites 26 H. 8.

4. In action upon the *caſe that the defendant promiſed to pay* 10 *l. to the plaintiff which he owed to him for a horſe and a cow*, the defendant may plead *that he aſſumpſit ſolvere* 10 *l. to the plaintiff which he owed to him for a horſe which he bought of him, which ſum he has paid to the plaintiff abſque hoc that he aſſumpſit ſolvere* 10 *l. quas debuit querenti pro uno equo & una vacca*, prout, &c. or *abſque hoc quod debuit to the plaintiff* 10 *l. pro equo & vacca*, prout, &c. Br. Action ſur le Caſe, pl. 105. cites 33 H. 8.

5. In aſſumpſit, &c. *for payment of money*, the defendant *pleaded that after the promiſe it was agreed between the plaintiff and him, that he with two other perſons ſhould enter into a bond to the plaintiff for the money which the defendant had promiſed to pay, and that ſuch a bond was made and delivered to one J. S. and gave notice thereof to the plaintiff's ſervant, and which they were now ready to deliver to the plaintiff*, &c. Wray Ch. J. ordered that the plaintiff ſhould releaſe the bond and take judgment upon the promiſe, which was done accordingly. 2 Le. 181. pl. 223. Trin. 30 Eliz. B. R. Freeman v. Drew.

6. In aſſumpſit, &c. the defendant *pleaded that the day before the promiſe to pay the money he became bound to the plaintiff in a bond to pay it*, and *averred it to be the ſame debt, and that the bond was made for the ſame debt*. Per tot. cur. the plea is not good, for a bond cannot deraign a contract or an aſſumpſit made afterwards. And the truth was the obligation was made after the aſſumpſit, though

Aſſumpſit for that *ſuch a day* 4 *Jac. upon an account the defendant was found in arrearages to*

ſuch a ſum, and promiſed to pay it; the defendant *pleads that ſuch a day they accompted, and then he was found in arrear ſuch a ſum as the plaintiff ſuppoſed, and the ſame day made an obligation for the payment of it, and traverſed, that at any other day [* before or] after the obligation they accounted* together; the court held the account, which was the ground of the action, was well traverſable; adjudged for the defendant. Cro. J. 234. pl. 4. Hill. 7 Jac. B. R. Dalby v. Cook.

* Yelv. 171. S. C. adjudged for the defendant.——Bulſt. 19. Talby v. Cook S. C. adjudged accordingly.

† The original is (after) but ſeems miſprinted.

though the plaintiff declared of its being made † before. And it was holden that the defendant might plead the ſpecial matter that the obligation was made after the aſſumpſit abſque hoc that he aſſumpſit, &c. Le. 154. pl. 214. Trin. 32 Eliz. C. B. Jennings v. Winch.

Cro. E. 201. pl. 27. S. C. adjudged for the plaintiff.

7. In aſſumpſit, &c. in *conſideration of forbearance to ſue for a debt till ſuch a day*, the defendant promiſed to pay the money; the defendant *pleaded that* he was indebted to the plaintiff, prout in the declaration, and for ſecuring thereof *he acknowledged a ſtatute upon which the plaintiff took execution and levied the money, abſque hoc that he was any how indebted to him either before or after the ſaid day.* This traverſe of the debt was held ill, becauſe it was *the promiſe* which was the ground of the action, and that *ought to have been traverſed, and not the debt*; and judgment for the plaintiff. Le. 252. pl. 340. Trin. 33 Eliz. B. R. Smith v. Hitchcocks.

8. Aſſumpſit *to deliver to the plaintiff in London certain monies, when he delivers to the defendant certain broad cloths there*; the defendant *pleaded non aſſumpſit.* The jury *found the promiſe to deliver ſo many of pheaſant colour, and ſo many of other colours.* The court ſeemed that the ſpecial matter is good maintenance of the declaration, and that the *defendant ſhould have* ſaid by way of anſwer, that the aſſumpſit was thus ſpecial, and have *traverſed the general aſſumpſit* in the declaration. Mo. 466. pl. 659. Paſch. 39 Eliz. Cheney v. Hawes.

9. A. *promiſed B. his ſon to pay him 10 l. a year if he married the daughter of J. S.* and brought an action on this promiſe, and averred that he had married her. The defendant *pleaded that the promiſe was conditional* [viz.] *if J. S. gave 1000 l. with her* and he married her, then he promiſed, but that J. S. did not give her, &c. *Abſque hoc that he promiſed modo & forma.* This is naught, becauſe it is only the general iſſue on the demurrer. 2 Roll. Rep. 350. Trin. 21 Jac. B. R. Barret v. Barret.

10. Aſſumpſit for that 20 Aug. 21 Jac. the *defendant borrowed of the plaintiff 15 l. which he promiſed to pay upon requeſt*, the defendant *pleaded that before the ſaid 20th of Aug. he was indebted to him in the ſaid 15 l. and paid the ſame the 20th of June 21 Jac. to J. S. the plaintiff's factor to the plaintiff's uſe, abſque hoc that he poſtea aſſumpſit modo & forma*; the plaintiff *replied, that poſtea aſſumpſit modo & forma.* It was moved in arreſt, that the allegation of payment takes away the conſideration, and therefore he ought to have traverſed the payment and not the aſſumpſit; for the conſideration being taken away, the aſſumpſit falls. Sed non allocatur. Becauſe the payment is alleged to a ſtranger to the plaintiff's uſe, and it is averred that

that he accepted of it, or that it was paid to the ſervant by his command; and the iſſue being poſtea aſſumpſit it is intended that it was afterwards lent by the plaintiff, wherefore it was adjudged for the plaintiff. Cro. J. 699. pl. 2. Mich. 22 Jac. Holmes v. Toſtwood.

11. In *caſe for diverſe wares and medicines of ſuch a value, and ſhewed them particularly;* the defendant *pleads that he hath paid to the plaintiff tot & tantas denariorum ſummas, as the ſaid medicines were worth, without * ſhewing any ſum certain.* This was held to be no good plea. Judgment for the plaintiff. Mar. 77. pl. 120. Trin. 16 Car. C. B. Anon.

In *aſſumpſit to pay the 24th of September*, the defendant *pleads payment of part after the aſſumpſit, but did not ſay by whom, and an agreement to pay the reſt on demand, and that no demand ever was, and that ſhe is yet ready to pay, proferend.* to which the plaintiff demurred; and per curiam, the not ſaying *by whom*, is ill; but had it been *profert hic in curia*, it would be a good bar; but judgment for the plaintiff. 3 Keb. 334. pl. 36. Trin. 26 Car. 2. B. R. Merrick v. Hannam.

*[376]

12. Aſſumpſit for that the *defendant in conſideration of ſo much wood ſold to him promiſed to pay to the plaintiff ſo much money, and alſo to carry away the wood before ſuch a day;* the defendant *as to the money pleaded payment, and as to the carriage of the wood, non aſſumpſit.* Per Bramſton Ch. J. the plea is not good, becauſe *it is but one intire promiſe, and ſo cannot be apportioned;* and therefore the plaintiff might have demurred upon it. And the jury having apportioned it to the verdict is naught, and a repleader was awarded. Mar. 100. pl. 172. Trin. 17 Car. B. R. Eaſt v. Farmer.

13. In aſſumpſit *to pay for certain barrels of beer delivered to the defendant on ſuch a day.* He *pleaded ſpecially non aſſumpſit, prout the plaintiff had declared.* The *plaintiff demurred* to this plea, *becauſe by this pleading the plaintiff is tied up to a particular day*, whereas he might give evidence of any other barrels of beer delivered at any other time before the action brought. The defendant was ordered to ſhew cauſe why the plaintiff ſhould not have judgment on this demurrer. Sty. 195. Hill. 1649. B. R. Cook v. Moor.

14. Where a *promiſe* is *to do 2 things, as to deliver a deed upon requeſt, and to pay 40 l. without ſaying on requeſt*, and the defendant *pleads the ſtatute of limitations*, and that he did not promiſe within 6 years before the action brought, this plea being *intire to both parts* of the declaration, and *being ill in part*, viz. as to the deed, *is ill in toto;* and adjudged for the plaintiff for the whole. Lev. 48. Mich. 13 Car. 2. B. R. Webb v. Martin.

Sid. 66. pl. 41. S. C. but S. P. does not appear. — Keb. 177. pl. 142. S.C. & S.P. adjornatur. — Ibid. 197. pl. 190. S. C. adjudged for the plaintiff.

15. In caſe the plaintiff declared that he *had bought a dog, called a lurcher, of the defendant, who promiſed that if the dog returned he would reſtore him to the plaintiff toties quoties*, and *that the dog returned to the defendant on ſuch a day, and that on the day after he refuſed to deliver it.* The defendant *pleaded that on the*

Keb. 680. pl. 76. S. C. adjornatur. — Keb. 822. pl. 109. Richardſon v.

Elliot, S. C. adjudged for the defendant.

the ſame day he did deliver it; and upon demurrer to this plea the defendant had judgment *without traverſing*, the juſtification being on the ſame day; and it ſhall be intended that he continued in the plaintiff's poſſeſſion, without anſwering to the toties quoties. Sid. 234. pl. 39. Mich. 16 Car. 2. B. R. Elliot v. Richardſon.

16. *Not guilty* is a good plea, and iſſue in aſſumpſit; for it is treſpaſs upon the caſe; per Windham J. Lev. 142. Mich. 16 Car. 2. C. B. Elrington v. Doſhant.

17. In *conſideration the plaintiff, at the defendant's requeſt, would deliver him certain parcels of timber, the defendant would build up 2 rooms in ſuch a houſe, and repair*, &c. After verdict in ſpecial action upon the caſe for the plaintiff, it was moved in arreſt of judgment, that the defendant hath time during life, unleſs requeſt be made, and *the requeſt is 10 Oct. and the action is of Michaelmas Term;* ſo there is *no convenient time given.* Sed per curiam, the *defendant ought to have pleaded it ſpecially, or demurred* for that cauſe, becauſe it is not ſufficient. Judgment for the plaintiff. 1 Keb. 866. pl. 13. Paſch. 17 Car. 2. B. R. Cambell v. Preſton.

[377]

Sid. 292. pl. 10. S.C. and judgment affirmed accordingly. 2 Keb. 67. 58. pl. 24. S. C. and judgment affirmed;

18. In *aſſumpſit againſt an executor upon a promiſe of his teſtator*, he *pleaded non aſſumpſit;* and judgment for the plaintiff. It was aſſigned for error, that the plea does *not ſhew by whom the non-aſſumpſit was*, whether by the teſtator or not; but per cur. it ſhall be ſo intended, becauſe the executor is not charged with the promiſe; and judgment affirmed. Lev. 184. Trin. 18 Car. 2. B. R. Browning v. Litton.

and Twiſden ſaid, that in ſuch actions where the law makes the promiſe, as in an indebitatus, it is good without alleging who promiſed, or to whom.

In an aſſumpſit *againſt an adminiſtrator*, the defendant *pleaded quod ipſe non aſſumpſit*, inſtead of ſaying that the inteſtate non aſſumpſit. After verdict a repleader was awarded, and no coſts to either party upon a repleader. 2 Vent. 196. Trin. 2 W. & M. in C. B. Anon.

Saund. 267. S. C. adjudged for the plaintiff.

19. In an action ſur le caſe, in conſideration the plaintiff would ſerve the teſtator of the defendant, he promiſed to eſteem him as his ſon, or [and] uberrime providere for him; and ſheweth that he left a ſervice of 60 l. per ann. and ſerved from ſuch a day to ſuch a day. The defendant pleaded that the plaintiff ſerved a leſs time than is alleged in the declaration, and had diet and 8 l. per ann. and then departed, abſque hoc that the plaintiff ſerved ſo long as he alleged. Twiſden ſaid, that by the traverſe the plea is out of doors, which the court agreed; but had it been alleged that he ſerved him ſo long, and then departed, during which time he had a ſalary, abſque hoc that he ſerved longer, this were good, but not to involve the whole time; and the court inclined this promiſe to ſerve muſt be intended only, that while he ſerved he ſhould be paid, not to ſerve during life; but this being matter of damage, and the demurrer ſpecial on the traverſe, judgment pro plaintiff. 2 Keb. 525, 526. pl. 23. Trin. 21 Car. 2. B. R. Oſborn v. Rogers.

20. Where

20. Where the *conſideration is paſt it is not traverſable* in aſſumpſit, and therefore not neceſſary to lay a place; but the defendant ought to take advantage at the trial on non-aſſumpſit, if there was no conſideration. Comb. 163. Mich. 1 W. & M. in B. R. Lee v. Baſhpole.

Show. 78. Breas v. Baſpoole, S. C. ſays it was agreed without much debate.

21. In quantum meruit *by a ſurgeon for curing a wound*, the defendant *pleaded a tender of* 2 *guineas*, *value* 45 *s. which was ſufficient*, *abſque hoc that he deſerved more.* The plaintiff demurred, becauſe the traverſe made the plea double, and was impertinent, and that no ſuch value could be put upon guineas, and the plea was adjudged ill. 3 Lev. 440. Trin. 8 W. 3. C. B. Stephens v. Cooper.

22. In aſſumpſit on *ſeveral promiſes*, the defendant pleaded quod ipſe *performavit omnia ex parte ſua performanda.* Upon demurrer it was ſaid that this plea, if any thing, amounted to the general iſſue; and adjudged per tot. cur. for the plaintiff. 2 Ld. Raym. Rep. 968. Trin. 2 Ann. Taylor v. Sea.

23. In action on ſeveral promiſes, the defendant pleaded in abatement that the *promiſes were made* ſuch a day, which was *after the action brought*, and traverſed their being made before. Holt Ch. J. ſaid that this matter might be given in evidence on non aſſumpſit, and that if there had been any fact to ſupport this plea, the defendant would have pleaded the general iſſue; beſides the matter of this plea is *new matter*, *out of the compaſs of the plaintiff's action.* And the defendant was ordered to anſwer over. 2 Ld. Raym. Rep. 1249. Paſch. 5 Ann. Facquire v. Kinaſton.

(A. a. 3) Aſſumpſit. Plea. Good. And how to be pleaded in Indebitatus Aſſumpſit.

1. IN indebitatus aſſumpſit the defendant may ſafely plead *non debet*, as well as in debt. Noy 146. cites Paſch. 28 Eliz. B. R. Wood v. Draper.

2. Where *arbitrement* is no plea in debt, it is no plea in aſſumpſit upon the debt. Agreed. All. 5. Mich. 22 Car. B. R. in caſe of Farrer v. Bates.

3. In *indebitatus aſſumpſit for money lent* to the defendant, the defendant *pleaded that it was lent to the defendant and J. S. and not to the defendant ſole*; to which the plaintiff demurred, becauſe it amounts but to the general iſſue, which the court agreed; and judgment for the plaintiff, niſi. 3 Keb. 312. pl. 54. Paſch. 26 Car. 2. B. R. Ravenſcroft v. Fouk.

4. In an *indebitatus aſſumpſit*, &c. the defendant *pleaded an agreement between him and J. B. his ſon, that the plaintiff ſhould deliver certain cloaths in his cuſtody to the defendant, and ſhould accept the ſaid J. B. as her debtor for 9 l. to be paid as ſoon as he received certain pay from the king due to him, and to be in full ſatisfaction*, &c. and avers that the plaintiff delivered the ſaid cloaths, and accepted J. B. her debtor, and that he agreed to pay the ſame; and that as ſoon as he received the pay, he was ready, and offered to pay the 9 l. but plaintiff refuſed to receive it; and that J. B. is ſtill ready. But adjudged for the plaintiff, becauſe no conſideration appears for J. B.'s paying, but only the agreement without any conſideration; and admitting it would bind, yet by 29 Car. 2. the plaintiff has no remedy, unleſs it be in writing; and though plaintiff need not ſet forth ſuch agreement to be in writing, yet when ſuch agreement is pleaded in bar, he muſt plead it ſo as it may appear to the court that an action lies upon it; for he ſhall not take away the plaintiff's preſent action, and not give him another upon the agreement pleaded. Raym. 450. Trin. 33 Car. 2. B. R. Caſe v. Barber.

Raym. 449. S. C. accordingly.

5. Plaintiff *declares upon an indebitatus aſſumpſit for* 100 *l. received to the plaintiff's uſe, and upon an inſimul computaſſet for another* 100 *l. the ſame day.* The defendant *pleads that the ſaid ſeveral ſums of* 100 *l. are for one and the ſame cauſe of action for one ſum of* 100 *l. only, and not for ſeveral ſums; and that after the aſſumpſit he had paid* 30 *l. in part of payment, and then in full ſatisfaction of the reſidue of the money demanded, he became bound to the plaintiff in a bond of* 120 *l.* conditioned *for payment of* 65 *l. to the plaintiff, at a day not yet come*; which ſaid 30 l. and bond the plaintiff accepted, &c. Upon demurrer the whole court held this a good plea, and the averment was only ſurpluſage; and the other matter is a full anſwer to the whole, for the plea ſays that the obligation was given in full ſatisfaction of the reſidue of the monies demanded, which extends

to

to the whole. But the demurrer was after waived on payment of coſts, and iſſue taken on the plea. 2 Jo. 158, 159. Trin. 33 Car. 2. B. R. Sheldon v. Clipſham.

6. Indebitatus aſſumpſit, the defendant pleaded *quod ante exhibitionem billæ;* the *plaintiff became a bankrupt*, whereby he became unable to diſcharge the defendant, becauſe the ſaid money, from ſuch times as he became a bankrupt, was to ſuch creditors as ſhould ſue out a commiſſion. On demurrer judgment pro quer. for this is no plea. 12 Mod. 267. Hill. 11 W. 3. Harvey v. Williams.

[379]

7. Indebitatus aſſumpſit for 40 *l. for work done*, and quantum meruit for the ſame, the defendant pleads that there being *mutual dealings* beween the plaintiff and him, they *came to an account;* and that it did appear on the account the defendant *was in arrear* to the plaintiff *but* 5 *l. which he promiſed to pay him, in conſideration whereof the plaintiff did diſcharge him of the ſaid* debt and claim. To this plea there was a demurrer; it was held no good plea, and judgment for the plaintiff. 12 Mod. 537. Trin. 13 W. 3. May v. King.

Ld. Raym. Rep. 680. S. C. and per Holt, this ought not to be pleaded ſpecially, but amounts to the general iſſue, and might have been given in evidence upon it. At another day the plea was waived by conſent, and the defendant pleaded to iſſue.

(A. a. 4) Aſſumpſit. Requeſt neceſſary in what Caſes, and what amounts to a Requeſt.

1. A. *Pawned a deed* of lands to B.—T. *intending to purchaſe the land, aſked B. to deliver him the deed, and he would give him* 10 *l. at what time he would requeſt it*, whether he bought the land or not. B. delivered the deed to T. Per tot. cur. though this be a duty, yet it is not a duty payable before requeſt, and the requeſt makes a title to the action. And by Clench the requeſt is traverſable; and adjudged againſt the plaintiff. 3 Le. 73. pl. 113. Mich. 21 Eliz. B. R. Banks v. Thwaits.

But where *one* who is *indebted promiſed to pay upon requeſt*, in an action upon the caſe upon that promiſe, the party needs to expreſs the aſſumpſit with the requeſt, it being *an old debt*. But otherwiſe it is where there is ſuch a promiſe, without any duty precedent. 4 Le. 2. pl. 6. 26 Eliz. Pultman's caſe.

2. Aſſumpſit, *in conſideration the plaintiff would marry the defendant's daughter, he promiſed to give the plaintiff* 40 *l.* and alleged in facto, that he did marry her, &c. It was moved in arreſt of judgment, that *neither time nor place was mentioned of any requeſt.* Sed non allocatur, becauſe it is in nature of a debt, and it is not promiſed to be paid upon requeſt. But otherwiſe of a *thing collateral.* Cro. E. 229. pl. 18. Paſch. 33 Eliz. B. R. Applethwait v. Nortley.

4 Le. 56. pl. 143. S. C. adjudged for the plaintiff. ——And though the aſſumpſit was in conſideration that the plaintiff would marry A. B. to pay the plaintiff 20 l. *when required after the marriage*, it being moved in arreſt of judgment that no ſpecial requeſt was laid, Hobart and Winch held it well without it, but Warburton e contra. Brownl. 10. Hill. 14 Jac. Skipwaſh v. Skipwaſh.

3. *Bond* of 100 l. conditioned *to pay* 50 *l.* and *no day limited.* Reſolved upon demurrer that it is payable preſently upon requeſt,

In caſe of *collateral matters*,

which are not duties, a requeſt is neceſſary and material, and muſt be alleged. Browni. 13. Trin. 5 Jac. per cur. in caſe of Gore v. Colthorp.

and he has no further time to pay it; and the *purchaſing of the writ* is a requeſt in itſelf, and obligee need not make a ſpecial demand. And it is not like the condition of a bond *to make a feoffment*; for that *is* * *collateral*, and the obligor without requeſt ſhall have time to make it during his life, and ſhall have a *convenient time after requeſt* to make it; but here it is *a duty preſently*, and part of the greater ſum. And adjudged accordingly. Cro. E. 798. pl. 47. Mich. 42 & 43 Eliz. C. B. Noſe v. Bacon.

* As to deliver an obligation, or an indenture upon requeſt, there he ought to ſhew a requeſt expreſsly, with the *place and time*; for it is iſſuable, and a licet ſæpius requiſitus is not ſufficient. Noy 98. 18 Jac. in the exchequer chamber, Murton v. Burtley.

[380]

4. In action upon a *promiſe to pay* the *arrearages of rent* upon an inſimul computavit, *when* he ſhould be *thereunto requeſted*, a requeſt was not expreſsly alleged, and yet adjudged good; for the arrearages are due before the requeſt, and an action of debt lies for them; and alſo the bringing of an action is a requeſt ſufficient; this was moved in arreſt of judgment, and yet judgment was for the plaintiff. Noy 98. 18 Jac. in the exchequer chamber, Murton v. Burtley.

*Poph. 209. S. C. the *declaration was on the ſale of ſeveral parcels of tobacco*, viz. for one parcel ſo much, for

5. Aſſumpſit *for* 9 *particular ſums, which in toto attingunt to* 52 *l.* (which was *more* * [*or leſs*] *than the ſeveral ſums did amount unto;*) and the defendant licet ſæpius requiſit' fuiſſet did not pay the 52 l. Jones and Whitlock J. (only preſent) held that *that ſumming up the particulars was but ſurpluſage*, and that the requeſt was not neceſſary; but if it had, then the declaration had not been good. Lat. 175. Mich. 2 Car. Riſley v. Hames.

another ſo much, &c. quæ in toto, &c. And Jones and Whitlock held the declaration good; for there is a particular promiſe for every parcel, and it was ſurpluſage and the officiouſneſs of the clerk to ſum up the particulars, and therefore judgment was affirmed.

In *debt* upon a note to this effect, *I acknowledge myſelf indebted to A.* 10 *l which I promiſe to pay upon demand.*

6. In *debt or detinue* the very bringing the action and demand of the writ is a demand and requeſt. Per Jones J. Godb. 403. pl. 483. Paſch. 3 Car. B. R.

It was moved in arreſt of judgment, that though upon a note acknowledging a debt a demand need not be alleged, yet where it is *part of the agreement*, a demand is neceſſary. But the court held the contrary; for it is a debt in præſenti, and the laſt words import no more than that I am ready to pay it at any time, and ſhall not reſtrain the other words, this *being no debt ariſing upon the performance of a certain condition, but* plainly *precedent to the demand.* Beſides, ſuppoſing the demand neceſſary, the action itſelf is perhaps a demand. 10 Mod. 38. Mich. 10 Ann. B. R. Rumball v. Ball.

7. If one *ſells* a horſe for money *to be paid upon requeſt*, and *no requeſt is ſhewn*, he can never have judgment, per Richardſon, which was not denied. Het. 148. Mich. 5 Car. C. B. in Moſſe's caſe.

8. There is *no difference* where a man is to do a thing upon *requeſt* and upon *reaſonable requeſt*; for in both caſes there ought to be an expreſs requeſt. Per tot. cur. Cro. C. 299, 300. pl. 1. Paſch. 9 Car. B. R. in caſe of Symms v. Smith.

Lev. 48. S. C. but there the promiſe was

9. Caſe on a *promiſe to re-deliver ſuch a deed, and ſo much money upon requeſt.* The plaintiff alleged not any requeſt. Adjudged per tot. cur. upon demurrer, that *where the thing itſelf is to be re-*

covered

covered in the action, as the deed is in this caſe, there *the bringing the action amounts to a requeſt; but* where it is *to recover damages, there muſt be an actual requeſt* made. Sid. 66. pl. 41. Mich. 13 Car. 2. B. R. Ward v. Martin.

to re-deliver the deed upon requeſt, and in conſideration of having delivered him another deed, he promiſed to pay 40 l. and alleged that ſuch a day after he made requeſt, but the defendant had not re-delivered the firſt deed nor paid the 40 l. The defendant pleaded the ſtatute of limitations, and that he did not promiſe within 6 years before the action brought. The plaintiff demurred, becauſe the cauſe of action as to the deed did not ariſe upon the promiſe, but on the refuſal after requeſt, which was within 6 years; and of that opinion was the court.

10. Promiſe to deliver ſuch a thing *before ſuch a day*, he is bound to do it without requeſt. Per cur. Vent. 72. Paſch. 22 Car. 2. B. R. Bernard v. Bernard.

Lev. 289. S. C. per cur. accordingly.

11. Aſſumpſit in *conſideration that he, at the defendant's requeſt, would at his own charges procure himſelf to be made a knight, ſo that* his wife *(the defendant's daughter) might be a lady, promiſed to pay him* 2000*l.* After judgment for the plaintiff, it was aſſigned for error that the plaintiff did *not ſhew that he procured himſelf to be knighted at the defendant's requeſt*, which in this caſe is executory and part of the conſideration; but per cur. the requeſt ſhall be intended to be executed and made at the time of the promiſe, viz. that then he requeſted him to be made a * knight, and promiſed to give him 2000l. Judgment affirmed per tot. cur. 2 Lev. 198. Trin. 29 Car. 2. B. R. Tripps v. Rand.

2 Mod. 199. Rands v. Tripp, S.C. in C. B. a new trial was granted; but ſays nothing of judgment. —3 Keb. 769. pl. 8. S. C. and though it was not ſaid to be at the defendant's requeſt, yet the *declaration being* that the plaintiff *fidem adhibens promiſſioni & licet ſæpius requiſitus*, it is ſufficient after verdict on non aſſumpſit, which muſt prove him knighted at the defendant's requeſt, the requeſt being executed; and judgment affirmed.

* [381]

12. Where there are *mutual covenants* it is not requiſite to make requeſt for performance. 8 Mod. 173. Trin. 9 Geo. 1. Wilkinſon v. Meyer.

(A. a. 5) Aſſumpſit. Requeſt. When the Requeſt muſt be made.

1. AAſſumpſit for that the *defendant upon a certain conſideration promiſed to deliver to the plaintiff* 40 *quarters of wheat between Sturbridge fair and Chriſtmas, if the plaintiff liked thereof at Sturbridge fair; and ſhewed that he liked thereof, and upon the laſt of November at ſuch a place, required the defendant to deliver them.* It was the opinion of the court in this caſe for the defendant; for his liking is to be at Sturbridge fair, and here a requeſt is alleged to be the laſt of November, which is long after and at another place, and therefore not good; and judgment for the defendant. Cro. E. 249. pl. 13. Mich. 33 & 34 Eliz. B. R. Brable v. Hollywell.

Ow. 109. S. C. and S. P. held accordingly in the exchequer-chamber.

2. Where a *time certain* is limited for the *payment* of any thing, he never ſhall allege a requeſt *before the day;* but otherwiſe it is where it is uncertain. Cro. E. 455. pl. 3. Mich. 37 & 38 Eliz. in the exchequer-chamber, Philips v. Sackford.

——Mo. 689. pl. 952. S. C.——Aſſumpſit *in conſideration the plaintiff would forbear to fell ſuch trees, the defendant promiſed to pay him* 800 *l. before Mich.* 1650, *upon requeſt,* and *alleged a requeſt at Mich.* 1660. It was inſiſted in arreſt of judgment, that this requeſt ought to have been before Mich. 1650; but it was anſwered and not denied, that upon the requeſt as laid in this declaration, *a requeſt at any other time might be given in evidence though it were ſeveral years before,* and the jury ſhall aſcertain the damages. Sid. 268. pl. 19. Trin. 17 Car. 2. B. R. King v. Bray.

3. Aſſumpſit for that the *defendant being indebted to him in* 15 *l. he promiſed to pay it by* 25 *s. the quarter, and to enter into bond upon requeſt for the payment of ſuch ſums, and allegeth a requeſt to enter into bond.* It was moved in arreſt of judgment, becauſe *the requeſt was made after the end of the quarter;* ſo that a bond for payment thereof, the day of payment being paſt, would be forfeited preſently; and for that cauſe it was adjudged againſt the plaintiff. Cro. J. 116. pl. 3. Paſch. 4 Jac. B. R. Gregory v. Wikes.

4. A. promiſes to pay 100 l. to B. 25 *March, quando requiſitus foret,* A. is not bound to pay this till the laſt hour of the day, and B. ought not to requeſt it before. Per Coke Ch. J. Roll. Rep. 189. Paſch. 13 Jac. B. R. in pl. 23. But Roll makes a quære.

5. Caſe by an adminiſtrator, for that *upon an account between the inteſtate and the defendant, he was found in arrear of rent* 40*l. which being demanded he promiſed in conſideration thereof to give ſecurity to pay it by parcels on certain days, till all be paid quando requiſitus eſſet.* It was moved in arreſt of judgment that *the requeſt refers to the ſecurity to pay* the money on ſeveral days; and by the declaration it *appears that it was not made till all the days were paſt,* [382] ſo that he could not perform it, and ſo the declaration not good; quod fuit conceſſum per tot. cur. Roll. Rep. 189. pl. 23. Paſch. 13 Jac. B. R. Hudſon v. Barton.

6. Caſe for that the *defendant had requeſted him to lend the defendant's ſon* 5 *l. for* 6 *months, and if the ſon did not then pay the money, the*

the defendant would repay it at the end of the year after the lending, upon requeſt; and alleged that afterwards, and within the year, he requeſted the defendant to pay it at the end of the year, which he did not do, &c. It was moved in arreſt of judgment, that the requeſt was not purſuant to the agreement, which was that for default of the ſon (then, at the end of the year upon requeſt) ſo that by the adverb (then) *the requeſt was not to be made till after the end of the year;* and this was agreed to by 3 juſtices; for the requeſt within the year ſerves to no other purpoſe than to admoniſh him to be ready againſt the time; but Mountague Ch. J. e contra. 2 Roll. Rep. 88. Paſch. 17 Jac. B. R. Pafford v. Webb.

(A. a. 6) Aſſumpſit. Requeſt. By whom, and to whom, Requeſt muſt be made.

1. IF 3 *aſſume* to pay or give, &c. upon requeſt, &c. and the *requeſt is made to one* of them, it is good. Ruled per cur. Noy 135. Brereton's caſe.

2. The count was of a promiſe *by the defendant that his ſon ſhould pay, &c. to the plaintiff for his boarding with him when he ſhould be thereunto required;* but did *not ſhew that he required the ſon to pay* the money, which the defendant promiſed ſhould be paid upon requeſt, but only ſaid that the defendant licet ſæpius requiſitus & non ſolvit. Per Roll Ch. J. this is a *collateral promiſe*, and therefore the requeſt muſt be averred to be made to the ſon. And nil capiat per breve was ordered to be entered. Sty. 207. Hill. 1649. Williamſon v. Mead.

(A. a. 7) Aſſumpſit. Requeſt. Alleged. How the Requeſt muſt be made.

1. IN conſideration that A. the plaintiff *at the requeſt of B. the defendant would repair a houſe, B. promiſed to pay*, &c. The plaintiff *declared quod reparavit* generally, *without ſaying* that *at the requeſt of the ſaid B.* he repaired it, and that is not the reparation intended by the declaration, viz. reparation at the requeſt, &c. but a reparation of his own head; and for that cauſe judgment was reverſed. 2 Le. 53. pl. 72. Mich. 29 Eliz. C. B. Merry v. Lewis.

3 Le. 91. pl. 131. Paſch. 26 Eliz. C. B. S. C. in totidem verbis; and judgment was ſtayed.—— 2 Vent. 75. S. C. cited Arg.——7 Mod. 144. Holt Ch. J. upon this caſe being cited, ſays, the agreement muſt have been thus, viz. in conſideration that A. at the ſpecial inſtance and requeſt of B. would repair the houſe for B. that then B. would pay him ſo much for it. And he declares that he did repair the houſe, but not that he did it at B.'s requeſt; and Holt ſays he needed not to do it; for the agreement was not that he ſhould repair it when he ſhould requeſt him, but the agreement was abſolute to repair a houſe, and to that agreement he was brought at the requeſt of the defendant.

2. In

In aſſumpſit for that the plaintiff had *expended diverſe ſums* of money for

2. In an action on the caſe upon *aſſumpſit* to pay money to the plaintiff on requeſt, he *muſt allege* an actual requeſt, and at what *place* and *day* the requeſt was made. Le. 287. pl. 389. Paſch. 26 Eliz. B. R. Short v. Short.

the defendant amounting to 25 l. the *defendant promiſed to pay* him all the ſums he had expended for him, &c. but did not licet ſæpius requiſitus; but becauſe *the day and place of the requeſt was not alleged*, it was adjudged for the defendant; for here was no duty due. Cro. E. 73. pl. 32. Mich. 29 & 30 Eliz. B. R. Morris v. Kirk.

Aſſumpſit for that he *ſold the defendant wool for 20 l. to be paid at Lady-day*, and *that licet ſæpius requiſitus on ſuch a day, and at ſuch a place, the defendant had not paid* the money, *and alſo that he ſold him more wool for 10 l. to be paid when required*, and alleged that licet ſæpius requiſit' the defendant had not paid, *but without alleging time and place*. But adjudged good; for it ſhall refer to the day and place alleged in the firſt requeſt. Cro. Eliz. 240. pl. 13. Trin. 33 Eliz. B. R. Barnes v. May.

3. A. brought action on the *caſe upon 5 ſeveral aſſumpſits*, and counted licet ſæpius requiſitus, &c. ſo as there was *but one licet ſæpius to all the 5 aſſumpſits*, whereas every ſeveral aſſumpſit ought to have his ſeveral demand; for one general requeſt for all is not ſufficient. For it has been adjudged, that if one is *indebted to J. S. in ſeveral ſums* of money made [to be paid] upon requeſt or demand, and J. S. goes to him, and ſays, *pay me what you owe me*, this is not a ſufficient demand or requeſt. 3 Le. 206. pl. 266. Paſch. 30 Eliz. B. R. Abbot's caſe.

Caſe for that the defendant *promiſed, in conſideration he would cure B. of a certain diſeaſe, he would pay him what it ſhould be worth, and for his medicines.* He *declared likewiſe upon 2 other promiſes*, the *one for curing the wife of B.* de quadam putredine, *and the other for curing the defendant himſelf*; and ſets forth that he had cured them, and that he deſerved ſo much for the ſeveral cures, and ſo much for his medicines, amounting in the whole to ſo much, and alleged that licet ad hoc faciendum ſæpe requiſitus, he had not paid. It was moved in arreſt of judgment, that there was *no place ſhewed* where this requeſt was made. But adjudged not neceſſary; for *where the thing is a duty before any requeſt made, there the requeſt is only alleged to aggravate the damages, and* is *not traverſable.* But it is *otherwiſe where the requeſt makes the duty itſelf*, as in aſſumpſit to do ſuch a thing upon requeſt, there the day of the requeſt ought to be alleged, becauſe it is traverſable. And that the words *(ad hoc) refers to all the particulars reddendo ſingula ſingulis*, as a particular requeſt. Palm. 389. Mich. 21 Jac. Manury v. Strong.—— Roll. Rep. 378. Manary v. Strange, S. C. but S. P. does not fully appear.——Ibid. 411. S. C. and S. P. that the words (ad hoc) refer to all the particulars.

In aſſumpſit the plaintiff declared *on ſeveral promiſes*, and *laid only one requeſt for all*; and this being moved in arreſt of judgment, Hutton and Yelverton thought it good and ſufficient. Adjornatur. Het. 84. Paſch. 4 Car. C. B. Gammon v. Milbourne. —— Ibid. 93. S. C. and the court were of the ſame opinion, that the requeſt ſhall be referred to all the particular ſums reddendo ſingula ſingulis.

4. Aſſumpſit for that *the defendant was indebted to the plaintiff 5 l. for rent, and promiſed to pay it quandocunque requiſitus*; and that he requeſted it ſuch a day, but the defendant had not paid it; the defendant *pleaded payment*, and found againſt him. Though the declaration did *not ſhew when the rent was due, nor for what term, nor upon what contract*; yet becauſe the defendant had taken notice thereof by pleading payment and iſſue thereupon, and found for the plaintiff, it was adjudged for the plaintiff. Cro. J. 668. pl. 5. Trin. 21 Jac. B. R. Slack v. Bowſal.

Win. 112. S. C. in C. B. adjudged accordingly.—Hutt. 73. S. C. the

5. A. gave *bond to B. to pay money ſuch a day. A. tendered the money on the day*, and *B. promiſed to deliver up the bond upon requeſt, if he would pay the money to T. S. his ſervant.* Accordingly *A. paid the money to the ſervant*, but B. did not deliver up the bond on requeſt; whereupon A. brought his action. It was moved in arreſt

reſt of judgment, that the plaintiff had *ſet forth* the promiſe and the requeſt, but *no place where the requeſt was made.* Ley Ch. J. Jones and Whitlock held the place not material, becauſe *iſſue was taken upon not guilty;* but *if the defendant had demurred,* he ſhould have had judgment. 2 Roll. Rep. 476. Mich. 22 Jac. B. R. Method v. Peck.

court were of opinion the plaintiff ſhould have judgment, and that non aſſumpſit allows the requeſt. But a note is added, that this judgment was reverſed in B. R. becauſe the requeſt being upon *collateral matter*, which was *the cauſe of the action*, it is material.——Poph. 160. PACK v. METHOLD, adjudged for the plaintiff in C. B. but in error in B. R. the opinion of the court was ſtrong, that the time and place of the requeſt ought to have been alleged ſpecially and certainly, becauſe it is traverſable, and parcel of the aſſumpſit——Jo. 85. pl. 1. Mich. 1 Car. B. R. the S. C. and reſolved per tot. cur. that a ſpecial requeſt ſhould have been alleged; and though iſſue was taken * upon the non aſſumpſit, and not upon the requeſt, yet this does not help it, becauſe the requeſt is the ſubſtance and parcel of the contract; and this being omitted, no iſſue can make it good. And judgment was reverſed.——3 Bulſt. 297. S. C. in B. R. and after ſome difference in opinion the whole court reſolved, that by the omiſſion of time and place the judgment was erroneous; and therefore reverſed nullo contradicente.——Lat. 93. Peck v. Cole, S. C. in B. R. but no judgment.

6. Aſſumpſit, &c. in *conſideration of a ruff-band delivered* to him, he promiſed *to pay 3 l. at the day of the plaintiff's marriage;* and alleged that he was married ſuch a day, and that the defendant poſtea, &c. licet ſæpius requiſitus, had not paid it; and though *no notice of the marriage nor day of the requeſt was mentioned,* and though the payment was to be made after that day, and not before, yet 3 juſtices held it well enough. Contra Crooke J. and judgment for the plaintiff. Cro. C. 34. pl. 8. Paſch. 2 Car. C. B. Crane v. Crampton.

7. Caſe, for that one *T. S. being indebted to the plaintiff in* 12 *l. and* whereas *the defendant (as he told the plaintiff) was indebted to the ſaid T. S. in* 12 *l. the defendant, in conſideration the plaintiff, at his ſpecial inſtance and requeſt, would procure an order from T. S. to the defendant to pay the* 12 *l. to the plaintiff, he promiſed to pay it;* and ſhews that he did procure an order from T. S. requiring the defendant, upon ſight thereof, to pay the plaintiff 12 l. and that the plaintiff ſhewed the ſaid order to the defendant on ſuch a day, and at ſuch a place, and requeſted him to pay the money, which he refuſed. Upon demurrer it was objected that he did *not allege that he procured the order at the requeſt of the defendant*; beſides, the promiſe was not for a duty to the plaintiff, but was *collateral*, and became due upon a ſpecial promiſe, therefore a requeſt ſhould be alleged with time and place. Sed non allocatur; and per tot. cur. judgment for the plaintiff; for *no other requeſt ſhall be intended than what is included in the agreement, (viz.) that the plaintiff, at the requeſt of the defendant, did procure the order;* otherwiſe if it had been to procure the note when he ſhould be required; but here no ſubſequent requeſt was intended; but if a requeſt had been neceſſary, it is here ſufficiently alleged, viz. that at ſuch a day and place he ſhewed the note to the defendant, and required him to pay it, without ſaying adtunc & ibidem, he required. 2 Vent. 71. 74. Mich. 1 W. & M. in C. B. Bokenham v. Thacker.

8. Aſſumpſit

8. Aſſumpſit, for that the *defendant ſold him a gelding for* 8 *guineas, and upon the ſale agreed, that in conſideration the plaintiff had paid him the* 8 *guineas, he promiſed* the plaintiff, *that if he did not like the gelding, and ſhould deliver it to B. to the uſe of the defendant, B. ſhould repay the* 8 *guineas, and if he did not, then the defendant would upon requeſt*; and ſets forth that he did not like the gelding, but delivered it to B. and required him to pay the 8 guineas, which he refuſed; and that the defendant licet ſæpius requiſitus, had not paid. It was moved in arreſt of judgment, that the promiſe to repay the 8 guineas was collateral, and the defendant himſelf was not the debtor, becauſe he was no more than a ſurety in default of B. and therefore * notice ſhould be given that B. had not paid, and a ſpecial requeſt ſhould be alleged to the defendant, and all this matter be laid in the declaration, and not a ſæpius requiſitus only. But reſolved per tot. cur. that this is *not a collateral promiſe*, but one entire contract upon the ſale, and B. is only a ſervant to receive the horſe and pay the money; by the not doing whereof the defendant is the debtor, and the money is in his hands, as received to the plaintiff's uſe; wherefore judgment was given for the plaintiff in C. B. and affirmed in error in B. R. 3 Lev. 363. Trin. 5 W. & M. Maſters v. Marriot.

Skin. 347. pl. 16. S.C. adjudged accordingly; and by Holt Ch. J. by the redelivery of the horſe the eight guineas became a duty.

* 12 Mod. 44. is a ſhort note of S. C. and ſays where *a certain perſon is mentioned*, as if it were, viz. If J. S. pay ſo much money, &c. in ſuch caſe notice is not neceſſary, but if it be, if any body pay, &c. there notice muſt be, becauſe it is uncertain.

(A. a. 8) Aſſumpſit. Requeſt ſpecially alleged. In what Caſes it muſt be, and where.

1. ASSUMPSIT *againſt the defendant as executrix of G. W. in conſideration that the plaintiff would aſſure certain lands to T. P. at the inſtance of the ſaid G. W. he promiſed that if T. P. did not pay him yearly upon requeſt* 10*l. and* 10 *loads of faggots, that he would* pay them, and he did aſſure the land, &c. and that neither G. W. nor T. P. licet ſæpius requiſitus, did pay the 10l. and the 10 loads of faggots. Adjudged for the defendant; for ſince the payment of the 10l. was to be upon requeſt, a requeſt is material, otherwiſe the defendant is not chargeable, *and the time and place of the requeſt are to be expreſsly alleged.* Cro. E. 85. pl. 5. Hill. 30 Eliz. B. R. Davenly v. Wellbore.

2. If *money is lent to be repaid when required,* licet ſæpius requiſitus is not ſufficient; but if the plaintiff declares upon a *cum indebitatus fuiſſet the defendant aſſumed to pay,* there licet ſæpius requiſitus is ſufficient; per Wray. 3 Le. 206. in pl. 266. Paſch. 30 Eliz. B. R.

3. Aſſumpſit, for that the plaintiff *was poſſeſſed of a leaſe for years, and B. poſſeſſed of the reverſion for years, B. in conſideration the plaintiff would ſurrender his eſtate and term, and procure one T. to give him* 100*l. for a leaſe to be made by B. to the ſaid T.* he *promiſed to pay the plaintiff* 30*l. when required;* and alleged the performance on his ſide by making the ſurrender, (viz.) 20 April; and that on the ſame 20 April he procured T. to give the teſtator 100l. for a leaſe, &c. then and there made for 19 years to come; but that B. licet ſæpius requiſitus, had not paid the 30l. &c. A motion was made of other matter in arreſt of judgment, but it was entered for the plaintiff. Poph. 30. Trin. 35 Eliz. Hughes v. Robotham. Cro. E. 302. pl. 1. S. C. adjudged for the plaintiff.

4. *Where* a debt is *the ground of the action,* and the *law induces a promiſe to pay,* there the requeſt is neither parcel of the conſideration nor iſſuable; *otherwiſe where* the action is *founded upon a collateral matter,* and not upon a duty, there the requeſt ought to be expreſsly alleged. Yelv. 66. Trin. 3 Jac. B. R. The caſe of the Hoſtler. *As in* aſſumpſit by an innkeeper, for that the defendant brought his horſe to livery, and agreed to pay 6d. for a day and night, and that the horſe had been kept by him for many days and nights; that the money amounted to 20l. and declared licet ſæpius requiſitus, &c. without alleging any requeſt in facto; and adjudged good.

So where a commiſſion for examining witneſſes was to be held at an inn, and in conſideration the inn-keeper promiſed to find horſe-meat and man's-meat during the time for the defendant and his company, the defendant promiſed to pay him, when required, ſo much as the ſame ſhould amount to, and that the ſame amounted to 5l. but the defendant, licet ſæpius requiſitus, hath not paid it. But per tot. cur. a preciſe requeſt ought to be alleged, and the very time and place expreſſed, and the ſame diverſity taken by them as above in the caſe of Yelverton. [And ſo this caſe is taken as a collateral promiſe, and not a mere debt of the defendant's, and ſo differs from that caſe.] And therefore judgment was ſtayed. Cro. J. 183. pl. 1. Mich. 5 Jac. B. R. Selman v. King.

If one promiſes to ſave another harmleſs, he ought to do it at his peril, without any requeſt. Sty. 141. Mich.

5. In aſſumpſit *to ſave harmleſs when required*, a ſpecial requeſt muſt be alleged, and a licet ſæpius requiſitus is not ſufficient, nor will a verdict aid it; but if the promiſe had been *to pay a certain ſum of money when required*, it would be good without laying any ſpecial requeſt. 2 Bulſt. 229. Paſch. 12 Jac. Harriſon v. Mitford.

24 Car. B. R. Smithſon v. Wells.

But where in aſſumpſit, in conſideration the plaintiff would cut down and carry away certain trees, *to ſave him harmleſs from all damages*, &c. which might happen to him by reaſon thereof, when he ſhould be required, the defendant, licet ſæpius requiſitus, had not ſaved him harmleſs, but ſuffered * him to be ſued, which had coſt him a great deal of money. It was moved in arreſt of judgment, becauſe he did *not ſhew in what court he was ſued, nor what money he had expended, nor how much damnified*, and therefore adjudged for the defendant. Cro. C. 385. pl. 17. Mich. 10 Car. B. R. Palmer v. Knight.

*[386]

If a *collateral thing* be to be done, there to ſay ſæpius requiſitus is not ſufficient; per Jones J. Godb. 403. Paſch. 3 Car. B. R. in pl. 483.—S. P. Sid. 303.

6. Where the plaintiff declares upon *aſſumpſit to do a collateral thing upon requeſt*, the *time and place* of the doing it *ought to be alleged*, whereupon iſſue may be taken; for there the requeſt, together with the not doing the thing promiſed, gives the cauſe of action. *But* where the promiſe is *founded upon a debt*, as *for wares bought* of the plaintiff, he promiſed to pay 10l. upon requeſt, there the plaintiff need not allege the requeſt more preciſely than in an action of debt, viz. licet ſæpius requiſitus, &c. Agreed by all the judges, and that it had been often ſo adjudged. 2 Roll. Rep. 62. Mich. 16 Jac. B. R. Hill v. Wood, or Wade.

pl. 10. Mich. 18 Car. 2. B. R. Birks v. Trippet, which was in aſſumpſit *for not paying money awarded*. The plaintiff demurred, becauſe no demand was alleged; and for that reaſon adjudged for the defendant.——Saund. 32. S. C. The aſſumpſit was founded on the promiſe made at the ſubmiſſion to pay ſo much if he did not perform his part of the award, cum ad inde requiſitus, &c. and adjudged for the defendant.——2 Keb. 126. pl. 78. Berks v. Trippet, S. C. judgment for the plaintiff, niſi.

Caſe, &c. upon a ſpecial promiſe, ſetting forth that *in conſideration the plaintiff would permit the defendant to collect and receive certain tithes, he promiſed to pay him 20s. per ann.* It was objected that the promiſe being to do a *collateral act*, and there being nothing due before the promiſe made, the plaintiff ought to have alleged a ſpecial requeſt, to which the court agreed; but they ſaid that it is otherwiſe where the thing is not to be done upon requeſt. Lutw. 229. 231. Mich. 3 Jac. 2. Coningſby v. Rodd.

2 Roll. Rep. 65. S. C. and agreed per omnes, that the requeſt was material, and that if the defendant had demurred, judgment ſhould be againſt the plaintiff; but it was moved that the verdict had ſupplied the defect of the count.

7. Aſſumpſit, in *conſideration he would buy ſuch lands* of the defendant, the defendant *promiſed to pay* the plaintiff 9l. *which J. S. owed to the plaintiff*, when he ſhould be thereunto required; and that, licet ſæpius requiſitus, he had not paid it, but alleged neither time or place. Reſolved, in regard it was *a* † *ſtranger's debt*, and was not due before promiſe, or payable but upon requeſt, therefore a ſpecial requeſt ought to be made, and licet ſæpius requiſitus will not ſerve; and judgment for the defendant. Cro. J. 523. pl. 8. Hill. 16 Jac. B. R. Hill v. Wade.

† *A. ſued B.* whereupon *C. promiſed A. that if he would forbear the ſuit he would pay him* 200l. *at Midſummer-day, and another* 100l. *at any time after that day, when he ſhould be reaſonably required.* Adjudged that in this caſe the requeſt was iſſuable, and ought to have been ſpecially alleged; for it *was no duty before the requeſt, the promiſe being made by a ſtranger*; but where he, who is indebted, promiſes to pay upon requeſt, there licet ſæpius requiſitus is ſufficient. Lat. 209. Trin. 3 Car. Alcock v. Blofield.——Noy 95. S. C. agreed accordingly.

8. Plaintiffs

8. Plaintiffs declared that whereas there *was a ſuit in chancery between them and other copyholders of ſuch a manor againſt their lord*, and that *W. their clerk in the ſuit, had diſburſed* 14*l. the defendant*, being *a copyholder of the ſame manor, promiſed in conſideration the plaintiffs would pay to W. the* 14*l. he would pay to them* 40*s. upon requeſt.* The plaintiffs ſhewed they had paid the 14l. and that defendant had not paid the 40s. licet poſtea ſæpius requiſitus. Hobart ſaid that the requeſt is part of the cauſe of action, and ought to be ſet down preciſely, and there ought to be a promiſe broken, and ſuch a promiſe upon which an iſſue may be taken. Win. 102. Mich. 22 Jac. C. B. Brown & Ware v. Barker.

Aſſumpſit, &c. in conſideration the *plaintiff had delivered to the defendant a gelding, he promiſed to redeliver him, or to pay ſo much*, &c. *upon requeſt*, and counted licet ſæpius requiſitus, &c. After verdict and judgment in C. B. for the plaintiff, it was aſſigned for error, that the plaintiff did not allege any ſpecial requeſt, and that it was parcel of the conſideration; and for this reaſon the judgment was reverſed. But *if a requeſt had been alleged, and no place where it was made, it had been well enough on non aſſumpſit pleaded, and found for the plaintiff.* But if the requeſt had been traverſed it would be otherwiſe, becauſe then no viſne appears for the trial. Jo. 56. pl. 2. Mich. 22 Jac. C. B. Lowe v. Kirby.——2 Roll. Rep. 483. [but it is wrong * paged, and ſhould be 486.] S. C. but ſeems not very clearly reported.——S. C. cited Jo. 86.——S. P. and ſeems to be the very S. C. cited by the name of James's caſe. 3 Bulſt. 300. by Crew Ch. J.——S. P. Godb. 403. And ſee (G) pl. 6.

*[387]

9. If I *ſell a horſe for* 10*l. to be paid upon requeſt*, there the requeſt muſt be preciſely alleged, for it is *parcel of the contract*; and in an action on the caſe, and upon debt, you muſt lay a requeſt; per Jones and Dodderidge J. Godb. 403.

10. When a thing is to be done upon requeſt, the *performance muſt be when* the perſon requires it; and it is no *plea* that he was *ready* after the promiſe made. 3 Mod. 295. Trin. 2 W. & M. in B. R. Harriſon v. Hayward.

11. Where a ſpecial requeſt in aſſumpſit ſhould be alleged, and is not, it is fatal on demurrer, but helped after verdict. 12 Mod. 44. Trin. 5 W. & M. Maſters v. Marriot.

12. The defendant *borrowed money for* the uſe of *his mother, and gave bond to pay it on demand, if his mother would not*; and in an action of debt brought on this bond, the defendant after oyer demurred, for that there was not any ſpecial requeſt laid, as made of the mother, and when and where; and that licet ſæpius requiſita will not do. But per cur. though where there is no duty till a demand it is ſo, yet *here was a duty ab initio*, which the law makes payable on demand, and ſo there needs no demand expreſsly to be laid. Judgment for the plaintiff. 6 Mod. 200. Trin. 3 Ann. B. R. Harwood v. Turbervill.

(B. a) In what Caſes an Action lies for a Collateral Reſpect. [*Words ſpoke in Evidence in Courſe of Juſtice.*]

[1. IF *J. S. libels againſt J. D.* in the ſpiritual court *for a defamation*, and produces W. N. as a witneſs to prove the defendant guilty, and the *defendant makes an allegation* in writing

Cro. J. 432. pl. 11. Weſton v. Dobniet, S. C.

accordingly; but otherwise it is if the court has not juriſdiction, or though the court has juriſdiction, yet if the ſaid bill be falſe, and he publiſhes his bill abroad, an action lies.

writing (as the courſe there is) *that* the ſaid *W. N. ought not to be received as a witneſs, becauſe* he is a perjured man, and that *he was perjured in ſuch a cauſe, at ſuch an aſſiſes* in certain, *which allegation is falſe*, yet W. N. ſhall not have action upon the caſe for this againſt J. D. becauſe the ſpiritual court had a juriſdiction of the firſt matter, and this allegation is but according to the common courſe of juſtice there, where the ſentence is given upon the proofs; and therefore if the action would lie, every man would be *deterred* from taking his lawful exceptions to falſe witneſſes. Trin. 15 Jac. B. R. between *Weſtover and Daubinet*, adjudged upon a demurrer.]

Adjudged for the defendant.—See (C. a) pl. 8.

Cro. J. 432. pl. 11. in the caſe above, Houghton J. cited it as Brook's caſe.—Cro. J. 90. pl. 18. Mich. 3 Jac. B. R. Brook v. Sir R. Mountague, Recorder of London, the words were, *that he* (the plaintiff) *was arraigned and convicted of felony*, &c. See (M. b) pl. 1, 2, 3. and the notes there.

[2. In an action between two, where the queſtion is upon evidence to a jury, if one of the parties was a bankrupt or not? if a *counſellor in* giving *evidence for his client, ſays* expreſsly to a juror, that *he was a bankrupt*, where it is falſe; yet no action lies againſt him, becauſe it is in the courſe of juſtice. Trin. 15 Jac. B. R. in the ſaid caſe of *Weſtover*, agreed per curiam; and it ſeems by *Hought. and Mount.* that ſuch an action was brought againſt the ſame Mount. now chief juſtice, and that it was not maintainable.]

[388]

3. In an action brought for ſcandalous words, the defendant *juſtified that he ſpoke them as a witneſs* upon his giving evidence on his oath. See 2 Roll. Rep. 198. and Palm. 144. cites Hill. 37 Eliz. Broad's caſe.

(C. a) Actions [*for Words ſpoke, or Things done*] in Courts of Juſtice.

* Godb. 240. pl. 333. S. C. reſolved that the action lay, becauſe A. exhibited the articles in chancery, and did not purſue them there; for when he had ſworn the articles there, he could not have a ſupplicavit (as he had out of B. R.) to have the good behaviour there, and the oath and affidavit in chancery remain as a ſcandal upon record, and becauſe he made the articles in chancery but a colour for the good behaviour, and though B. R. might grant the good behaviour without any articles preferred, yet when they firſt begin in another court, they ought to follow the cauſe there.—Brownl. 3. S. C. and the court ſaid that if he had proſecuted in chancery, though the articles had been ſcandalous, yet no action would have lain; for a man ſhall not be puniſhed for miſtaking the law, for he might be miſadviſed by counſel.

[1. IF *A. exhibits falſe articles* to a maſter in chancery againſt B. *whereupon B. is bound to his good behaviour*, B. ſhall have action againſt A. for his diſceit and vexation. Paſch. 17 Jac. B. between *Allen* and his wife plaintiffs, and *Gomerſal* defendant, adjudged per totam curiam. Mich. 11 Jac. B. between * *Bradley and Jones* adjudged.]

Cro. J. 601. pl. 26. Eyres v. Sedgewick,

[2. If a *ſupplicavit* iſſues out of chancery to the ſheriff *againſt J. S.* and thereupon the *ſheriff makes a warrant* to a bailiff to take him, &c. and after the *bailiff* comes into chancery, and there

there *makes an affidavit that he took him, and* that he *rescued himself;* whereupon *J. S. is committed* to the Fleet by the lord chancellor, though the *affidavit be false* by which he is committed to the Fleet, and so to his great damage; yet because the affidavit was made in a legal course, though he was not compelled by process to make it, no action upon the case lies; for then every man would be *deterred* from making affidavits in such kind. Mich. 18 Jac. B. R. between *Aier and Redgwit* adjudged, in arrest of judgment.]

S. C. accordingly by 3 J. who delivered their opinions seriatim that this action lay not, because for misdemeanor in courts, every court where the misdemeanor is committed shall have the examination thereof, and if they find misdemeanors, may punish them; but to punish upon an action on the case upon pretence of a false oath shall not be suffered, but it ought to be (as Dodderidge said) punished by conviction upon indictment or suit in the star-chamber; but Haughton J. contra. But adjudged for the defendant. ——Palm. 142. S. C. says, that all the four justices held that the action did not lie; and judgment accordingly. ——2 Roll. Rep. 195. S. C. adjornatur. ——Ibid. 197. S. C. all the court held accordingly; but it does not appear that judgment was given.

Exhibiting a bill to the queen, charging the plaintiff to have recovered against the defendant 400l. by forgery, perjury, and cozening; and also that he had published the matter of the said bill at Westminster, &c. The court held that the exhibiting the bill to the queen is not actionable in itself; for she is the fountain of justice, and all her subjects may lawfully resort to her to complain; but if they will afterwards divulge the contents to the disgrace of the person intended, it is actionable. Adjudged against the plaintiff. 3 Le. 138. pl. 187. Mich. 28 Eliz. C. B. Hare v. Meller. ——Ibid. 103. pl. 213. Hill. 29 Eliz. C. B. the S. C. in totidem verbis.

[3. In an action upon the case by A. against B. if the plaintiff declares that he took his oath in the court of B. R. against the defendant, concerning certain matters, to have him bound to his good behaviour; and thereupon the defendant intending to scandalize the plaintiff, did then falsely and maliciously say, in the hearing of the justices and officers of the court, and others there being, *there is not a word true in that affidavit, and I will prove it by* 40 *witnesses*, this action is not maintainable; for the defendant by the * said answer made a *defence of himself* in the court *against the charge* and accusation against him; and therefore it *is justifiable, being in a judicial way.* Pasch. 15 Car. B. R. between *Moulton and Clapham* adjudged in arrest of judgment. Intratur Hill. 14 Car. Rot. 459.]

*[389]

Jo. 431. pl. 5. Boulton v. Clapham, S. C. and rule given by 3 J. that the plaintiff nil capiat per Billam. —Mar. 20. pl. 45. S. C. and the court was clear of opinion that the words would not bear an action.

[4. If *A. recovers* against A. [B.] *damages* and costs in C. B. or B. R. *and sues out a fieri facias* to the *sheriff*, who by force thereof *takes the goods of B. to the value, and* so returns it, and the goods *remain in his hands pro defectu emptorum;* and after *A. well knowing thereof*, yet to the intent to vex and double charge B. *sues out another fieri facias, and* delivers it to the same *sheriff* to be executed, who *thereupon levies the money of other goods of B. and pays it over to A.* in this case for this wrong and vexation, though it was in a legal way, yet an action upon the case lies. Hob. Rep. Case 257. and 350. between *Waterer and Freeman* adjudged.]

Fol. 34.

Hob. 205. pl. 259. Mich. 15 Jac. S. C. argued. Ibid. 266. pl. 352. S. C. adjudged for the plaintiff. —— Brownl. 12. Warter v. Freeman, S. C. adjudged for the plaintiff, though the defendant alleged that fieri facias was an act in law, and so no cause of action against him. ——Noy 23. S. C. says the better opinion was that the action was well brought.

[5. If *A. sues B. in the spiritual court for tithes, contrary to a composition* by him made, an action upon the case lies for it. Hob.

Cro. E. 836. pl. 3. S. C. but I do not

obſerve S. P.—— Noy 23. Rep. in caſe 251. cites Mich. 43 & 44 Eliz. B. R. between *Bray and Partridge*, for this ſuit is coram non judice.]

S. C. & S P. and by Popham and Gawdy the action lies.——Noy 37. S. C. but S. P. does not plainly appear.——S. C. cited Hob. 206. in caſe of Waterer v. Freeman, that the action lies.

Cro. J. 133. pl. 9. Waterhouſe v. Bawde, S.C. Mich. 4 Jac. and becauſe this action was brought by the party only, and not tam quam, the court all held, that though otherwiſe an action might lie, yet for this cauſe it was not well brought; and therefore it was adjudged for the defendant.——Hob. 206. in caſe of Waterer v. Freeman, cites S. C. as that the action lies.——S. C. cited Noy 23 in caſe of Brey v. Partridge, that the action does not lie.

[6. *So* [*But*] if A. ſues in the ſpiritual court *for tithe of trees not titheable*, no action upon the caſe lies. 4 Jac. between Dame *Waterhouſe and Moodie*.]

In the margin of Hob. 206. is a quære; for Moodie himſelf tells me [which ſeems to mean Hobart himſelf] that he ſuing for tithes as a farmer of the parſonage of Woodchurch in Kent, ſuch an action upon the caſe was brought; whereupon he demurred, and the court diſliked the action, and ſo it reſted without any farther proceeding.——An action lies not againſt one that ſues for tithes that are not payable; per Hale Ch. B. Hardr. 196. Trin. 13 Car. 2.

4 Rep. 14. b. pl. 3. Mich. 33 & 34 Eliz. B. R. the S. C. and

[7. So [*But*] if a man *charges* another with *felony, or* of *piracy, in a bill in the ſtar-chamber*, whereof the court has no juriſdiction, an action lies. Hob. Rep. caſe 350. cites the caſe of *Bulkly and Wood*.]

becauſe the ſaid words were not examinable in the ſaid court, the action lay; and the ſame was afterwards reſolved accordingly in the exchequer, though the judgment was reverſed for miſpleading.——Cro. E. 230. pl. 21. S. C. adjornatur.——Ibid. 247. pl. 7. S. C. reſolved that the action lay.——Mo. 705. pl. 986. ſays it was agreed by all, except Owen, in the exchequer, that no action lay; and therefore judgment was reverſed.——2 And. 28. pl. 18. S. C. in the exchequer chamber, and agreeable to the report in Mo.——S. C. cited Hob. 267. that the action lies.——2 Keb. 832. pl. 56. in the caſe of Lake v. King, Mich. 23 Car. 2. B. R. the court ſaid, that notwithſtanding what is reported in 4 Rep. 14. b. in Buckley's caſe, it was held that want of juriſdiction will not make a libel; for it is only the error of counſel, and a nil capiat per Billam was awarded niſi.——Powell (John) J. ſaid, he had heard my Lord Hale ſay, that it was reſolved in Sir Richard Buckley's caſe, that for putting matters in a bill of which the court had no cognizance, action does not lie againſt the plaintiff, though in 4 Rep. it is reported otherwiſe. 2 Lutw. 1571.——S. P. admitted Noy 102. in TURVILL'S CASE, which was, that H. *exhibited a bill in the ſtar chamber for forging a will, but upon the hearing reſiquaſhed the forgery, and inſiſted on a practice between them to draw the party to make that will.* The bill was diſmiſſed, and the plaintiff fined 200 l. to the king, and ſeveral damages to every of the parties becauſe they have not a remedy for thoſe ſlanders (being before a competent judge) at the * common law. And it ſeems that this was the firſt precedent for damages for a ſcandalous bill.

[And ſee tit. Libel (A) pl. 6. in the notes.]

* [390]

Hob. 266. 267. pl. 352. per Hobart Ch. J. in caſe of Waterer v. Freeman.——S. P. Cro. J. 134. pl. 6. Mich. 4 Jac. B. R. in caſe of Lady Waterhouſe v. Bawde.——Cro. J. 432. pl. 11. Trin. 15 Jac. B. R. per tot. cur. S. P. in caſe of † Weſton v. Dobinet.

† See (B. a) pl. 1. S. C.

[8. If a man brings an *action upon a falſe ſurmiſe in a proper court*, no action lies for it; for the ſuit was legal, though the cauſe thereof was not true, for which he ſhall pay *coſts*. Hob. Rep. caſe 350.]

D. 285. a. pl. 37. Trin. 11 Eliz. cites Mich. 13 H. 7. Lord Beauchamp v. Sir Richard Croft,

[9. If a man brings a writ of *forgery againſt a peer*, &c. and the *defendant is found not guilty* by the jury, yet he ſhall not have a ſcandalum magnatum, and lay the charge contained in the action to be a ſcandal. Hob. Rep. caſe 350. cites 11 Eliz.]

by the better opinion of the court; for no puniſhment was ever appointed for ſuit at law, though it be falſe, and for vexation.——Kelw. 26. pl. 1. S. C.——Hob. 266. pl. 352. cites it as a caſe of 11 Eliz.

[10. If

[10. If A. cauſes B. to be *impriſoned upon a ſtatute confeſſed* by him, *though* the ſtatute was *defeaſanced, and the money paid* according to the defeaſance, yet no action of falſe impriſonment lies againſt A. Hob. Rep. caſe 350. cites 43 Edw. 3. 33.] Hob. 266. pl. 352. cites S. C.

[11. If one *ſues* me *contrary to his releaſe*, an action lies. Hob. Rep. caſe 350. Per Hob.] By Hobart Ch. J. Hob. 267. pl. 352.

in the caſe of Waterer v. Freeman.——But ſee (H. c) pl. 4. 5.

[12. If the *obligee ſues* the obligor *after the money paid*, though it be upon a ſingle obligation, an action lies. Hob. Rep. caſe 350. per Hob.] Per Hobart Ch. J. Hob. 267. pl. 352. S. P. by

Gawdy and Fenner e contra. Cro. E. 836. in pl. 8. Trin. 43 Eliz. B. R.

13. One was brought in by *ſubpœna ad teſtificandum*, and upon his oath *declared matter of infamy* againſt the plaintiff; if he ſwears falſely he may be puniſhed for perjury, but an action lies not againſt him, becauſe he comes in by courſe of juſtice. Cro. E. 230. in pl. 21. Arg. cites Mich. 8 & 9 Eliz. Stanley v. Curſon.

14. Action on the caſe will not lie againſt one for *exhibiting articles to a juſtice of peace*, containing ſuggeſtions *for binding* the party *to the good behaviour*; for ſhould ſuch actions be permitted, none, though they had good reaſon to complain, would venture to do it for fear of vexation. 4 Rep. 14. b. pl. 2. Mich. 27. & 28 Eliz. B. R. Cutler v. Dixon. 3 Le. 123. pl. 176. Cutter v. Dixwell, S. C. held accordingly. ——4 Le. 35. pl. 96.

S. C. in totidem verbis.——S. C. cited Godb. 240. pl. 333.——So for exhibiting articles to the ſeſſions for the like purpoſe, though they are *falſe*, it is not actionable, becauſe it is in a courſe of juſtice. Cro. E. 230. in pl. 21. Arg. cites 27 & 28 Eliz. B. R. Tuthill v. Oſborne.

15. Pariſhioner ſhall not have an action upon the caſe *againſt the parſon for ſuing him in the ſpiritual court for tithes, without cauſe*; for if it be without cauſe, he will have coſts there. Palm. 381. cited Arg. as 43 Eliz. Croſs v. Jackſon. 2 Roll. 328. Arg. cites S. C. accordingly.

16. An action on the caſe was brought *for ſuing in the admiralty* court, *for a thing done on the land*, and not on the ſea. 1 Brownl. 4 Mich. 11 Jac. Row. v. Alport.

17. Caſe for that the defendant went to a juſtice of peace, and requeſted a warrant againſt the plaintiff for ſtealing his ropes. The juſtice ſaid, be adviſed, and look what you do; the defendant replied, Sir, *I will charge him with flat felony for ſtealing my ropes from my ſhop*, quorum quidem verborum, &c. Per tot. cur. theſe words *being ſpoke to a juſtice of peace when he came for his warrant*, which was lawful, would not maintain an action; for if they ſhould, no other would come to a juſtice of peace to make complaint and inform him of any felony. Hutt. 113. Mich. 8 Car. Ram. v. Langley. [391]

18. Caſe for that the plaintiff brought an action againſt one L. and the defendant being produced as a *witneſs at the trial, gave evidence that the plaintiff was a common liar, and ſo recorded in the ſtar-chamber, by reaſon whereof the jury, though they found for the plaintiff, gave* him *but ſmall damages* in that action. It was moved in arreſt of judgment that the action doth not lie, for if it did, every witneſs might be charged upon ſuch a ſuggeſtion; and for what Brownl. 2. Harding v. Bulman, S. C. and the court ſeemed of opinion that the action would not lie.

what appears the evidence may be true; for it is *not averred that he is not a common liar, or that he was not recorded for a common liar in the ſtar-chamber;* and for theſe reaſons adjudged againſt the plaintiff. Hutt. 11. Hill. 15 Jac. Harding v. Bodman.

19. If *in treſpaſs the defendant juſtified that the plaintiff was a bankrupt, whereby he had a commiſſion upon the ſtatute, and thoſe goods were delivered to him,* whereas the plaintiff was not any bankrupt, nor any commiſſion iſſued; yet the plaintiff for the *words contained in the plea* ſhall not maintain any action. Per Houghton. Cro. J. 432. Trin. 15 Jac. B. R. in pl. 11.

20. In trover and converſion, judgment was given againſt the defendant and 140 l. damages; the *defendant* according to the cuſtom in B. R. *rendered himſelf* to the marſhal *in diſcharge of his bail,* whereby the bail were diſcharged of their recogniſance according to the cuſtom of the court; notwithſtanding which the *plaintiff in the action took out a capias ad ſatisfaciendum againſt the bail,* to take them in execution, and delivered the ſame to the ſheriff, whereupon the plaintiff brought his action upon the caſe. It was moved in arreſt of judgment that this action does not lie, becauſe it is the act of the court to award this proceſs. But adjudged for the plaintiff, and affirmed in error. Cro. J. 667. pl. 1. Trin. 21 Jac. B. R. Steer v. Scobel.

21. Preferring a *bill in the ſpiritual court* againſt the plaintiff for *drunkenneſs,* is not actionable. Agreed per cur. But they would not over-rule it upon the declaration only, but ordered the defendant to demur. Litt. 314. Mich. 5 Car. C. B. Eaton v. Sharman.

22. Plaintiff declared that the defendant *endeavoured to charge him at the quarter-ſeſſions to be the reputed father of a baſtard-child;* but the whole court were clear of opinion that action of the caſe did not lie, becauſe it was an eccleſiaſtical ſcandal, and ſo to be puniſhed there; but if he had laid that he had *procured an order there againſt him to be the reputed father, and ſo to keep the child,* the action would lie, by reaſon of the temporal loſs. 2 Bulſt. 343. Mich. 6 Car. B. R. Bowber v. Panter.

Lev. 129. S. C. adjudged for the plaintiff. And per cur. though the goods of the plaintiff had been among B.'s goods, and yet action lies, and the ſcienter is not material; for the ſheriff is at his peril to levy the goods of B. only. —— Keb. 693. pl. 10. S. C. and judgment accordingly, niſi, &c.

23. A. *entered a plaint in London* againſt B. and the *ſheriff attached the goods of J. S. the plaintiff, who declared that the ſheriff knew them to be the plaintiff's goods, and took them at the houſe of a ſtranger.* Per cur. the action well lies, inaſmuch as it is *found* that they were taken *ſcienter* to be the plaintiff's. Sid. 183. pl. 3. Paſch. 16 Car. 2. B. R. Saunders v. Powell.

24. An action was brought *in an inferior court againſt an attorney of C. B.* and the plaintiff knew him to be ſuch, yet per tot. cur. no action lies, for perhaps he may not inſiſt upon his privilege, and if he does, he may plead it. Mod. 209. pl. 41. Hill. 27 & 28 Car. 2. C. B. Anon.

[392] 25. If one be *retained to ſue for a debt as attorney, which he knows to be releaſed, and to which himſelf was a witneſs,* yet the court held that an action would not lie; becauſe what he does is only

only as ſervant to another, and in the way of his calling and profeſſion. Mod. 209. Hill. 28 & 29 Car. 2. C. B. in pl. 41.

26. Action on the caſe for *ſuing in an inferior court, without any cauſe of action within the juriſdiction*, was held good; and judgment for the plaintiff. 2 Show. 328. pl. 335. Mich. 35 Car. 2. B. R. Hudſon v. Cooke. Skin. 131. pl. 6. S. C. adjudged accordingly.—Vent. 369. Hodſon v. Cooke S. C. and though it was moved, that it was *not alleged that the defendant knew that the place where the action aroſe was out of the juriſdiction*, which it would be hard to put the plaintiff to take notice of, yet Jefferies Ch. J. Holloway and Walcot, held that the plaintiff ought at his peril to take notice of the place; but Withens J. e contra. And the court ſaid, that it could not be aſſigned for error in fact that the cauſe aroſe out of the juriſdiction, becauſe that is contrary to the allegation of the record; neither is the officer puniſhable that executes proceſs in ſuch action, but an action lies againſt the party. And yet it was reſolved in the exchequer, when Ld. Ch. J. Hale ſat there, Paſch. 18 Car. 2. in a caſe of Cowper v. Cowper.——S. C. of Cowper v. Cowper, cited 2 Show. 328. as held good, becauſe in interior courts they hold to bail in all actions.——2 Lutw. 1571. in the appendix, Powell (John) J. in his argument, cites the caſe of Hudſon v. Cooke accordingly, and ibid. 1572. cites alſo the caſe of Cowper v. Cowper, Paſch. 18 Car. 2. in the exchequer, and ſaid he had cauſed the roll to be ſearched, and had ſeen the record, that the plaintiff declared that the defendant, without any cauſe of action, by a precept out of the court of Southwark, laying great damage, procured him to be arreſted and detained in priſon for want of bail, ubi revera he had no cauſe of action within the juriſdiction. Upon not guilty, it was found for the plaintiff, and 40 l. damages, but the gift of the action was the *laying great damages, and cauſing him to be arreſted and detained in priſon for want of bail*, for which an action would lie, though the court had juriſdiction of the cauſe; and therefore the averment that he had no cauſe of action within the juriſdiction, was immaterial to the gift of the action.——2 Show. 374. pl. 360. Trin. 36 Car. 2. B. R. Anon. S. P.

(D. a) For Words. For what Words it lies, for *Matters whereof the Spiritual Court hath Conuſance.* [And Pleadings.]

[1. IF one man ſays to another, thou art a *whoremaſter*, or to a woman, thou art a *whore*, no action lies for this, becauſe this is *merely ſpiritual, without any temporal loſs*. Trin. 11 Jac. B. R. between *Mathew and Croſe*, per curiam.] Cro. J. 325. pl. 2. S. C. as to the word (whoremaſter) being joined with other words, and a temporal loſs alleged; and by reaſon thereof the words were held actionable; and judgment for the plaintiff.——2 Bulſt. 86. Matthew v. Craſſe S. C. according to Cro. J.——See infra, pl. 5. S. C.

[2. If a man ſays of another that is married, *he hath had two baſtards 36 years agone, and he ſhould pay for keeping them*, no action lies for theſe words, though he averred that by force of theſe words a contention aroſe between him and his wife, and he was in danger to have been divorced; for here is *not any temporal loſs*, and the offence was pardoned by ſeveral general pardons, this being 36 years before. Paſch. 16 Jac. B. R. between *Randle and Beal*, adjudged in arreſt of judgment.] Cro. J. 473. pl. 5. Barmund v.—S. C. it was moved that this imagination to be divorced is not to any purpoſe, it being but a cauſeleſs fear; and of that opinion was the court; and judgment for the defendant——S. C. Poph. 140. by the name of BERNARD v. BEALE accordingly.——2 Roll Rep. 24. RANDAL v. BELL S. C. accordingly; and it is not alleged that a divorce did enſue.——Godb. 273. pl. 385. Anon. accordingly, and ſeems to be S. C.

[3. If a man ſays of a woman, that *J. S. did beget her with child, and ſhe had a child by him*, by force of the ſpeaking of which words ſhe *loſt her marriage* with J. D. though thoſe words [393] Poph. 36. pl. 3. Mich. 34 and 35 Eliz.

words are a ſpiritual * ſlander, yet the loſs of the marriage is temporal, and therefore the action lies for them. Co. 4. 16. b. *Anne Davies v. Gardiner*, adjudged.]

* Fol. 35.

S. C. adjudged for the plaintiff. Becauſe if the feme had a baſtard, ſhe was puniſhable by the ſtatute of 18 Eliz. 3. 4 Rep. 17. a.—Het. 161. S. C. cited.—2 Roll Rep. 433. S. C. cited.—S. C. cited Palm. 298. and ſays that one reaſon of the judgment is, that the juſtices may puniſh her by the ſtatute; and ſays that though it is alleged there that ſhe had loſt her marriage, yet this was not out of neceſſity to make the action to lie, but for the increaſe of damages.——It was ſaid, Sid. 397. pl. 4. Hill. 20 & 21 Car. 2. B. R. that Popham Ch. J. ſaid that Ann Davies's caſe was adjudged upon other reaſons than is reported in 4 Rep. 16, 17——And Vent. 4. Hill. 20 & 21 Car. 2. B. R. in caſe of Barnes v. Bruddel, the reaſon of the ſtatute of 18 Eliz. cap. 3. alleged in that caſe of Anne Davies, was ſaid by Twiſden J. to be of my Ld. Coke's putting in; for that juſtice Jones affirmed to him, that nothing was ſaid thereof in the caſe.—And in the caſe of Tuckey v. Flower, Comb. 137. Mich. 1 W. & M. in B. R. Dolben J. denied 4 Rep. 17. Ann Davies's caſe to be law.——And 6 Mod. 104. Hill. 2 Ann. B. R. in caſe of Ogden v. Turner. Holt Ch. J. denied the ſaid reaſon given in Anne Davies's caſe.——Lev. 261. Hill. 20 & 21 Car. 2. B. R. ſays that the loſs of marriage was the ſole reaſon in Anne Davies's caſe.——S. C. cited Arg. Comb. 392. Mich. 8 W. 3. and ſays that it ſeems to be only the opinion of the Ld. Coke; and Holt Ch. J. ſaid that it had often been denied. And that if the caſe were new, perhaps we ſhould think an action lies without alleging loſs of marriage, as well as for words tending to the diſcredit of a tradeſman; for it touches her in the moſt tender part, and is a manifeſt loſs. And he ſaid that for aught he knew, marriage is the very end of her creation.

Cro. J. 162. pl. 17. S. C. with an inuendo that he had carnal copulation with her; and adjudged for the plaintiff, and afterwards affirmed in error.—Jenk. 316. pl. 7. S. C.——See (Z. a) pl. 7. S. C.

[4. *So* if a man ſays of a woman, that *J. S. had the uſe of her body*, by which ſhe *loſes her marriage*, an action lies. Paſch. 5 Jac. B. R. between *Dame Morriſon and Cade*, adjudged.]

Cro. J. 323. pl. 2. S. C. that by reaſon of the allegation of his loſs of marriage, the action is maintainable; and judgment for the plaintiff.——2 Bulſt. 89. S. C. and judgment for the plaintiff.

[5. [*So*] if a man ſays *to J. S.* another man, *thou art a whoremaſter, for thou haſt lain with Brown's wife, and hadſt to do with her againſt a cheſt*, by which he loſes his marriage with A. D. &c. J. S. ſhall have an action for theſe words; for there is not any difference between a man and a woman as to this matter; for a man may have a temporal damage by the loſs of his marriage as well as a woman. Trin. 11 Jac. B. R. between *Mathew and Craze*, adjudged. Mich. 12 Jac. B. R. between † *Sell and Fairee*, per curiam.]

† Roll Rep. 79. pl. 24. the court agreed that a man may have action upon the caſe for a loſs of marriage by ſcandalous words, as well as a woman.——2 Bulſt. 276. Sell v. Facy, S. C. upon the manner of the plaintiff's declaring.——3 Bulſt. 48. Trin. 13 Jac. Selly v. Facy, S. C. and judgment for the plaintiff; the loſs of a wife being the ſame to a man as the loſs of a huſband is to a woman.

2 Roll. Rep. 433. THOMPSON v. TWENGE, Trin. 21 Jac. B. R. ſeems to be S. C. Adjudged that *thou art a whore*, with a ſuppoſal of temporal loſs, viz. of marriage, is actionable; but Doderidge and Chamberlaine J. ſaid that without temporal loſs it is not actionable.

[6. [*So*] If a man ſays to a woman, *thou art a whore, I will marr thy marriage*, by which ſhe loſes her marriage, an action lies. Trin. 22 Jac. B. R. between *Tonſon and Spring*, adjudged, this being moved in arreſt of judgment.]

S. C. cited Sid. 397. pl. 4. Hill. 20 and 21 Car. 2. B. R. in caſe of Barnes Prudlin, and was there denied.—S. C. cited Vent. 4. in S. C. where the words were, viz. *She was with child by J. S. whereof ſhe miſcarried*;

[7. In an action upon the caſe, if the plaintiff declares that ſhe had ſeveral ſuitors to marry her, and that the defendant ſaid of her, *ſhe is with child, and hath taken phyſic for it*, by which ſhe became in diſgrace, & *perdidit conſortium vicinorum ſuorum*, &c. though it be not alleged that ſhe loſt any marriage thereby, yet the action lies. Mich. 21 Jac. B. R. between *Medhurſt and Balam*, adjudged, this being moved in arreſt of judgment.]

carried; and notwithſtanding the ſaid caſe of Medhurſt v. Balaam, and alſo of Anne Davies's caſe, there cited, the opinion of the court was, that ſuch action would not lie without alleging ſpecial damage, as to ſay that ſhe loſt her marriage.—Lev. 261. S. C. by the name of Barnes v. Strud, and this caſe of Medhurſt v. Balaam, was denied to be law.—Comb. 391. in caſe of Byron v. Elms, Arg. cites S. C. as denied in ſeveral books, which caſe was thus, viz. the plaintiff declared, that ſhe being a young woman, the defendant, to hinder her marriage, ſaid, *What did you go to London for, but to drop your ſlink?* ſhe went to London laſt winter to lie in, and to my knowledge ſeveral people have lain with her; adjudged not actionable, becauſe fornication, which is the crime here, is only a ſpiritual offence, and not here without a temporal loſs. 2 Salk. 693. pl. 2. Mich. 8 W. 3. B. R. Byron v. Elmes.——Comb. 391. S. C. Holt Ch. J. ſaid, that if the caſe were new, perhaps we ſhould think an action lies (without alleging loſs of marriage) as well as for words tending to the diſcredit of tradeſmen, for it toucheth her in the moſt tender part, and is a manifeſt loſs. Marriage is the very end of her creation for ought I know; if it were actionable, then there muſt be a prohibition in ſuch caſe, for the party muſt not be liable to eccleſiaſtical cenſures and temporal damages too.——12 Mod. 396. S. C. adjudged for the defendant.

Words ſpoke of a maid were, *ſhe was with child, and did take phyſic to kill the child*, and alleged that thereupon divers ſu tors refuſed her. Adjudged for the plaintiff, without any reaſon alleged. Het. 18. Paſch. 3 Car. C. B. Reading's caſe.

[8. If one man ſays to another, *thou waſt found in bed with J. S.'s wife*, by the reaſon of the ſpeaking of which words he *loſes his marriage* with A. S. &c. though he might be in bed with her without any ill done, yet becauſe this ſounds in ſcandal, and he has loſt his marriage thereby, the action lies. Mich. 8 Car. B. R. between *Southall and Dawſon*, adjudged, this being moved in arreſt of judgment. Intratur Trin. 8 Car. Rot. 868.]

Cro. C. 269. pl. 3. Southold v. Daunſton, S. C. adjudged for the plaintiff, and that ſuch foreign intendments ſhall not be taken.

[9. In an action upon the caſe for words, if the plaintiff declares that the defendant ſaid of him, *he had the uſe of my wife's body by force*, by reaſon of which words he was brought before certain juſtices, &c. and by them *examined for a rape* by him committed upon the ſaid woman, by reaſon of which, for the purgation of himſelf therefrom, he *expended ſeveral ſums of money*. An action lies upon this declaration for the temporal damage which he had thereby. Mich. 9 Car. B. R. between *Harris and Smith*, adjudged per cur. in a writ of error upon a judgment in Southampton, and the firſt judgment affirmed accordingly. Intratur Hill. 9 Car. Rot. 73.]

Action was brought for theſe words, *Sir John Lenthall lay with me, and had the uſe of my body by force, and againſt my will.* It ſeemed to all the juſtices that the words are actionable; but Hutton doubted, becauſe the word (force) is not ſo much as raviſhment. Litt. Rep. 337. Trin. 6 Car. C. B. Sir Edm. Lenthall's caſe.

[10. In an *action upon the caſe*, if the plaintiff declares that there was a communication of a marriage between him and A. S. and the defendant ſaid of him, *he had a baſtard child by Jennings's wife of Northampton*, by the ſpeaking of which words he himſelf refuſed to marry with A. S. where it ought to have been that A. S. *refuſed to marry* with him; after *not guilty* pleaded, and this found for the plaintiff, it was moved in arreſt, Mich. 11 Car. B. R. between *Carter and Smith*; and per cur. the words would maintain the action if the loſs of the marriage had been well alleged, becauſe it might be intended that he might have a baſtard by her before her marriage with *Jennings*; and if ſhe had iſſue by him after her marriage, though this be no baſtard in law, yet ſuch a ſcandal might occaſion the loſs of his marriage. But *per cur.* the action does not lie, becauſe it is *not well alleged that A. S. refuſed*

refuſed to marry him, but that he himſelf refuſed to marry A. S. and ſo no damage, and therefore the poſtea was ſtaid.]

Fol. 36.

Jo. 356. pl. 6. Colabyn v. Viner, adjudged.

[11. If a man ſays to a feme covert, *thou bold Cullobine, baſtard-bearing whore, thou didſt throw thy baſtard into the dock at Whitechappel*, no action lies for theſe words, though it might be intended that ſhe had a baſtard by the ſaid *Cullobine* (who *in truth was her huſband*) before her marriage, inaſmuch as there does not appear to be any temporal damage thereby, by the loſs of any marriage; but only a puniſhment by the ſtatute for having a baſtard, which is not a ſufficient cauſe to maintain the action. Hill. 10 Car. B. R. between *Cullobine and his wife*, plaintiffs, *and Vinor*, defendant, adjudged in arreſt of judgment.]

[12. In an *action upon the caſe*, if the plaintiff declares that whereas divers perſons conabantur & deſiderabant to marry their couſins and friends to the plaintiff, the defendant (being a woman) on purpoſe ſcandalized the plaintiff; and to hinder him in his marriage with any woman, *preferred a ſcandalous libel in the ſpiritual court againſt the plaintiff*, and thereby charged him *that he, under colour to be a ſuitor to her in the way of marriage, often reſorted to her in the night, and lay with her, and got a child of her body*; and after publiſhed and affirmed the ſame matter before ſeveral perſons falſely and maliciouſly, whereby the plaintiff was ſo much ſcandalized, that all honeſt perſons having the fear of God before them, aliquam mulierem de filiabus aut conſanguineis ſuis in legitimo matrimonio cum querente copulari & jungi ſemper poſtea, & hucuſque omnino recuſaverunt & adhuc recuſant; and upon not guilty pleaded, the *jury find a ſpecial verdict*, ſcilicet, that the defendant preferred the ſaid famoſum & ſcandaloſum libellum, &c. and that ſhe after, at the ſeſſions of the peace, being examined *who was the father of the child begotten of her body*, ſaid and affirmed that the plaintiff was; and that ſhe affirmed this falſo & injurioſe of the plaintiff; and that by reaſon thereof the plaintiff was much ſcandalized in his fame and name; and *that all honeſt* men, having the fear of God before them, *aliquam mulierem de filiabus aut conſanguineis ſuis in legitimo matrimonio cum querente copulari & jungi ſemper poſtea hucuſque recuſaverunt & adhuc recuſant*. The action in this caſe does not lie upon this ſpecial verdict, becauſe here does *not appear to have been* any *malicious proſecution*, and *here there is not alleged or found any loſs of any particular marriage*, *or* that there was *any communication of any particular marriage*; and this general matter that all honeſt perſons refuſed, by reaſon thereof, to marry their daughters or relations to him, is too general. Mich. 11 Car. B. R. between *Norman and Simons*, per curiam adjudged in the exchequer chamber, and the judgment given *e contra in B. R.* reverſed accordingly.]

Cuſtoms of London (A) pl. 1. S P. —Calling a woman *living in the borough of*

[13. In an *action upon the caſe*, if the plaintiff declares that *in London, by the cuſtom*, a common *whore ought to be carted*, and a baſon tingled before her; and that the defendant ſpoke theſe words of the plaintiff, *thou art a whore, and a common whore, and art a bawd to thy miſtreſs, and I will have a baſon tingled before thee*,

thee, the action well lies upon this declaration for theſe words. Trin. 15 Car. B. R. between *Haſſel and Capcot*, adjudged good, this being moved in arreſt of judgment that the action does not lie.]

Southwark, where, is actionable, becauſe ſhe is liable to public carting by preſcription. But then ſhe muſt take care to lay the preſcription well. Sid. 97. pl. 26. Mich. 14 Car. 2. B. R. Roberts v. Herbert. ——— Keb. 418. pl. 131. Caus v. Roberts ſeems to be S. C.

*[14. [So] in an *action upon the caſe*, if the plaintiff declares that in *London* there is a cuſtom that a *bawd* ought to be carted, and the defendant ſaid theſe words of the plaintiff, *ſhe is a bawd, and I will have her carted.* Hill. 15 Car. B. R. between *Rily and Lewis, per Jo.* and *Bark.* adjudged that the action lies; this being moved in arreſt of judgment, no other judge being then preſent.]

[15. In an *action upon the caſe*, if the plaintiff declares that whereas he was a pariſhioner of S. the defendant being *vicar* there, to the intent to ſcandalize the plaintiff, and to draw an ill opinion of the plaintiff among his neighbours, ſo that they withdraw themſelves from the company of the plaintiff, tanquam ab homine excommunicato, & nulla fide aut credentia digno, and injuſtly to exclude the plaintiff out of the church, and for a great time to deprive him of all the benefit of hearing divine ſervice in the ſaid church; the defendant *in the time of divine ſervice* in the church, in the hearing of the pariſhioners, maliciouſly *pronounced the plaintiff excommunicated*, prætextu cujuſdam inſtrumenti by him received from the ordinary; whereas he had no ſuch inſtrument of excommunication, nor was he excommunicated; and alſo at another time to the intent aforeſaid, in the time of divine ſervice, in the hearing of the pariſhioners, maliciouſly pronounced the plaintiff excommunicated; and further, refuſed to celebrate divine ſervice till the plaintiff departed out of the church, upon which the plaintiff was compelled to go out of the church; whereas the plaintiff was not excommunicated; by which means the plaintiff was ſcandalized, and hindered of hearing divine ſervice for a long time; and for the clearing of this ſcandal, and his innocency therein, diverſos corporis ſui grandes labores capere, & diverſas ingentes denariorum ſummas erogare & exponere coactus fuit in extremam depauperationem & ignominiam maximam of the plaintiff; this action lies, though he does *not ſhew that any man avoided his company, or forbore to trade or deal with him, or* that he *had any temporal or ſpecial loſs*; for this is a great and malicious ſcandal, though to his ſoul, and though ſpiritual. Mich. 16 Car. B. R. between *Barnabas and Traunter*, adjudged per curiam, this being moved in arreſt of judgment.] Fol. 37.

[16. If one ſays of another that has land by deſcent, that *he is a baſtard*, an action upon the caſe lies; for this *tends to his diſinheritance*, and diſturbance by ſuit. Mich. 3 Jac. B. R. per curiam.] S. P. doubted by Vaughan Ch. J. unleſs there be a ſpecial damage, any more than to ſay that one had no title to his land. 2 Vent. 28.

Tota

Thou art a baſtard, is actionable; and yet baſtardy is a ſpiritual thing, and determinable there. Le. 131. Hill. 32 Eliz. in pl. 179. Arg. cites it as ruled in caſe of Dorrington v. Dorrington.

If the defendant pretends that the plaintiff was baſtard, and *that he himſelf was the next heir*, there no action lies; and this the defendant may ſhew by way of bar, if the plaintiff omits it in his count. 4 Rep. 17. a. in pl. 11. cites it as reſolved Trin. 25 Eliz. B. R. Baniſter v. Baniſter.

[17. *But* if one man ſays of another that has lands by deſcent, that *he is baſe born*, no action lies; for theſe words, taken *in mitiori ſenſu*, are not actionable. Mich. 3 Car. B. R. per curiam.]

S. P. reſolved actionable; for it tends to his diſheriſon of the land, which might deſcend to him from his father. 4 Rep. 17. a. in pl. 11. cites Trin. 25 Eliz. B. R. Baniſter v. Baniſter. —— S. P. by Wilde J. 2 Vent. 26. but Ibid. 28. Vaughan Ch. J. ſaid he took it not to be actionable to call a man baſtard while his father is alive; and ſaid that the books are croſs in it.

[18. If a man ſays, *to the ſon and heir apparent of J. S.* that *he is a baſtard*, no action lies; becauſe he has not any prejudice thereby as yet. Mich. 3 Jac. B. R. per curiam.]

[397]

* Sty. 221. Trin. 1650. S. C. and it was, that upon the rumour that a baſtard child was drowned, the defendant ſaid to the plaintiff, *I do verily believe the baſtard-child was thine; nay, it was thine.* Adjudged for the plaintiff. It was objected that it did not appear that a baſtard child was drowned; and if there was none, it ought to be ſhewed on the defendant's part.—To ſay of a feme ſole *ſhe had a baſtard*, are words actionable in themſelves; per Vaughan Ch. J. Freem. Rep. 80. pl. 99. Paſch. 1673. in HICKS's CASE; but in the principal caſe the words being, that *ſhe was brought to bed of two boys*, curia adviſare vult. —— She was the woman that had a baſe child, and that it was at L. and a red-headed boy. After verdict without ſpecial damage, not actionable per curiam, without alleging it was likely to be a charge to the pariſh. Keb. 487. pl. 28. Paſch. 15 Car. 2. Bonithon v. Kendall. —— Holt Ch. J. ſaid, that to ſay of a young woman ſhe had a baſtard, is a very great ſcandal, and for which, if he could, he would encourage an action; but that it is not actionable, becauſe it is a ſpiritual defamation puniſhable in the ſpiritual court. 6 Mod. 104, 105. Arg. Hill. 2 Ann.

[19. If a man ſays to a woman, *thou hadſt a baſtard*, no action lies, becauſe it does not hereby appear that he intends that the baſtard was *chargeable to the pariſh*; in which caſe a corporal puniſhment is to be inflicted by the ſtatute. Hill. 5 Car. B. R. between *Lightfoote and Piggot*. Rot. 423. per curiam, this being moved in arreſt of judgment, and the plaintiff never had judgment therein. Mich. 1650. between * *Winter and Barnard* adjudged. Intratur Hill. 1649. Rot. 666.]

Cro. C. 436. pl. 5. S. C. adjudged in C. B. for the plaintiff; but upon error brought all the court (abſente Bramſton) were of opinion that the words were not actionable, unleſs he had alleged ſome

* Fol. 38.

[20. [*So*] in an action upon the caſe for words, the plaintiff *Thomas Brown* declared, that one *A. G. had a baſtard ſon* begotten of her body, then living, [and] the *defendant* knowing it, of his malice to defame him, and to draw him in danger of the ſtatute of 18 Eliz. having a diſcourſe of the baſtard, and of the plaintiff, *ſaid* of *the plaintiff*, that *Brown is the reputed father* of that child, whereby he was very much prejudiced in his buying and ſelling, and put to great expences in the clearing of himſelf in hac parte. The action does not lie for theſe words upon this declaration, becauſe it is *not ſaid* by the defendant *that he was to be puniſhed by the ſaid ſtatute*; for he was not to have any corporal puniſhment, or to be impriſoned, unleſs the baſtard was ſome charge to the pariſh. Hill. 11 Car. B. R. between *Salter and Brown* adjudged, in a writ of error upon a judgment for the plaintiff in * B. where it was adjudged, as I have heard per totam curiam e contra for the

plaintiff there; but the ſaid judgment was now reverſed per curiam. Intratur Hill. 10 Car. Rot. 270. B. R.

temporal loſs, as loſs of marriage, or that by this means he ſhould be chargeable for maintenance of ſuch child, and to have further puniſhment. And the judgment in C. B. was reverſed.

[21. In an action upon the caſe, if the plaintiff declares that he was heir apparent to his father, and B. his brother, and that each of them had land in fee of the value of 40l. per annum, and that they intended either to ſuffer their ſaid land to deſcend to him, or to convey it to him; yet the defendant intending to diſinherit the plaintiff, ſaid to the plaintiff, *thou art a baſtard*; by reaſon whereof his *father* and *brother intended to diſinherit him*, and to convey their lands to another. The action lies upon this declaration for the *temporal damage* that may accrue to him thereby. Paſch. 13 Car. B. R. between *Humfrys and Stutfield* adjudged per curiam, this being moved in arreſt of judgment.]

Cro.C. 469. pl. 1. Humphrys v. Stanfield, S. C. held accordingly per tot. cur. ——— Jo. 388. pl. 7. Paſch. 12 Car. B. R. Humphreys v. Stotvile, S. C. adjudged that action lies. ——Godb. 451. pl. 519. S. C. and ſays, the words were ſpoken in the preſence of the father and brother; and adjudged that the words were actionable. ———4 Rep. 17. a. at the end of pl. 11. cites Trin. 25 Eliz. B. R. Baniſter v. Baniſter, reſolved that where defendant ſaid of the plaintiff (who was ſon and heir to his father) that he was a baſtard, action upon the caſe lies, becauſe it tends to his diſheriſon of the land, which would deſcend to him from his father. ———S. C. cited Cro. C. 469. by Jones J.

[398]

[22. In the ſaid caſe of Humfrys, it was ſaid by juſtice Jones, that it was adjudged in the exchequer, and affirmed in a writ of error in the exchequer chamber, that where there was grandfather, father, and ſon, and the ſon brought an action upon the caſe, and declared that the *grandfather* (whoſe heir he is) *intailed certain lands* upon himſelf, and the heirs males of his body; and the *defendant intending to ſcandalize his poſſibility that he had to inherit this land*, as heir of the body of his grandfather, *ſaid that he was a baſtard*. Though the grandfather and father were then living, yet the action brought ut ſupra by the ſon lay. But juſtice Jones did not ſay in what term or year it was ſo adjudged.]

S. C. cited by Jones J. Cro. C. 469. pl. 1. in the ſame caſe, by the name of Vaughan v. Ellis.— Cro. J. 213. pl. 6. Mich. 6 Jac. in the exchequer chamber, S. C. of VAUGHAN v. ELLIS, ſays, the plaintiff was the youngeſt ſon, and his elder brothers living; and that J. S. was to buy the land, and offered him a ſum of money for his title; and by reaſon of thoſe words refuſed to give him any thing. And the 2 chief J. conceived, that though he has no preſent title (as was objected) yet it appears he is by poſſibility inheritable to thoſe lands; and being offered a ſum of money for that poſſibility to join in the aſſurance, though he has no preſent title to the lands, yet by thoſe words he had a preſent damage, and might receive prejudice thereby in futuro, in caſe he were to claim any land by deſcent; and therefore affirmed the judgment. ———Baſtard is determinable by the ordinary; but if he adds further words to intitle himſelf to be heir, or *ſhews ſome poſſibility of being heir*, this will make the ſame words of calling him baſtard to be actionable; per Fleming Ch. J. 2 Buſſt. 90. Trin. 11 Jac.

[23. In an action upon the caſe for ſcandalous words, if the plaintiff declares that the defendant ſaid theſe words of the plaintiff, being a feme ſole, the of 1650, *this is that whore that my man A. got a baſtard by, and withal ſpent all my money*; and being aſked by another ſtanding by, whether he were not miſtaken, for the maid hath been but a little above a year in town, the defendant replied, *the queen hath been too long*

Sty. 274. S. C. and it being objected that no ſpecial loſs or damage was alleged; and cited the

case of Lightfoot v. Piggot, and Winter v. Barnard [ſupra, pl. 19.]

long to my coſts; no action lies for theſe words, for to ſay that *a woman had a baſtard* is no cauſe of action. Trin. 1651. between *Owen and Jevan* adjudged, this being moved in arreſt of judgment after a verdict for the plaintiff.]

whereupon judgment was ſtayed till moved on the other ſide. But upon moving the caſe of the other ſide, page 277. it was inſiſted that if the words were true, the party is puniſhable by 7 Jac. with corporal puniſhment; beſides, the ſpeaking theſe words was after the ſtatute againſt adultery, which makes the words more actionable. And judgment was given for the plaintiff niſi.

2 Roll. Rep. 43. S. C. adjudged that no action lies; but it was agreed that if he had alleged temporal damages, as that he was

[24. If a man ſays of another, *he was the true patron of the advowſon of S. but he hath loſt that patronage and preſentation by being a ſimoniſt and recuſant, both which I will prove him to be,* yet no action lies; for by the *ſimony* only the loſs of the preſentation pro hac vice comes by the temporal law only, and the *recuſancy* touches him only in his religion; for it does not appear that he intended him to be a recuſant according to the ſtatute. Trin. 16 Jac. B. R. between Sir *John Taſburrough and* adjudged in arreſt.]

in communication of ſelling of the advowſon, and that by reaſon of theſe words he could not ſell it, to the damage, &c. this had given a good cauſe of action.——Cro. J. 484. pl. 3. Taſborough v. Day, S. C. ſays, he counted that he was ſeiſed in fee of the advowſon, and intended to ſell it for payment of his debts, but that by the ſaid words he was hindered in the ſale of it; but becauſe he did not ſhew that there was any communication to ſell it to any, nor that any, who intended to buy it, was thereby hindered in his buying, and without ſome ſpecial cauſe ſhewn the action lies not; and of that opinion was all the court, and gave judgment for the defendant.

25. All the juſtices *refuſed to grant conſultation to the ſpiritual court in caſe of defamation.* But it does not appear there what defamation it was; and the reaſon ſeems to be *inaſmuch as by this the party is damnified, and to gain his damages the ſuit is only* [399] *at the common law;* for the ſpiritual court can do no more but give puniſhment for the ſin, and not damages. Br. Action ſur le Caſe, pl. 115. cites the Regiſter 54.

26. Thou art a *whore-monger*, action lies; per Mountague and Hales. Mo. 10. pl. 38. Mich. 4 E. 6.

27. Calling one *adulterer* is not actionable, becauſe it is not puniſhable by the common law, but only by the ſpiritual law. Mo. 29. pl. 92. Trin. 3 Eliz. Anon.

Coldſb. 172. pl. 104. S. C. held not actionable;

28. *Thou art a whore, and J. S. hath the uſe of thy body; the cart is too good for thee.* Adjudged not actionable. Cro. E. 582. pl. 8. Mich. 39 & 40 Eliz. B. R. Pollard v. Armſhaw.

for the common law cannot define who is a whore.——Saying of a *married woman*, that *ſhe is a whore; ſhe is my whore*, is actionable; per cur. 3 Mod. 120. Hill. 2 & 3 Jac. 2. B. R. Baldwin v. Flower.

29. Action for theſe words; *Mrs. Anne Reſton* (the plaintiff innuendo) *hath had a child. It is true; for ſhe was conveyed to B. and there ſhe laid her great belly. It is as true that ſhe hath had a child as that you ſit there; for ſhe was ſent away with child, and if ſhe had not a child ſhe hath made it away;* and alleged, that by reaſon of theſe words ſhe loſt her marriage. The defendant demurred; and thereupon adjudged for the plaintiff. Cro. E. 639. pl. 40. Mich. 40 & 41 Eliz. B. R. Reſton v. Pomfreict.

30. Actions

30. Actions for words ſpoken to the plaintiff's ſervant, viz. *thy miſtreſs is an arrant whore, and would have lain with me 7 years ſince; and I would not unleſs ſhe would go to the hedge;* and alleged that ſhe was in communication of marriage with J. S. who was ſeiſed of land worth 200l. a year. Adjudged not actionable, becauſe they are ſpiritual ſlander and defamation, and puniſhable there; but if the words had been ſpoken to him who was in communication of marriage with her, ſo as his purpoſe was to hinder the marriage, the words had been actionable. Cro. E. 787. pl. 27. Mich. 42 & 43 Eliz. B. R. Holwood v. Hopkins.

31. Action will lie for calling one *baſtard;* per Dyer and Walſh, but Brown e contra. And Dyer ſaid, that at Berwick aſſiſes a formedon in deſcender was brought; and one ſaid that *his father, by whom he claimed, was a baſtard;* and he brought action on theſe words, and recovered. Ow. 32. Mich. 40 Eliz. Anon.

Calling one *baſtard* is actionable; cited by Chamberlain J. as adjudged 15 Jac. and though error was brought and aſſigned that the *plaintiff did not claim any inheritance, or to be heir to any perſon certain,* yet the judgment was affirmed. Godb. 327. in pl. 421.

Calling one baſtard generally, without ſhewing ſome ſpecial loſs, is not actionable. Per Doderidge J. 2 Roll. Rep. 249. But ibid. 250. Chamberlaine J. contra, and cited a caſe in * 6 Eliz. Dyer, where one recovered great damage becauſe the defendant had ſaid that *his father was a baſtard,* and cited 5 Jac. NELSON v. STOKES, where the plaintiff did not allege any ſpecial cauſe of action, and yet recovered; but one at the bar, who was counſel in the principal caſe, ſaid he was counſel in that caſe, and that the plaintiff averred a temporal cauſe; but Chamberlaine J. denied it, and ſaid as before. ——— See (K. a) Nelſon v. Staffe.

* Dal. 63. pl. 23. 6 Eliz. S. P. and ſeems to be S. C.

32. Plaintiff declared, that he being in treaty of marriage, the defendant ſaid of him, that *he had a baſtard;* and that by reaſon of thoſe words the marriage broke off, and ſo being damnified thereby, he brought this action. It was *proved that the marriage was broke off before the words ſpoken.* This verdict is found againſt the plaintiff. 3 Bulſt. 76. cited by Coke Ch. J. as a caſe tried before him.

33. Caſe, &c. for theſe words, *thou art a whore, a baſtard-bearing whore, and T. H.'s whore, thou didſt play the whore with him at ſuch a gate, and didſt forget your gloves behind you; thou hadſt a baſtard by him, which was ſent to Ireland.* It was moved that the action would not lie, becauſe the plaintiff did *not allege any temporal loſs,* this being in its nature a ſpiritual offence; but adjudged, that by the ſtatute 18 Eliz. and 7 Jac. the one appointing a puniſhment for a woman who hath a baſtard, and the other appointing, that a whore ſhall be ſent to bridewell for a year, had altered the nature of the offence, and given [400] the temporal courts juriſdiction, and though ſhe is not puniſhed by virtue of theſe ſtatutes, it is ſufficient that ſhe is liable to be puniſhed, and that was the reaſon of the judgment in Ann Davis's caſe. It is true, in that caſe the loſs of marriage was alleged, which is temporal, not as neceſſary to ſupport the action, but to encreaſe the damages. Palm. 298. Trin. 20 Jac. B. R. Vaughan v. Standiſh.

2 Roll. Rep. 373. Taylor v. . . . S. C. and judgment arrested accordingly.— Lat. 218. Mich. 3 Car. Taylor v. Tolwin, S. C. and adds these words, viz. *and you had better follow your daughter to the gallows than bestow her on him.* The court said that the action lay; and the plaintiff had judgment, nisi, &c. The court insisted upon it, because it is a ravishment of another's wife, which (as they seemed to incline) could be no other than felony.

34. *Do you mean to cast away your daughter on T.? It is as true as any thing can be, that T. ravished H.'s wife.* Whereupon the daughter refused to marry him. It seems the words in themselves are actionable; but judgment was arrested upon exceptions to the declaration. Palm. 385. Mich. 21 Jac. B. R. Taylor v. Tally.

35. Words spoke of a widow where *she is a whore, and her children* (innuendo those she had by her late husband) *are F.'s bastards.* She alleged a communication of marriage. Per tot. cur. action lies; and judgment for the plaintiff. Cro. C. 322. pl. 4. Mich. 9 Car. B. R. Brian v. Cockman.

36. *She played the whore for a white smock,* not actionable; for nothing is charged but incontinency. Cart. 55. Arg. cites it as so ruled in case of Dracot v. Siblit.

37. Case, &c. in which the plaintiff declared that he was inducted, &c. into a parsonage in Ireland, and executed the office of a pastor in that church for 4 years; the defendant said of him, *you are a drunkard, a whore-master, a common swearer, and a common liar, and you have preached false doctrine, and deserves to be degraded;* after a verdict, it was objected that the words are not actionable, because they impute no civil or temporal damage to the plaintiff, but adjudged actionable; for if true, he may be degraded, and so lose his freehold. All. 63. Pasch. 24 Car. B. R. Dodd v. Robinson.

38. *She is L. R.'s whore, and he knows her as well as her husband;* not actionable. Sty. 352. Mich. 1652. B. R. Wall v. Bye.

39. *You are a whore, and have played the whore with so many men you cannot number them;* adjudged by Jerman J. (absente Roll) for the plaintiff; for the words shall be construed to a common intendment. Sty. 328. Pasch. 1652. Brian v. Twite.

She is a whore, and I will prove her a whore, and an arrant whore. Roll. Ch. J. held the words too general, and but words of passion only; and judgment against the plaintiff, nisi, &c. Sty. 299. Mich. 1651. Freeman v. Childeress.

40. *Thou art a whore, and I will prove it,* was held by Roll. Ch. J. not actionable, though spoke during the act against adultery; because they are only words of heat and choler; but if a *special damage is laid,* as per quod maritagium amisit, or the like, they are actionable. Sty. 387. Mich. 1653. Dekin v. Turner.

41. The plaintiff declared, that he was of good fame, &c. and that the defendant to the intent that he (the plaintiff) might be punished by the *statute of fornication,* said, he hath got M. N. with child, and would lay it to my son; adjudged that the words are actionable. 2 Sid. Mich. 1657. B. R. Marston v. Dennis.

42. *Thou*

42. *Thou art a whore* is not actionable, but to ſay, thou art a whore, * *and haſt been carted*, are actionable; and ſo it is to ſay, thou art a whore, *and haſt been in bridewell*, or, thou art a whore, † *and haſt emptied thy caſk in the country*, or, thou art a whore, ‡ *and thy § plying-place is in Cheapſide, where thou getteſt 40s. a day.* Such words are well actionable; per Glyn Ch. J. For a circumſtance added ought to be conſtrued with the precedent ſentence, and ſometimes ſentences conjoined are actionable, where ſeparatim they are not. 2 Sid. 34. Hill. 1657. B. R. in caſe of Colſwood v. Chandler.

* S. P. per cur. Hardr. 107. Mich. 1657. in the exchequer. —† S. P. per cur. Hardr. 107. Mich. 1657. in the exchequer.— ‡ Adjudged for the plaintiff; 394. Mich.

for by Roll. Ch. J. the words import more than the bare calling a woman whore. Sty. 1653. Hicks v. Joyce.

§ [401]

45. *You are a whore, and I can have a better whore for a groat, and you get your living by your tail.* Adjudged actionable ſince the [then] late act [againſt adultery.] For thoſe acts imply a continued courſe of fornication and adultery; and judgment niſi, &c. Hardr. 107. Mich. 1657. in the exchequer, Gardiner v. Parker.

S. C. cited as adjudged not actionable; and ruled accordingly in the principal caſe, for ſaying, *you are a whore, and a jade, and a ſtrumpetly whore, and I will prove you a common whore.* Sty. 323. Paſch. 1652. B. R. Green v. How.

46. *B. did lie with J. P. as often and familiar as with his own wife.* But there being no ſpecial damnification aſſigned, the judgment was ſtayed uſque, &c. Keb. 19. pl. 53. Paſch. 13 Car. 2. B. R. Baſtard's caſe.

47. *Thou art a whore-maſter, and haſt had to do with the wife of J. S.* Not actionable. Keb. 119. pl. 26. Mich. 13 Car. 2. B. R. Whitcher's caſe.

48. A. intending to marry M. the defendant wrote a *letter* to A. viz. *You ought not to marry M. for, before God, ſhe is my wife, and therefore if you do, you will live in adultery, and your children will be baſtards;* whereupon the plaintiff loſt her marriage; and alleged that it was wrote falſo & malitioſe to hinder her marriage. At firſt all the court except Twiſden, held that the action did not lie; but after the cauſe had depended ſeveral terms by adjournment, the other juſtices having changed their opinions, gave judgment for the plaintiff, by reaſon of the words, falſo & malitioſe. Sid. 79. pl. 5. Trin. 14 Car. 2. B. R. Shepherd v. Wakeman.

Lev. 37. S. C. adjudged for the plaintiff becauſe it was found to be falſe and malicious, and if ſuch action would not lie, a mean and baſe perſon may injure any perſon of honour and fortune, by ſuch pretence.

49. Saying of the plaintiff, who held a copyhold dum ſola & caſta vixerit, with intention to indanger the loſs of her copyhold, *thou art a whore, and I will throw thee out of thy living*, is actionable, by reaſon of the ſpecial damage. Sid. 214. pl. 15. Trin. 16 Car. 2. B. R. Boys v. Boys.

Lev. 134. S. C. held accordingly. ——Keb. 758. pl. 62. S. C. held accordingly.

——In ſuch caſe the incontinency ſhall be tried by the common law. 4 Rep. 17. a. per cur. obiter, in pl. 11.

Sid. 306. pl. 4. Barnes v. Prudlin, S. C. and the plaintiff laid that ſhe loſt ſeveral ſuitors, &c. but there does not appear any opinion of the court.—Lev. 261. Barnes v. Strudd, S. C judgment was ſtayed, there being no loſs of marriage. But the reporter ſays, nota, in this caſe loſs of marriage is laid alſo. —— 2 Keb. 451. pl. 21. S. C. judgment ſtayed. ——All the 3 reports above are, that her father threatened to turn her out of doors, but Vent. is that he actually did ſo.

50. *She is with child by T. S. whereof ſhe miſcarried*, by reaſon whereof her father turned her out of doors; and that ſhe was brought within the penalty of the ſtatute 18 Eliz. It was inſiſted for the plaintiff, that ſince that ſtatute it is actionable to ſay that a woman had a baſtard; and ſo it was held in Anne Davis's caſe. But the court held that an action would not lie without ſpecial damage alleged, as that ſhe had loſt her marriage. And per Twiſden, the ſtatute was not mentioned in Anne Davis's caſe, but that was put in by my Lord Coke himſelf, in the report of that caſe. 1 Vent. 4. Hill. 20 & 21 Car. 2. B. R. Barne v. Bruddle.

[402]

51. *Thou art a baſtard-bearing whore, and hadſt a baſtard by J. S.* The court inclined that the words were not actionable; and judgment was ſtaid. 2 Keb. 577. pl. 102. Mich. 21 Car. 2. B. R. Hexill v. Oyden.

52. Words ſpoke of an inn-keeper were, *I ſaw Cook lie with Sam. Collins's wife;* and declared that by reaſon thereof he loſt much gain and cuſtomers. Per cur. the words are actionable. 3 Keb. 242. pl. 59. Mich. 25 Car. 2. B. R. Collins v. Matthews.

53. *Thou art thy maſter's whore and concubine, and he hath the uſe of thy body as commonly as I have of my wife's*; not actionable without ſpecial damage, they being of ſpiritual cognizance. Freem. Rep. 274. pl. 302. Paſch. 1674. Potter v. Elliot.

2 Lev. 250. S. C. accordingly.

54. *Thou art a ſacrilegious perſon, and committeſt ſacrilege every day;* not actionable. Sid. 376. pl. 4. Mich. 20 Car. 2. B. R. Gawdy v. Smith.

55. *She is a whore, and a common whore, and N's whore;* by which ſhe loſt her marriage. The *jury found* the ſpeaking the words, but *that ſhe did not loſe her marriage thereby.* All the court held the words not actionable, being only ſcolding. And judgment was arreſted. 2 Mod. 296. Paſch. 30 Car. 2. C. B. Oſborn v. Wright.

56. Words ſpoke of the plaintiff's wife were, *I have lain with her, and pockified her*, held actionable. 2 Show. 312. pl. 325. Mich. 35 Car. 2. B. R. Neale v. Mallard.

Ibid. 28 Mich. 2 Jac. 2. B. R. S. C. Withens J. ſaid, though it ſeems hard in reaſon, yet the authorities determined him that the action lies not. Herbert ſaid he ſhould not follow precedents againſt reaſon; but judgment was arreſted by the 3 juſtices. ——2 Show. 482. S. C. and judgment accordingly.

57. *She is a common whore, and J. S. lay with her in A. B.'s barn;* and declared that ſhe loſt her marriage. Herbert Ch. J. held, that though ſhe cannot allege any particular ſuitors going off on that account, yet the ſcandal may prevent addreſſes made to her; and ſo reaſon ſeems to be againſt the books cited e contra. Wythens accorded, & adjornatur. Comb. 26. Trin. 2 Jac. 2. B. R. Tuckey v. Flower.

58. *You*

58. *You are a whore, and keep a man to lie with you,* ſpoke of a married woman; judgment was ſtaid till, &c. the court ſeeming clear that the words are not actionable. 2 Ld. Raym. Rep. 1004. Mich. 2 Ann. Gaſcoigne v. Ambler.

59. Action for theſe words, *ſhe is a whore, and had a baſtard by her father's apprentice.* Judgment was arreſted. The court ſaid they could not overthrow ſo many authorities. The reaſon of the law is, that fornication is a ſpiritual offence, and no action lay at common law for what the common law took no notice of, without ſpecial damage. 2 Salk. 696. pl. 7. Paſch. 3 Ann. B. R. Graves v. Blanchett.

6 Mod. 148. S. C. and declared of the ſame words ſpoke at one time, and other words ſpoke at another time, viz. *thou art a whore, and hadſt a baſtard by thy father's apprentice,* quorum quidem aliorum verborum propalatione, &c. ſuch a one who courted her for a wife, and was ready to marry her, fell off. After verdict, and intire damages, it was moved in arreſt of judgment, that the firſt words were not actionable, the ſpecial damages being tied up to the laſt words by the word (aliorum.) Judgment was arreſted.

(D. a. 2) Words relating to Religion. [403]

1. CALLING another *heretic*, is not actionable, becauſe it belongs to the eccleſiaſtical juriſdiction; by Fitzherbert and Shelly. 27 H. 8. 14. a. b. pl. 4.

Br. Action ſur le Caſe, pl. 2. cites S. C. becauſe thoſe of the common law cannot diſcuſs what hereſy is.——S. C. cited 4 Rep. 17. a. in pl. 11. Arg.——3 Mod. 27. S. C. cited Arg.——S. P. per Warburton J. 2 Brownl. 167.——But if a *clergyman is to be preſented to a benefice*, and one, to defeat him thereof, ſays to the patron that he is a heretic, *or baſtard, or excommunicated*, by reaſon whereof the *patron refuſes to preſent him*, (as he well may if the imputations are true) *and he loſes his preferment*, he ſhall have ſuch action for ſuch words tending to ſuch an end. 4 Rep. 17. a. per curiam obiter, in pl. 3.

He is an heretic, and denies the articles of the chriſtian faith. The court inclined that they are not actionable at common law without ſpecial damage alleged; but the ſuit ought to be in the eccleſiaſtical court. Adjornatur. Freem. Rep. 277. pl. 311. Trin. 1678. B. R. Dudley v. Spencer.

2. *He hath ſaid many a maſs to J. S.* &c. Anderſon thought no action lay, but Periam J. e contra, becauſe the ſaying maſs is malum in ſe. Godb. 106. pl. 125. Mich. 28 & 29 Eliz. C. B. Anon.

3. To call one *papiſt* no action lies; but if one *calls the archbiſhop of Canterbury ſo*, an action will lie; for he is governor of the church; per Wray Ch. J. Le. 336. in pl. 469. Trin. 32 Eliz. in B. R.

S. P. 2 Brownl. 166. by Winch J.

4. *My maſter hath put me away, becauſe I would not be a papiſt; for he will keep no ſervants but papiſts.* The plaintiff alleged that he is a juſtice of peace. Held not actionable. Cro. E. 308. pl. 14. Mich. 35 & 36 Eliz. B. R. Perepoint's caſe.

S. C. cited Arg. Roll Rep. 427. pl. 20.—— S. C. cited Arg. 3 Bulſt. 260.——A juſtice of peace ſtood for parliament man, and the defendant ſaid to one of the electors, *do not vote for him, for he is a papiſt.* Adjudged the calling a juſtice of peace (papiſt) is actionable; for by the ſtatutes he is intruſted to put the laws againſt papiſts in execution. 3 Lev. 50. Mich. 33 Car. 2. C. B. Stawel v. Caune.

5. *He is a papiſt, and hath gotten a pardon from the pope, and can help thee to one, if thou wilt;* held not actionable. Brownl. 12 Hill. 9 Jac. Ireland v. Smith.

2 Brownl. 166. S. C. held accordingly.

Freem. Rep. 530. pl. 714. Sir John Cutler's case, S. C. says that 3 of the judges inclined that since the statute 3 Jac. which makes it treason to be reconciled to the pope, the words are actionable.

6. *He is a papist and a pensioner*, were spoke of a justice of peace and deputy lieutenant. North Ch. J. and Windham held the words (he is a papist) actionable, but the other justices doubted; and adjornatur. 2 Show. 140. pl. 117. Mich. 32 Car. 2. B. R. Cutler (Sir John) v. Friend.

2 Show. 305. pl. 311. S. C. adjornatur.—Skin. 98. pl. 13. Marriot v. Knightly, S. C. adjornatur.—Ibid. 111. pl. 3. S. C. argued.—2 Vent. 265. Arg. cites S. C. as adjudged for the plaintiff in C. B. and that judgment affirmed in B. R.

7. Case, &c. for these words spoken of a justice of peace and deputy lieutenant of the county of Warwick, viz. *I have heard that a maid of Sir J. K.'s should report that he being sick, and she looking through a hole of the door, where he then lay, saw a priest (innuendo a popish priest) give the eucharist and extreme unction to Sir J. K.* and that the defendant, of his farther malice, &c. at another day said, *I have heard that a maid-servant, who then lived with Sir J. K. peeped through a cranny of a door where Sir J. lay sick, and saw a popish priest anoint him, (extreme unction innuendo) and gave him the sacrament of the eucharist.* It was moved in arrest of judgment, that these words did not amount to calling him papist; for by the first words it doth not appear that the priest was a popish priest, unless by innuendo; and in the last words the extreme unction is brought in by an innuendo, which is not sufficient. But * after another argument it was resolved, that the words taken all together are actionable, and explain one another; for a priest who gave the eucharist and extreme unction must be a popish priest, and he that receives it must be a papist; and the word (anoint) being done to a sick person, cannot be intended of any thing but extreme unction, which is never done, nor the eucharist given, but to those who are fully conformed papists. 3 Lev. 68. Trin. 34 Car. 2. C. B. Sir John Knightly v. Marrow.

*[404]

3 Mod. 26. S. C. and judgment affirmed.—3 Lev. 30. Mich. 33 Car. 2. C. B. adjudged for the plaintiff.—Skin. 68. pl. 15. S. C. argued.—Ibid. 88. pl. 6. S. C. and the judgment in C. B. was affirmed.

8. Case, &c. for that he was a *deputy lieutenant* for the county of M. and a *privy counsellor in Ireland*, and stood for burgess of parliament at C. &c. and that the defendant said of him, viz. *he is a papist.* The plaintiff had a verdict and judgment, and the judgment affirmed in error; because by the statutes 23 Eliz. and 3 Jac. and 25 Car. 2. papists are exposed to several penalties and incapacities, a fortiori, and as the words spoken do relate to a person thus qualified, and a deputy lieutenant is an officer of great trust, and though (papist) was not actionable formerly, yet times alter the sense of words, and this word is now a word of more reproach. Raym. 482. Hill. 34 & 35 Car. 2. B. R. Row v. Clargis.

una voce in B. R.——2 Show. 250. pl. 257. S. C. in B. R. judgment was affirmed.——Freem. Rep. 280. pl. 319. Mich. 1681. C. B. Clarges v. Rowe, S. C. but no judgment.

S. C. cited Arg. 2 Vent. 265, 266. and the reporter says, note these words were spoke the day that K. James came to the crown, and the time is supposed to have influenced the opinion of the court.

9. Words spoke of a *merchant* were, *he is a rogue, a papist dog, and a pitiful fellow, and never a rogue in town has a bonfire before his door but he;* adjudged actionable. 3 Mod. 103. Pasch. 2 Jac. 2. B. R. Peak v. Meker.

10. If

10. If W. was a member of parliament 13 Car. 2. and M. ſaid of him *he is a papiſt; when he is at home he goes to church, but when he is at London he goes to maſs.* After ſeveral arguments judgment was given for the plaintiff, principally for the words (he went to maſs;) becauſe by the ſtatute 23 Eliz. cap. 4. the offender is to forfeit 100 l. and be impriſoned for a year; ſo that the words expoſed him to a corporal puniſhment. 2 Vent. 265. Hill. 2 & 3 W. & M. in C. B. Walden v. Mitchell.

Ibid. 266. the reporter ſays, note the time theſe words were ſpoken was taken notice of, viz. between K. James the 2d's deſertion of the kingdom, and the proclaiming of the king and queen, when to call a man papiſt would have expoſed him to the danger of the rabble. ——S. P. 2 Salk. 696. in pl. 9. ——S. P. per Holt Ch. J. 6 Mod. 104.

(E. a) Actions upon the Caſe for Words. [*Taking falſe Oath, or being perjured.* And Pleadings.]

[1. IN an action upon the caſe, if the plaintiff declares that he exhibited articles in B. R. againſt the defendant for his good behaviour, and ſwore the ſaid articles to be true before juſtice Whitlock, one of the juſtices of the ſame court; and the defendant, to the intent to ſlander the plaintiff, ſaid of him that he had *taken a falſe oath againſt him before juſtice Whitlock*; (innuendo the ſaid oath taken upon the ſaid articles) though it is *not averred that the* * *oath was taken of record*, yet the action lies; for this ſhall be intended, the articles being exhibited in court, and ſworn before a † juſtice of the court. Mich. 10 Car. B. R. between *Yolden and Wannel*, adjudged; this being moved in arreſt of judgment.]

*[405] Jo. 352 pl. 2. Golding v. Wennall, S. C. adjudged for the plaintiff. —Cro. E. 378. pl. 4. Robodham v. Venleck, † Fol. 39. ſeems to be S. C. held that this is charging the plaintiff with perjury; for it is an oath taken in a court of record.

Thou waſt forſworn before my lord Ch. J. in an evidence, is actionable. Le. 127. in pl. 173. ſaid Arg.

[2. If a man ſays of another, that he *hath written a forged will, wherein I will prove him falſe, forſworn, and perjured in a will that he made of John Hunt*, an action lies for theſe words; for it ſhall be intended that he meant he was perjured in his oath taken touching the ſaid will. Hill. 12 Car. B. R. between *Cowley and Clough*, per curiam adjudged; this being moved in arreſt of judgment.]

To ſay that *A. is forſworn in B. R. or C. B.* there being *no colloquium of any cauſe there depending*, the words are not actionable; for it may be in common diſcourſe; per Vaughan Ch. J. and Wylde J. Freem. Rep. 55. Mich. 1672. in pl. 70.

[3. In an action upon the caſe, if the plaintiff declares that there was a writ of inquiry of damages between A. and B. in a court of *Canterbury*, at the ſeſſions-houſe there, where he was ſworn to give evidence of what he knew; and after the defendant ſaid of him, *he is a forſworn rogue in taking an oath in the ſeſſions-houſe*, action lies for theſe words; though it was objected in arreſt of judgment, that if one ſwears falſely before an *inqueſt of office*, this is not within the ſtatute of 5 Eliz. of perjury. Mich. 13 Car. between *Pruer and Moadman*, adjudged. Intrat. Trin.

See (F a) pl. 27 S. C.

13 Car. Rot. 546. For though it be admitted that this is not within 5 Eliz. yet they all agreed that for ſuch forſwearing at the common law he may be indicted, and therefore if it be out of the ſtatute, yet action lies for this ſlander.]

4. The plaintiff declared there was a ſuit between J. and J. S. which was tried by niſi prius, and the plaintiff was produced and *ſworn as a witneſs* before the judge, and that the defendant ſpoke theſe words of the plaintiff to ſtrangers, viz. *I will prove him* (meaning the plaintiff) *forſworn*, (innuendo before the judge) *and it ſhall coſt me* 20 *l. but I will make his ears afraid.* The court of B. R. adjudged the words actionable, and that judgment was affirmed in the exchequer chamber. Cro. E. 730. Mich. 41 & 42 Eliz. Ireland v. Goodale.

(F. a) For Words. For what Words the Action lies. [*Perjured, and forſworn*, and Pleadings. *In reſpect of the Court where.*]

[1. IF one man ſays of another, *he is a perjurer; he ſwore once for me, and the ſecond time hath perjured himſelf with J. S. (a ſtranger)* an action lies for theſe words. Mich. 9 Car. in the exchequer chamber, in a writ of error adjudged; and the judgment given in B. R. affirmed, where the words were *ſpoke in Welch*, and interpreted to be ſo in *Engliſh*.]

[406] [2. If a man ſays of J. S. *I will prove J. S. forſworn, and that* 10 *men can juſtify, and I could prove him perjured if I would*, the action does not lie for the firſt words, but it lies for the laſt words; for this is a great ſlander to have it reputed to be in the power of any man to prove him perjured. Paſch. 5 Jac. B. R. between *Whitacre and Lovergden*, per curiam.]

Mo. 365. pl. 498. Woodliſe v. Vaughan, S. C. adjudged actionable, notwithſtanding the disjunctive. ——— Cro. E. 429. pl. 32. S. C. by the name of Woodroff v. Vaughan, adjudged that the words are actionable; and that it is as great a ſlander as if he had ſaid directly that he was perjured. ——— S. C. cited Poph. 210. Hill. 2 Car. Arg. in caſe of King v. Merrick.

[3. If a man ſays to another, *I did not know that maſter* Woodroofe *was your brother, he hath forſworn himſelf, and I will prove him perjured, or elſe I will bear his charges;* action lies for theſe words, though they were ſpoke conditionally to bear his charges, if he did not prove him perjured. Mich. 37 & 38 Eliz. B. R. *Woodroofe's caſe*, adjudged.]

Ow. 62. S. C. adjudged in B. R. and the judgment affirmed in the exchequer chamber. ——— Noy 61. Raynor v. Griviſton, S. C. accordingly.

[4. If a man ſays of another that *he was perjured, and he would prove him ſo by* 2 *witneſſes*, an action lies for theſe words, though he does not *ſay in what court* he was perjured, or how. Trin. 39 Eliz. B. R. 30. between *Rayner and Grimſton*, adjudged.]

S. P. agreed per cur. Cro. E. 429. in caſe of Woodroof v. Vaughan. —— Mo. 365. pl. 498. Mich. 36 & 37 Eliz. in caſe of Woodliffe v. Vaughan.

[5. If a man ſays of another he *hath forſworn himſelf*, no action lies for theſe words. Paſch. 40 Eliz. B. R. the laſt caſe adjudged.]

Vaughan, S. P. accordingly, becauſe it may be intended in communication; but to ſay that he is perjured is actionable, becauſe intendable of record.——S. P. reſolved 4 Rep. 15. b. Paſch. 27 Eliz. B. R. Stanhope v. Blith.

He had proved himſelf forſworn in the king's bench; no action lies. Cro. E. 135. pl. 1. Arg. cites Trin. 31 Eliz. C. B. Samms v. Cowbolt.

Thou art a forſworn baily, and wert forſworn this day; not actionable; becauſe he does not ſhew that he was forſworn in any court. Cro. E. 788. pl. 29. Mich. 42 & 43 Eliz. C. B. Wyſon v. Fenton.

Thou art forſworn, and I can prove thee forſworn when I will, were held actionable; and judgment given for the plaintiff. Bulſt. 40. Trin. 8 Jac. Smale v. Hammond.

He is a lying diſſembling fellow, and a mainſworn and forſworn fellow; adjudged after divers motions for the plaintiff. Brownl. 4 Hill. 10 Jac. Morton v. Leedell.——Brownl. 9. S. C. accordingly.

[6. If one ſays to another, *thou waſt perjured in a court of Tottenham*, action lies; for this ſhall be *intended a ſufficient court* to hold plea. Paſch. 40 Eliz. B. R. the which intratur Mich. 39, 40 Eliz. Rot. 2173.]

The defendant ſaid, *thou art a forſworn knave*. The plaintiff aſked where; he anſwered, *in Iſlton court*, (innuendo a court-leet held there.) Adjudged actionable. Cro. E. 720. pl. 48. Mich. 41 & 42 Eliz. C. B. Marſhal v. Dean.

Thou wert forſworn in Carpenter's-hall, is not actionable. Cro. E. 787, 788. pl. 28. Mich. 42 & 43 Eliz. C. B. Thaxble v. Smith.

[7. If a man ſays to another, *thou haſt forſworn thyſelf in Leake court*, no action lies without *ſhewing what manner of court* this is, becauſe it cannot be intended nor known whether this is ſuch a court that may compel one to ſwear, or not. Mich. 8 Jac. B. between Law and Bennet per curiam.]

He was *forſworn in the court of Whitchurch*, no action lies. Cited Arg. Cro. E. 135. in caſe of Brock v. Doughty, as Trin. 28 Eliz. Herne v. Hert; but Gawdy ſaid, the reaſon was, becauſe it was a baſe court, of which B. R. will not take cognizance.——S. C. cited Le. 127. accordingly, and that court is not known to B. R. as judges; and *it may be* but *a great houſe*, or manſion-houſe, *called Whitchurch-court*.——S. C. cited Cro. E. 609. pl. 13. in caſe of Shaw v. Thompſon.—Cro. E. 720. pl. 48. Mich. 48 Eliz. in C. B. in the caſe of Marſhal v. Dean is a nota, that this caſe of Whitchurch-court was ſhewn to the court in writing; and that the opinion of the court there * was, that the action will lay; and the defendant gave to the plaintiff 3 l. and he releaſed his ſuit, and no judgment was given.——But Cro. C. 378. pl. 4. in caſe of Robodham v. Venleck, the ſame caſe is cited as if the action did not lie.——And Cro. J. 199. pl. 14. Mich. 5 Jac. B. R. Skinner v. Trobe, the words were, thou art forſworn in Collet court; and did not ſhew that any action was depending there, nor that it was a court of record; and reſolved that it lay not.——Cro. J. 204. pl. 7. Hill. 5 Jac. B. R. Colome's caſe, S. P.——S. P. as to *Bell court*, and with innuendo that it is a court baron held at Bell, action lies, but not otherwiſe. Cro. E. 297. pl. 4. Paſch. 35 Eliz. B. R. Green v. Dancy.——S. P. cited Hutt. 34. in caſe of Adams v. Flemming as adjudged as to one's being alleged perjured in *Canterbury court*, that no action lies, becauſe they could not take notice of any court in Canterbury which has power to adminiſter an oath.

*[407]

Fol. 40.

[8. If one ſays to another, *thou art a forſworn knave, and waſt indicted by 12 men, and haſt compounded for it*, action lies; for all being laid together, it appears that he *intended* a perjury *in a court of record*. Mich. 1. Car. between Gilbertin and Rowe adjudged, this being moved in arreſt of judgment, the which intratur Trin. 1 Car.]

3 Bulſt. 304. Gilberd v. Rodd, S. C. The whole court agreed the words actionable, becauſe an indictment is an accuſation of record, it being the king's declaration, and the voice of the body of the country; and the ſaying that he had compounded for this, is a confeſſion of the matter of the indictment to be true; for fatetur facinus qui judicium fugit. And judgment for the plaintiff.

[9. If a man ſays to another, *thou art a forſworn knave, and I will prove thee forſworn in the eccleſiaſtical court*, an action lies for theſe

Cro. E. 609. pl. 12. adjudged for the plain-

tiff; for it is a court well known, and a judicial court. —— 2 Roll Rep. 410. Mich. 21 Jac. B. R. Arg. in case of Pole v. Carrel, cites S. C. adjudged, because it was perjury before a judge.

these words; for the ecclesiastical court is a court known. Pasch. 40 Eliz. B. R. between SHAWE AND THOMSON adjudged.]

In action for saying, *thou hast taken a false oath in the consistory court at Exeter*, it was argued that the words (taken a false oath) might intend the person before whom the oath is sworn, and that the statute 5 Eliz. extends not to perjuries in the spiritual court, and so not punishable by the common law. Sed curia contra; for as to the first, the plaintiff was a woman, before whom no oath can be taken; and as to the other, though it is not punishable by the statute, yet it is a great defamation, so that none will credit her, and the statute does not hinder but it might be punished in the star-chamber, as before. And judgment for the plaintiff. Cro. E. 185. pl. 4. Trin. 32 Eliz. B. R. Plaice v. How. —— Le. 131. pl. 179. S. C. by the name of Pierce v. How, Wray at first held the words not actionable; but afterwards changed his opinion, and said, that these words ought to be intended actively and not passively; and if so, the defendant ought to have pleaded it. Judgment for the plaintiff.

Hob. 283. pl. 361. S. C. the words are, he hath forsworn himself before the council of the marches, meaning his majesty's council in the marches of Wales, in the suit I had against him there; *and I will sue him for perjury there.* —— Brownl. 13. S. C. according to Hob. and has the same objection, that this court could not take notice that they had authority to hold plea in matters of record; but says nothing as to judgment being given. And the margin is, viz. Judgment arrested for uncertainty in the count, [which seems a mistake.] —— Hutt. 34. Mich. 16 Jac. S. C. according to the note out of Hobart; and says, the court was of opinion the action well lies; for the council of the marches (without innuendo) is sufficient, because there is no other council of the marches; and this court was established by statute, and concerned the king, and thereof the judges ought to take notice. And judgment for the plaintiff. —— 2 Roll Rep. 471. Mich. 22 Jac. B. R. the same point, Yate's case.

[10. Action lies for these words, *he hath forsworn himself before the council of the marches of Wales, in the suit I had against him there for perjury.* Hob. Rep. case 360. between ADAMS AND FLEMING adjudged, though it was objected that this court could not take notice of this council, &c.]

See (Y. a) pl. 46. S. C. —— *He hath forsworn himself, and I'll teach him the price of an oath, for I will have his ears crept*, seemed actionable; for though not said where he forswore * himself, yet by the circumstance it appears it was in such place for which it was punishable. And the plaintiff paid the box for the judgment. Het. 63. Mich. 3 Car. B. R. Williams v. Bickerton.

[11. If one says to another, *thou art a forsworn man, I will teach thee the price of an oath, and will set thee on the pillory*, action on the case lies; for this shall be intended such a forswearing for which he ought to stand in the pillory. Hill. 41 Eliz. B. R. Per Fenner.]

* [408]

Cro. E. 836. pl. 8. S. C. but S. P. does not appear. —— Noy. 23. S. C. but S. P. does not appear. —— Noy 37. S. C. but S. P. does not appear. —— *He is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against me.* Adjudged for the plaintiff. Cro. J. 204. pl. 7. Hill. 5 Jac. B. R. Colome's case.

You are a forsworn blade, and you are forsworn in your answer, that the land in such a place was purchased in my daughter's name. Actionable, though not alleged that the cause was within the jurisdiction of the court, where the answer was. And judgment for the plaintiff. 2 Show. 33. pl. 25. Pasch. 31 Car. 2. B. R. Goodwin v. Browne.

[12. If a man says of another, *he did forswear me* (innuendo the plaintiff) [out of] 40*l. worth of tithes in Canterbury court*, no action lies for these words; for there are divers courts in *Canterbury*, and it is *not shewn in what court*, nor before what judge, *nor that the judge had authority* to hold plea of tithes. Pasch. 43 Eliz. B. R. between BRAY AND PARTRIDGE adjudged.]

2 Bulst. 150. Croford v. Bittle, S. C.

[13. If a man says of J. S. *I had not been cast in that action but for the oath of J. S. and he was forsworn; and I marvel that B. would*

would marry his daughter to ſuch a forſworn man. In an action upon the caſe for theſe words, if the plaintiff *avers* that *there was an iſſue between him and A. and that ad curiam baronis de Geton ſoca domini regis* tent. apud S. in comitatu prædict. *he was produced as a witneſs*, and ſworn about the matter of the iſſue; *and after the defendant having a communication about this iſſue, ſpoke the ſaid words.* No action lies upon this declaration, becauſe it is *not alleged that S. is within the ſoke of Geton;* and ſo perhaps the court was held out of their juriſdiction, and alſo becauſe it is *not alleged that he was ſworn about a matter pertinent to the iſſue.* Mich. 11 Jac. B. R. between CRAWFORD AND BRISE adjudged.] adjudged clearly per tot. cur. Coke Ch. J. ſaid, that if a man will have benefit by an action for ſlanderous words (as ſaying that he was perjured) he muſt ſhew certainly that it was in a court, and in a matter pertinent to the iſſue; and if the words were, that he *was forſworn dando evidentiam ad exitum*, it is good; and ſo if in a judicial court forſworn, it amounts to perjury; but if it is no court, then it is coram non judice.

[14. If a man ſays of another, *he is a forſworn knave; for he ſwore that the wood was worth* 40*s*, *when it was dear of* 13*s.* 4*d.* no action lies for theſe words, though he *avers that there was a diſcourſe* between them *of a matter at the aſſize, in which the plaintiff was ſworn as a witneſs*, becauſe he does *not directly ſay that it was not worth* 40*s.* but that it was dear of 13*s.* 4*d.* Beſides, it does *not appear that the defendant intended this at the aſſizes.* Hill. 13 Jac. B. R. between Stephen APTHORPE AND COCKERELL adjudged.] 3 Bulſt. 150. S. C. and Coke Ch. J. as to the averment ſaid, that an * innuendo ſhall never give a cauſe of action; and what is here alleged is only argumentative, and ſo not actionable. To which the court all agreed, and judgment againſt the plaintiff. ——Roll Rep. 287. pl. 4. S. C. and Coke ſaid, that the averment is the invention and innuendo of the plaintiff, and not the parlance of the defendant. And Crooke ſaid, if a buſhel of wheat be ſold for 10*s.* yet a man may ſay, that it is dear at 3*s.* 4*d.* And judgment againſt the plaintiff. The reporter adds a quære as to both points; for he ſays, it ſeems they are hard.

* See (I. b) pl. 1.

[15. If one ſays to another, *that he was perjured in his anſwer in the ſtar-chamber*, an action upon the caſe lies. Paſch. 40 Eliz. B. R. between CORBET AND HILL adjudged.] See (I. b) pl. 9. S. C.—Cro. E. 609. pl. 13. S. C. accordingly. Le. 127. pl. 173. in caſe of Brooke v. Doughtie, cites Trin. 23 Eliz. Rot. 882. FOSTER v. THORNE, where the words were, *thou waſt falſely forſworn in the ſtar-chamber*, the plaintiff had judgment; for it ſhall be intended that the plaintiff was defendant or deponent there; and yet the words of the declaration do not ſay (in the court of the ſtar-chamber.) ——S. C. cited. Cro. E. 135. pl. 1. in caſe of Brooke v. Doughty.

[16. If a man ſays to another, *thou waſt forſworn in thine anſwer in chancery*, no action lies. Hill. 41 Eliz. B. R. cited per Clerk, to be adjudged within a year before paſſed. (It ſeems this is not law.)] [409] See (F. b.) pl. 2, 3.

[17. If one ſays to another, *thou waſt forſworn in the court of requeſts*, an action upon the caſe lies. Between BROOKE AND DOUGHTY adjudged, cites Hill. 41 Eliz. B. R.] Le. 127. pl. 173. Trin. 30 Eliz. B. R. S. C. and with theſe further words, viz. *and I will make thee ſtand upon a ſtage for it.* After verdict for the plaintiff it was moved, that it is not ſaid that he was there forſworn as defendant or witneſs; but Wray ſaid, that there is a vehement intendment that his oath was in the quality of a defendant or deponent, which Gawdy granted; and it cannot be intended but a court of juſtice, and before the judges there juridice, and the ſubſequent words ſound ſo much, viz. I will make thee ſtand upon a ſtage for it. And judgment for the plaintiff. ——S. C. Cro. Eliz. 135. pl. 1. ſays, it was found that he ſpoke the firſt words only.——Gawdy ſaid, the court of requeſts is a court of record, of which this court ſhall take conuſance. And afterwards, by conſent of Wray, judgment was given for the plaintiff; but the damages were abridged.——See (Y. a) pl. 40. S. C.

[18. If

See pl. 16. 20.

* Fol. 41.

[18. If one ſays to another, *thou wert forſworn in the chancery*, an action upon the caſe lies; for this is a court of record. Paſch. * 8 Jac. between PERIE AND ROCK agreed per curiam. Hill. 8 Car. B. R. between SHONKE AND BATTEN adjudged, that action lies for theſe words, *thou wert forſworn upon record in chancery*, innuendo a ſuit by bill there, which the plaintiff recited in his declaration, it being moved in arreſt that it was not a court of record.]

But per Hobart Ch. J. if a man is forſworn in a court baron before the ſteward, it is perjury.

[19. If one ſays to another, *thou wert forſworn in ſuch a court*, which is only *a court baron*, no action lies, becauſe it is not a court of record. Paſch. 8 Jac. in the exchequer, between PERIE AND ROCK agreed per curiam.]

Win. 3. Arg.——*Thou art a forſworn jack in the court baron of D. Thou haſt forſworn me out of* 20*s. rent, and haſt me on thy ſide.* Adjudged actionable. Cro. E. 342. pl. 10. Mich. 36 & 37 Eliz. B. R. Baxter v. Shade.

Action for theſe words, *thou art a forſworn jack in the court of A. thou didſt ſwear away* 20 *s. from B.* and avers that the court of A. was a court baron. And the plaintiff had judgment, although it was not ſhewn between what perſons, or in what action he was ſworn. Cro. E. 348. pl. 22. Mich. 36 & 37 Eliz. B. R. Banks v. Stacy.

Godb. 444. pl. 513. Jones v. Ballard, S. C. adjudged accordingly.

[20. If a man ſays of J. S. and another, *they are proper witneſſes, they will ſwear any thing, they have forſworn themſelves in chancery, and the lord keeper committed them for it;* an action lies by J. S. though he does *not ſay* that he was forſworn *in the court of chancery;* and though it may be that this was in an office belonging to the court; but this ſhall not be intended. Mich. 8 Car. B. R. between JONES AND BALL adjudged, this matter being moved in arreſt of judgment.]

He is a ſuborner of perjury. Adjudged actionable, though objected that no perſon is alleged to be ſuborned:

[21. If a man ſays of J. S. *he gave* 10*l. to B. for forſwearing himſelf in chancery*, an action upon the caſe lies for theſe words; for it ſhall be intended a ſubornation. Mich. 9 Car. B. R. between EWER AND adjudged, this being moved in arreſt of judgment; but there were other words alſo which were not held material.]

for per cur. it muſt be neceſſarily intended he did ſuborn ſome perſon to commit perjury, and the words in themſelves are very ſlanderous. Cro. E. 308. pl. 13. Mich. 35 & 36 Eliz. B. R. Guerdon v. Winterflood.

*[410]

Action was brought for theſe words, *thou art thrice perjured in thy anſwer in chancery to my bill*, innuendo a bill exhibited there by the defendant againſt the plaintiff, and an anſwer to that bill. The defendant demurred, becauſe he alleged not any perjury in any particular. And, without argument, it was adjudged for the plaintiff. Cro. E. 907. pl. 17. Mich. 44 & 45 Eliz. B. R. Poultney v. Wilkinſon.

[22. Upon an iſſue between two, if A. holds of B. by fealty and ſuit of court only, and at the aſſizes C. being produced as a witneſs, take his oath that it is held of B. by fealty and 5 s. rent, and ſuit of court; and after E. having a conference of * this iſſue, and of the evidence ſo given, ſays to C. *thou wert forſworn in that action at the aſſizes*, innuendo, &c. *and I will prove it;* C. ſhall have an action for theſe words, all this matter being alleged in the declaration, though E. does *not allege the particular thing in which C. was forſworn;* for it is *alleged that he ſaid the words, having a conference of this iſſue, and of the evidence ſo given*, Paſch. 11 Jac. B. R. between Lane and Gibbons adjudged.]

The plaintiff was *produced as a witneſs* at a trial at Guildhall, and upon his oath gave evidence, the defendant ſuper hoc immediate, ſaid, *thou haſt forſworn thyſelf*, innuendo in the ſaid oath. It was adjudged that the action lay upon theſe circumſtances. Cro. E. 293. pl. 6. Hill. 35 Eliz. B. R. Nedham v. Corſellis.

[23. If one ſays to a juryman, *thou art a common juryman and haſt* * *ſeen the overthrow of* 100 *men by thy falſe and ſubtle means*; an action lies; for theſe words *(ſubtle and falſe means)* ſhall be intended of a common juror, and this touches him in the point of his oath. Paſch. 17 Jac. B. R. Peter's caſe adjudged.]

Mo. 867. pl. 1226. Paſch. 7 Jac. ſeems to be S. C. but the word (ſeen) here is * *(been)* there as it ſeems it ſhould be. Adjudged the action well lies, with averment that he had been ſworn in juries of life and death. ——S. C. cited Godb. 242. pl. 336. in Brook's caſe by Warburton J. as Hill. 6 Jac. but there the words are (haſt been *the death* of 100 men, &c.) and that though the words in themſelves are not actionable, yet being ſpoke maliciouſly, will bear an action.—— S. C. cited Het. 173. Trin. 7 Car. C. B. in caſe of Hitcham v. Caſon, as Hill. 6 Jac. C. B. Lonſman v. Peck, and the words there agree with Godb.

[24. If A. be charged at a ſeſſions of the peace for divers treſpaſſes done to J. S. and [thereupon] J. N. a conſtable, is produced to teſtify his knowledge in the matter, and he is ſworn, and thereupon gives his teſtimony; and upon this A. ſays, (having reference to the ſaid oath,) *that he is forſworn*; though this *evidence* was *not given upon any iſſue* ſo that it may be perjury within the ſtatute, yet if he was forſworn in ſuch a court of record, this was an *offence at the common law*, and therefore the action lies. Mich. 8 Car. B. R. between DUKE AND CORDEROY; adjudged in a *writ of error upon a judgment in bank*, and the judgment affirmed accordingly. Intratur, Mich. 7 Car. Rot. 284.]

Cro. C. 288. pl. 35. Drake v. Corderoy S. C. But becauſe the words in the declaration were general, and not that he was forſworn in any court, nor by reaſon of his oath taken at the ſeſſions, it was objected that the count was ill. And the court held, that if there be any doubt, it is upon the declaration, which is uncertain, by not ſhewing that the words intended a falſe oath in a court of record. But the defendant having juſtified, and ſhewed that the oath was made in the open ſeſſions, and that it was falſe, the court held, that this confeſſion clears the queſtion whereof he intended to ſpeak; and ſo judgment given in C. B. was affirmed.——Jo. 307. pl. 19. S. C. the uncertainty in the declaration was made good by the plea in bar; and judgment affirmed.—— See All. 7. Mich. 22 Car. B. R. Oſborn v. Brooke, S. P.——Ibid. cites the caſe of Duke v. Corderoy by the name of Tuke v. Condie.

[25. In an action upon the caſe by A. againſt B. for words, if the plaintiff declares that one *Chriſtmas preferred a bill in chancery* againſt him, &c. (ſhewing the effect of the bill) and that he made a true anſwer thereto upon his oath there, according to the courſe of the court, and that after there being a diſcourſe between one D. and the *plaintiff* at Da. touching certain matters between them, the ſaid B. and one F. came to the ſame place, whereupon A. *ſaid* to D. *I will talk* † *no longer with you, now your* 2 *affidavit-men are come*; upon which B. the *defendant ſaid* of *the plaintiff*, he *need not to ſay ſo, for* * *he was abſolutely forſworn in his anſwer to Chriſtmas's bill* (innuendo ‡ the ſaid bill and anſwer) though he does *not ſay that he was forſworn in a point material*, yet it is a ſlander; and though there was † not any diſcourſe of this ſuit, yet there ſhall not be intended any other ſuit, nor any ſuit in any court, by reaſon whereof the action would not lie, without ſhewing of it by the defendant. Mich. 9 Car. B. R. between SIR RICHARD STRODE

See (F. b) pl. 3. S. C. —Cro. C. 321. pl. 3. Sir Rich. Snowe's caſe S. C. adjudged accordingly. —See (Y. a) pl. 45. Michel v. Brown.—

* Fol. 42.

‡ [411]

† So though in truth there was no ſuch ſuit, as

where the plaintiff declared that

STRODE AND STRODE ALLEN, adjudged; this being moved in arreſt.]

the huſband being ſued in the ſheriff's court, and the plaintiff *produced as a witneſs* againſt him, a verdict paſſed againſt him at the trial, the wife, having a colloquium of that trial, ſaid of and to the plaintiff, *thou art a forſworn raſcally fellow, and I will prove thou tookeſt a falſe oath againſt my huſband and me to-day*; after a verdict for the plaintiff, it was objected that the words were not actionable, becauſe it doth not appear that it was in a court of record, becauſe the words relate to a ſuit in which the wife was not a party; but adjudged, that, with ſuch an inducement of a colloquium, the words are actionable. Hardr. 151. Paſch. 1659. in the exchequer, Brumrigg v. Hanger & Ux'.

Cro. C. 509. pl. 2. Ceely v. Hoſkins S. C. the words were thou art forſworn in a court of record,

[26. If a man ſays of J. S. *he hath forſworn himſelf in a court of record;* action lies for J. S. though he does not expreſs in what court he intends. Mich. 14 Car. B. R. HOSKINS AND CHELE, adjudged per curiam, in a writ of error upon a judgment in B. where it was adjudged e contra; and this judgment now reverſed per curiam. Intratur, Hill. 13 Car. Rot. 696.]

and that I will prove. It was held, that it ſhall be taken he ſpoke theſe words maliciouſly, accuſing him of perjury, and for a falſe oath taken judicially upon judicial proceedings (and not in ordinary diſcourſe, as had been argued) in a court of record, and that it ſhall be underſtood according to the common ſpeech and uſual intendment. And judgment was reverſed.

M. forſwore himſelf in every thing that he ſwore in this cauſe; (diſcourſing of a trial at Guildhall, in which the plaintiff was a witneſs.) The plaintiff averred, he ſwore nothing but what was pertinent to the iſſue. Reſolved by Wyld and Archer, that the action lies, it appearing by the words to be in a court of record. Freem. Rep. 17. pl. 17. Mich. 1671. C. B. Myan v. Okey.

See (E. a) pl. 3. S. C.

[27. If one man ſays to another, *that he was forſworn in a court of record* (in ſuch matter and manner as is not within the ſtatute of 4 Eliz. of perjury) yet becauſe he may be indicted for this at common law, an action upon the caſe lies, though it was urged that it was not perjury within the ſtatute of 5 Eliz. the oath being made upon a writ of inquiry of damages of which the court gave no opinion, but that the action lay, admitting that it is not within the ſtatute. Mich. 13 Car. B. R. between PRUER AND MEADMAN, adjudged, this being moved in arreſt of judgment. Intratur, Trin. 13 Car. Rot. 546.]

Mar. 7. pl. 17. Smith's caſe S. C. the action will lie with averment that he was ſworn in the cauſe, otherwiſe not.—

[28. If one ſays of another, *thou art forſworn, and didſt take a falſe oath at the aſſizes at Hereford againſt J. S.* no action lies for theſe words without an *averment that this was at a trial, or before the court or jury;* for it might be at the aſſizes in a private houſe, or other place. Paſch. 15 Car. B. R. between PRICHARD AND SMITH, adjudged per curiam in a writ of error upon a judgment in *Ludlow;* and the 1ſt judgment reverſed for this cauſe. Intratur, Paſch. 14 Car. Rot. 179.]

He is falſely forſworn before the juſtices of aſſize between A. and B. Adjudged actionable. Het. 119. Mich. 4 Car. C. B. Keene v. Cox.——But where an action was brought for words, and the plaintiff declared, that the defendant being indicted of a forcible entry at the ſeſſions, and the plaintiff produced as a witneſs for the king, and ſwore nothing but was true; the defendant after diſcourſe of the ſaid oath, ſaid, *he took a falſe oath againſt me at the ſeſſions*, innuendo the ſaid oath, &c. It was moved, that the defendant might mean an extrajudicial oath, and cited the caſe of Pritchard, where it was adjudged that no action lay; ſed non allocatur; for in that caſe no colloquium was laid, which is alleged in this caſe, and ſhews to what the words ſpoke did relate. Vent. 195. Paſch. 24 Car. 2. B. R. Wood v. Coat.

[412]

All. 7. S.C. adjudged ac-

[29. If one man ſays of J. S. *he is forſworn, and his oath is upon record,* an action lies; for this is as much as if he had ſaid that

his oath is upon record, and he is forſworn; for the perjury is not of record, but his oath only, and ſo he intended that he was forſworn in the matter which he ſwore of record. Mich. 22 Car. B. R. between OSBORNE AND BROOKES, per curiam. Intratur, Trin. 22 Car. Rot. 767.]

cordingly. —Thou *haſt forſworn thyſelf at London, and there it appears upon record*; it was ruled upon demurrer, that action lies. Cro. E. 583. pl. 9. Mich 39 & 40 Eliz. B. R. Harriſon's caſe. ——In action, the plaintiff declared, that a communication being of him, the defendant ſaid, *that perjured knave* (innuendo the plaintiff) *ſtands perjured on record at Guildhall, London, and I will prove it.* And, at another time, he ſaid to the plaintiff himſelf, *thou art a perjured knave, and ſtandeſt perjured on record, for denying thy own hand, and I will prove it.* After verdict for the plaintiff, it was moved, that it is not ſhewn in what court the plaintiff was perjured, there being two courts there, one whereof is a court of record, and the other not. But the court held clearly, that it muſt neceſſarily be intended to be in a court of record, it being oppoſitum in objecto, to ſay he ſtands perjured upon record, if it was not in a court of record; and judgment for the plaintiff. 3 Bulſt. 283. Hill. 14 Jac. Meſſlyne v. Farneden.

The plaintiff appeared before a juſtice of peace to give evidence againſt another, and the defendant, to weaken his teſtimony, ſpoke theſe words, *thou haſt been a contentious man theſe 30 years, and a breeder of ſtrife, and haſt taken a falſe oath againſt my brother and ſiſter in a matter of incontinency, and haſt taken 20 s. for it, and I will ſhew it on record.* It was moved, that it was not ſaid, that he was perjured in any court of record, but that he will ſhew it of record. But adjudged actionable; the ſpeaking being laid to be falſo & malitioſe. Style 335. Trin. 1652. B. R. Heard v. Read.

[30. Upon a diſcourſe between A. and B. of a ſuit in a hundred court, in which A. was produced as a witneſs, and ſworn, if B. ſays to A. *thou art a perjured rogue*, action lies; for a perjury in a *hundred court* is within the expreſs words of the ſtatute of 5 Eliz. P. 1653. between SAINTSBURY AND ALBORNE, adjudged per curiam; this being moved in arreſt of judgment. Intratur, Trin. 1653.]

Thou art a falſe and forſworn knave, and that I will prove; for thou forſworeſt thyſelf againſt P. R. in the hundred

court. The plaintiff had a verdict; but becauſe it was not ſhewn that any action was depending in the hundred court, between P. R. and any other in which the plaintiff was a witneſs, which might have induced the word (forſworn) to be equivalent to the word (perjured). It was adjudged againſt the plaintiff. Yelv. 27. Mich. 44 & 45 Eliz. B. R. Gore v. Moreton. ——Cro. E. 905. pl. 11. S. C. with an (innuendo Stiverton hundred court); but becauſe it did not appear that it was any court of record, nor any court whereof the juſtices here ſhould take conuſance, the action does not lie.

31. *You have procured a perjured man to ſeek my blood.* Cro. E. 342. in pl. 11. cited to have been ruled in HASTINGS's caſe, Paſch. 32 Eliz. not to be actionable; but Fenner ſaid, the caſe was not adjudged, but ended by arbitrement.

32. *I will prove F. to be a perjured knave*; all the court held the words actionable. Cro. E. 222. pl. 1. Paſch. 33 Eliz. B. R. Fermor v. Dorrington.

3 Le. 151. pl. 203. Hil. 29 Eliz. C. B. S. C. accordingly.

33. *He is forſworn and perjured in ſwearing at C. B. bar, upon the deeds which he then had in his hand*, is actionable; and the words ſhall not be conſtrued of his, forſworn upon the deed; for the vulgar ſenſe is, that men do not uſe to ſwear but upon a book. Ow. 13. Hill. 35 Eliz. B. R. Carter's caſe.

34. *Thou art a forſworn man; for thou wert forſworn in the leet*; action lies, becauſe a leet is a court of record. Per tot. cur. Mo. 404. pl. 539. Paſch. 37 Eliz. Wild v. Copeman.

Noy 34. S. C. adjudged for the plaintiff. ——Cro. E. 492. pl. 9. S. C. all the juſtices held, that action lay for theſe words. —— S. C. cited Cro. E. 721. in pl. 48. ——So for ſaying, *thou art a perjured knave, for thou didſt ſwear this day at the leet, that I baked bread in my houſe, whereas I did not.* It was objected, that perjury cannot be in a leet, whereof the law takes any notice; but per tot. cur. the words are actionable; for though it be not perjury puniſhable by 5 Eliz. yet it is diſcredit, for which action lies; and adjudged for the plaintiff. Cro. E. 709. pl. 32. Mich. 41 & 42 Eliz. B. R. Spencer v. Shory.

35. *Thou*

S. C. cited Arg. Godb. 340. in pl. 472. —— *Thou art a falſe forſworn knave, for thou didſt take a falſe oath before a judge of aſſize, to hang a man.* Adjudged for the plaintiff. Brownl. 13. Anon.

35. *Thou art a forſworn fellow; for by thy falſe oath, thou haſt hanged as true a man as thyſelf*, is actionable; per tot. cur. for by the laſt words it cannot be intended but to be a falſe oath, judicially taken in evidence againſt a priſoner. Cro. E. 572. pl. 13. Trin. 39 Eliz. C. B. Bate v. Rookwood.

36. *Thou haſt forſworn thyſelf at London, and there it appeareth upon record.* Ruled actionable on demurrer. Cro. E. 583. pl. 9. Mich. 39 & 40 Eliz. B. R. Harriſon's caſe.

37. *You did moſt perjuredly preſent me at ſuch a viſitation before ſuch an ordinary*, not actionable; for, per tot. cur. it appears not that he was ſworn, nor what he ſwore, ſo as he might commit perjury, nor that it was in any judicial proceeding. Judgment for the defendant. Cro. J. 120. pl. 1. Trin. 4 Jac. B. R. Sill v. Heath.

38. *Thou art a perjured fellow; thou haſt 10l. to take a falſe oath, and therefore thou art a forſworn fellow.* Fenner and Williams held the words actionable, but Yelverton e contra. Bulſt. 69. Mich. 8 Jac. Anon.

39. The difference is, if one calls another a *perjured* man, theſe words are actionable, and it ſhall be *intended in a court of juſtice*, and to have a neceſſary reference to it; but for the words *forſworn* fellow no action lies; but if theſe had a *reference to a judicial court*, they are then held to be actionable; and this is the general difference in law touching theſe and the like words. Arg. 2 Bulſt. 150. Mich. 11 Jac. Croford v. Bliſſe.

S. P. Arg. Hutt. 44. accordingly; but ſays, that to ſay *he hath forſworn himſelf at the bar*, (innuendo the bar of C. B.) will not maintain an action. ——But if one ſays, *he was forſworn at the C. B.'s bar*, it is actionable; for it ſhall be intended, that it was upon examination in the execution of juſtice. Arg. Win. 3. Paſch. 19 Jac.

40. *He is forſworn in C. B.* is actionable; per Hobart Ch. J. Hutt. 34. Mich. 15 Jac.

41. *You have cauſed this boy to perjure himſelf.* Adjudged for the plaintiff. Brownl. 2. Bridges v. Playdell.

Hutt. 44. S. C. but nothing appears to be ſaid by the court.

42. *K. is a falſe forſworn knave, and took a falſe oath againſt me at a commiſſion at W.* is not actionable; for, per Hobart, the words are altogether uncertain; for it does not appear what authority the commiſſioners had, nor in what manner he was forſworn. Win. 2. Paſch. 19 Jac. King v. Bowen.

43. Caſe, &c. for theſe words, *ſhe is a forſworn whore, and a perjured whore, and forſwore herſelf at Waterman's-hall, concerning the ſervant of T. S.* It was moved in arreſt of judgment, that the words are not actionable, becauſe the charge is principally for forſwearing; but the Ch. B. ſaid, that the words (perjured whore) are in a diſtinct clauſe by themſelves, without reference to or dependance on the reſt; and judgment was given for the plaintiff. Hard. 7. Trin. 1655. in the exchequer. Wales v. Norton.

44. The plaintiff declares of a diſcourſe of a will, for proving whereof the plaintiff was ſworn, and the defendant ſaid of him, *in*

in ſwearing the oath that Hartwell took in the buſineſs, he did ſwear a falſe oath. Per cur. the words are actionable, by reaſon of the colloquium. Freem. Rep. 55. pl. 70. Mich. 1672. Hartwell v. Cole.

* (G. a) General Words.

[1. IF a man ſays to another *that he is a thief*, an action upon the caſe lies. Mich. 4 Jac. B. R. between † MINORS AND LIFORD, adjudged 14 Car. B. R. between COKE AND BRAMPTON, adjudged in a writ of error out of *Ludlow*. Intratur Paſch. 14 Car. Rot. 424. The words were, *thou art a foreſworn whore-thief.*]

See (R. a) pl. 1.

† Cro. J. 114. pl. 13. S. C. accordingly. —— Thief generally, without ſaying of what nature ſpecially, will bear an action; per Wray Ch. J. but Gawdy J. e contra. Ow. 47. in caſe of Moſſe v. Read.

Action will lie for calling one *thief* or *traiter* generally; per Bromley, Portman, Brooke, and Stamford clearly; for he may be damaged as much by thoſe general words, as if they had been ſpoken ſpecially; but Brooke ſaid, that in ancient time it was taken otherwiſe, but the law now is taken as before, and this is the better law. Dal. 17. pl. 7. 1 & 2 P. & M. Anon. The reporter ſays, vide — Br. Action ſur le Caſe, pl. 2. S. P. cites 27 H. 8. 14. by Fitzherbert and Shelly clearly. —— S. P. as to the word *(thief,)* and adjudged for the plaintiff. 2 Bulſt. 134. Mich. 11 Jac. Baily v. Maynard. —— S. P. Cro. E. 563. pl. 23. Paſch. 39 Eliz. C. B. —— S. P. Noy 55. in caſe of Elwin v. More.

[2. If there be a diſcourſe of the wife of J. S. and then one ſays, *who would ſay this of me but J. S.'s wife, who is a whore and a thief*, an action upon the caſe lies, without ſhewing what words were ſaid; for this is not material. Trin. 15 Jac. B. R. between GRIFFITH AND JOHNSON, adjudged.]

[3. If one ſays to another, *I charge you with felony*, an action upon the caſe lies. Mich. 5 Jac. B. R. between ‡ BACY AND CHILD, adjudged. Mich. 8 Car. B. R. between § SMITH AND HODGSKINS, adjudged per curiam upon a demurrer. Intratur Paſch. 8 Car. Rot. 104. and then a caſe was cited to have been Mich. 2 Car. between ‖ KING AND MERRICK, B. R. an action brought for theſe words, *I charge you with felony, and I charge you conſtable to apprehend and lay hold of him*; and it was adjudged that the action did not lie; but the court now denied it.]

Fol. 43.

‡ Noy 124. S. C. accordingly, by the name of Bayiye v. Child. —— § Jo. 302. pl. 5. S. C. by the name of Smith v. Hogſhead; and the words were, *I charge the plaintiff with flat felony*, and held actionable. —— Cro. C. 276. pl. 15. S. C. and though the defendant pleaded that the plaintiff aſſaulted him on the highway near Highgate, and beat him, whereof he complained to the conſtable, who refuſed to attach him unleſs defendant would ſay that he charged him with felony, which occaſioned his ſpeaking the ſaid words, yet it was held that the action lies; for it is a malicious ſcandal to charge him with felony, and he ſhews not what felony was committed; and judgment for the plaintiff, niſi.

‖ Lat. 175. Robert King's caſe ſeems to be S. C. The words were, *I charge you King with felony, and you conſtable* (innuendo one N. a merchant of a vill of Norfolk) *to take him*; and judgment was given for the defendant. —— S. C. cited Arg. Cro. C. 277. in caſe of Smith v. Hodgeſkins, as adjudged in B. R. Mich. 2 Car. in caſe of King v. Mellor, that the words were not actionable, and ſhewed a copy of the record; but Jones ſaid, he was judge at that time in this court, and did not remember any ſuch caſe; but if it were adjudged, it was becauſe the words were not laid to be ſpoke of the plaintiff. —— Poph. 210. King v. Merrick, S. C. and judgment quod querens nil capiat, &c. — [In the caſe in Lat. and Poph. Jones is mentioned as one of the judges in court.]

The words, viz. I charge thee with felony, will not bear an action, unleſs they are *ſpoke before an officer*, or that he is *carried before a conſtable, &c.* Agreed by Doderidge, Haughton, and Chamberlaine J. 2 Roll. Rep. 343. Trin. 21 Jac. B. R. in caſe of Wheeler v. Appleton.

Caſe, for ſaying to a conſtable of the plaintiff, *take him, and carry him away*; *for I lay flat felony to him*; and for ſaying to the plaintiff himſelf, *I will make you hold up your hand at the bar*, held clearly actionable,

actionable, and judgment, niſi. Sty. 235. Mich. 1650. B. R. Paine v. Preſtney. ——S. P. per Ley Ch. J. but if they were *ſpoke privately* to a man, no action lies for them, or *in a court which hath conuſance* of ſuch pleas, then the action will lie; for the party, by reaſon of ſuch words, may come into trouble; but charging one with flat felony, and charging the conſtable with him, is not actionable, becauſe it is in the ordinary courſe of juſtice. Godb. 340. Trin. 21 Jac. B. R. in pl. 454.

These words are too general and extravagant to ground an action upon,

[4. If one man ſays to another, *thou deſerveſt to be hanged*, no action lies for theſe words. Trin. 4 Jac. B. R. between HAKE AND * MOLTON, adjudged; for this only expreſſes his opinion and judgment of him.]

it not being ſhewn what act was done to deſerve hanging. Yelv. 90. Heake v. Moulton, S. C.—— S. C. cited 2 Mod. 163. in caſe of Townſend v. Hughes, Hill. 28 & 29 Car. 2. C. B. by Atkins J. as not actionable, becauſe it was only his opinion. ——— S. C. cited Arg. but Page and Probyn J. ſaid that they believed it never was determined, that to ſay of a man that *he deſerved to be hanged for robbing on the highway*, would be actionable.

H. will come home again, if he eſcapes the gallows; for he hath deſerved to be hanged; adjudged not actionable; for they are too general, becauſe the country people may intend he deſerved hanging, though he never committed any felony. Cro. E. 470. (bis) pl. 30. Paſch. 39 Eliz. B. R. Halland v. Mabbs.

If you had had your deſerts, you had been hanged before now; adjudged actionable;

[5. If a man ſays to J. S. *thou art a ſcurvy bad fellow, and haſt done that* [*for which*] *thou deſerveſt to be hanged*, no action lies. Mich. 11 Car. B. R. between FISHER AND ATKINSON, adjudged per cur. in arreſt of judgment, after a verdict for the plaintiff.]

for it ſhall be intended that he committed an offence, for which the penalty of death was due to him. Cro. E. 62. pl. 4. Mich. 29 & 30 Eliz. B. R. Donne's caſe. ——— Ibid. Wray ſaid that where A. wrote the name of B. upon a wall, and drew a gallows upon the wall, and wrote further, that *if this man had his deſerts he ſhould have been hanged on theſe gallows*, and adjudged actionable.

Yelv. 104. S. C. per tot. cur. the action does not lie; but if it had appeared by the

[6. If one man ſays to another, *you are no true ſubject to the king*, no action lies for theſe words, becauſe they are too general; for perhaps it may be, becauſe he had not paid his ſubſidies. Mich. 5 Jac. B. R. between SMITH AND TURNER, adjudged.]

declaration, that the words had been ſpoke upon any diſcourſe of the loyalty of the plaintiff, then the opinion was otherwiſe.——Cro. J. 202. pl. 1. S. C. and adds, *and that I will prove*; adjudged for the defendant; for it may be intended that he was no true ſubject, having been falſe in ſome office, or being accountant had not made a true account, and being laid barely without circumſtances, the action lies not; and ſo the court diſtinguiſhed it from the caſe of * Sir W. Walgrave v. Agas.

Thou art an untrue man to the queen, is not actionable if ſpoke of an ordinary ſubject; but if ſpoke of one of the *privy council*, are actionable; per Wray Ch. J. Le. 336. Trin. 32 Eliz. B. R. in pl. 469.

* See (C. b) pl. 1. S. C.

S. P. but no judgment. Brownl. 9. Paſch. 12

[7. If one man ſays to another, *thou art a rogue, and an arrant rogue, and I will prove thee to be a rogue*, no action lies. Mich. 41 & 42 Eliz. B. R. adjudged.]

Jac. Whitepain v. Coke.——The ſaying to a man that he is a *villain*, or a *rogue*, or a *varlet*, *or the like*, will not maintain an action; for they are uſual words of choler and paſſion. 5 Rep. 15. b. in the caſe of Stanhope v. Blith, per cur. Paſch. 27 Eliz. B. R.

Sty. 49. MACK v. CURITT, S. C. adjudged for the plaintiff. ——All.

[8. If a man ſays to another, *you rogue, you are a traitorly rogue, you cheated your father of all that ever he had; you are a branded rogue, and have held up your hand at the bar; you deſerved hanging, and you ſhall be hanged*, an action lies; for it appears that he intended that he was branded according to the ſtatute [1 Jac. cap.

cap. 7.] Mich. 23 Car. B. R. between MEAKE AND CUBIT adjudged, this being moved in arreſt of judgment.] 35. Mark v. Cubit, S. C. there was a verdict; for all the words, except (traitorly rogue.) So the queſtion was, whether (branded rogue) would maintain an action; for it was clear that none of the other would, becauſe, as was inſiſted, the moſt that they import is, if he has been branded for a rogue by 1 Jac. cap. 7. then his puniſhment is paſt; and ſo the words not actionable, becauſe they can be no damage to him. But adjudged for the plaintiff, becauſe, by that ſtatute, if a branded rogue wanders again, it is felony, and ſo the words put him in a nearer degree of felony than he would be otherwiſe.

[9. If one ſays to another, *thou art a rogue, a run-away rogue, and didſt run away from Oxford, and thou art a rogue of record at Oxford*, * action lies for theſe words; for he cannot be a rogue of record, if he be not convicted thereof upon record, according to the ſtatute. Trin. 1650. between ALLESLY AND MAWDIT, per curiam, this being moved in arreſt of judgment. Intratur Paſch. 1650. Rot. 409.] Sty. 220. Elſy v. Mawdit, S. C. the court inclined that they were actionable. But adjornatur——— Ibid. 221.

adjornatur.—*Thou art a rogue and a vagabond.* All the court held theſe words not actionable. Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B. Robinſon v. Meller.

10. *There is a neſt of thieves at Rippon, and Sir J. B is the maſter of them, and he is a thief himſelf.* Adjudged for the plaintiff. Dal. 9. pl. 7. Mich. 7 E. 6. B. R. Bridges's caſe. D. 75. a. pl. 21. Mich. 6 E. 6. Burgis alias Bruges v. Warenford, S. C. adjudged accordingly.——*He keeps a company of thieves at his mill, and I will not grind my griſt there as long as they are.* Adjudged not actionable. D. 75. a. marg. pl. 21. cites Paſch. 5 Jac. B. R. Sir Wm. Wray's caſe.

11. *He is a murderer* is actionable. Mo. 29. in pl. 92. Trin. 3 Eliz. Anon. S. P. by Dyer and Walſh; for there are ſome words which cannot be qualified, as murderer, *thief, extortioner, falſe knave*; and in ſuch caſe an action will lie. But contrary where ſuch words are *ſpoken in a jeſting way.* Ow. 33. Trin. 7 Eliz. Winter v. Barnham.

12. *He is an adulterer* is not actionable, becauſe it is not puniſhable at common law, but only the ſpiritual law. Mo. 29. pl. 92. Trin. 3 Eliz. Anon. For the common law cannot diſcuſs what ſhall be ſaid adultery. Br. Action ſur le Caſe, pl. 2. cites 27 H. 8. 14. by Fitzherbert and Shelly clearly.

13. *He is a falſe knave, and worthy to ſtand upon the pillory.* The defendant juſtified, becauſe the plaintiff by his attorney ſwore falſely that his debt was a true debt, and ſo cauſed 10l. due to defendant to be attached according to the cuſtom of the city of London; and after, upon iſſue joined between the plaintiff and defendant upon nil debet, it was found for the defendant; and thereupon the defendant ſays he ſpoke thoſe words. And the juſtification was held good. Mo. 77. pl. 210. Mich. 8 & 9 Eliz. Lucas v. Cotton. And. 12. pl. 27. S. C. accordingly. —Bendl. 155. pl. 210. S. C. accordingly, and the pleadings.—Dantſley's caſe, cited Het. 63. ſeems to be

S. C.—But Cro. E. 31. in pl. 6. Trin. 26 Eliz. B. R. the court conceived that ſaying, thou art a knave, and a pillory knave, are not actionable.——*Thou art the falſeſt knave in all England.* Dal. 89. in pl. 5. 15 Eliz. cited by Catlin as adjudged not actionable, in the caſe of Yale v. Boſtock.

Thou art a knave, and a pillory knave; remember thou ſhouldſt have been ſet on the pillory. Adjudged for the plaintiff, though not ſaid he was ſet on the pillory. Cro. E. 11. pl. 7. Mich. 24 & 25 Eliz. C. B. Browne v. Dawks.

Thou art a knave, and a cheating knave; not actionable, unleſs he ſhews that he was of ſuch a trade, and that he has ſpecial loſs by the words. Sid. 48. pl. 8. Mich. 13 Car. 2. B. R. Welden v. Johnſon.

He is a cheating knave, he has cheated me with brass-money. Resolved that to call a *tradesman* a cheat, an action will lie, if he speaks of his profession; but to speak it generally it will not. And adjudged for the plaintiff, who was a *broker*, and the words spoke of his profession. Raym. 62. Mich. 14 Car. 2. B. R. Davies v. Jones. —— Keb. 393. pl. 107. S. C. adjudged for the plaintiff, nisi.

14. *Thou wast the cause that J. S. did hang himself, and that R. N. did cut his own throat, and thou beginnest with no man but thou undoest him.* Not actionable. Dal. 89. pl. 5. 15 Eliz. Anon.

15. *If thou hadst justice thou hadst stood on the pillory.* Le. 127. in pl. 173. Arg. cites it as adjudged not actionable, in the case of Rylie v. Trowgrood.

16. *A. is a thief, and B. his partaker.* The whole court held the words not actionable, because too general; for it may be that the plaintiff is his partaker in other matters; but if the words had been, that *B. knowing A. to be a thief, was his partaker*, there the action would have lain. Judgment was given against the plaintiff. 4 Le. 24. pl. 74. Pasch. 26 Eliz. Bluet v. Cooks.

[417]

17. To say *he is a rogue*, or a *varlet*, or the like, such words are not actionable. 4 Rep. 15. b. per curiam in pl. 4. Pasch. 27 Eliz.

18. *He hath but one manor, and that he got by swearing and forswearing*, is not actionable, though plaintiff counted that he was a *justice of peace, and surveyor of the Dutchy of Lancaster*, and had divers other offices; for the words are too general, and the defendant does not charge the plaintiff with swearing or forswearing; for he might recover a manor by swearing and forswearing, and yet he not be procuring or assenting to it. 4 Rep. 15. a. b. pl. 4. Pasch. 27 Eliz. B. R. Stanhope v. Elith.

S. C. cited 3 Le. 163. per cur. Hill. 29 Eliz. in pl. 213. —— S. C. cited per cur. Cro. E. 603. Hill. 47. Eliz. C. B. in pl. 15. ——— See (Z. a) S. C.

The plaintiff hath deserved his ears to be nailed to the pillory. Adjudged actionable. Cro. E. 384. pl. 6. Pasch. 37 Eliz. B. R. Jenkinson v. Mayne.

19. *Thou shouldest have sat on the pillory if thou hadst thy deserts;* the court held it not actionable, because too general. And Anderson Ch. J. took a *diversity* between general words infamous *spoke to a private person*, and when *to a public officer or magistrate*, that the private person is not slandered with particular infamy, but the magistrate may be by general words. Mo. 243. pl. 383. Mich. 29 Eliz. Anon.

Thou hast forged a writing; per Wray and Gawdy, not actionable, because uncertain; but if the declaration be with an *innuendo such a deed*, then it had been good enough. 3 Le. 231. pl. 313. Anon. ——— *Thou art a forger*, not actionable, because not said to what thing; per Wray. Ibid.

20. *Thou hast forged my hand;* per Gawdy and Wray they are not actionable, because too general, without shewing to what writing. And adjudged accordingly. 3 Le. 231. pl. 313. Hill. 31 Eliz. B. R. Anon.

21. *Thou art a concealer of felony, and it lieth in my power to hang thee.* Adjudged actionable, though the words are general, and shew not how. Bulst. 148. Arg. cites Rewdam v. Tucker.

22. *Thy credit hath been called in question, and a jury being to pass upon it, thou foistedst in a jury early in the morning, and the lands thou hast are gotten by lewd practices;* adjudged not actionable, the words

words being too general. Cro. E. 348. pl. 21. Mich. 36 & 37 Eliz. B. R. Nichols v. Badger.

23. *Thou art a common filcher, companion of cut-throats, &c.* All the juſtices held theſe words not actionable. Cro. E. 554. pl. 6. Paſch. 39 Eliz. B. R. Goodale v. Caſtle.

24. *Thou art a corn-ſtealer*, adjudged actionable; for it ſhall be intended only of ſuch corn as might be ſtolen, and not of corn ſtanding. Cro. E. 583. pl. 23. Paſch. 39 Eliz. C. B. Anon.

25. *Thou art a murderer, and a bloody fellow, and I am afraid of thee.* Adjudged not actionable. Cro. E. 672. pl. 32. Paſch. 41 Eliz. C. B. Slade v. Allen.

26. *He is a blood-ſucker, and not worthy to live in a commonwealth, and his child not born is bound to curſe him.* The court held that no action lies. Noy 64. Thimmelthorp's caſe.

27. *You have bought a roan ſtolen horſe, knowing him to be ſtolen;* adjudged actionable. Godb. 157. pl. 212. Mich. 6 Jac. B. R. Briggs's caſe.

27. *Thou art a thief, murderer, villain, blood-ſucker, bankrupt*; [418] adjudged actionable, and affirmed in error; for it is ſufficient if one of the words will maintain an action. Jenk. 301. pl. 70. Trin. 8 Jac. B. R. Luker's caſe.

28. *N. who was Solomon Smith's clerk, is a knave, and a rogue, and I will prove it, and he is in Newgate, and is to be hanged for counterfeiting the king's hand and ſeal;* adjudged for the plaintiff. Raym. 17. Trin. 13 Car. 2. B. R. Nuttal. v. Page. Keb. 50. pl. 6. S. C. adjornatur; but ibid. 56. pl. 16. the cour agreed that the words are a direct affirmation, and that what ſeal ſoever it be it is felony; and judgment for the plaintiff.

29. The plaintiff married the daughter of M. who intended to give him 100l. and the defendant ſaid to a 3d perſon, *he is a rogue and a cheating knave, and he hath cheated his mother-in-law out of an eſtate in Norfolk, and I will put him up at the high-croſs for it*; and alleged that by thoſe words he loſt his mother's good-will. The plaintiff had a verdict. Bridgman Ch. J. thought theſe words would bear no action in themſelves, and would carry no preſent damages; and the mother being alive, ſhe may yet give the 100l. and her intention is revocable, theſe words in themſelves being but words of courſe; but ſaid they would conſider of it, and ſet a rule for conſequential damages. Cart. 1. Mich. 16 Car. 2. C. B. Harris v. Porter.

30. Caſe, &c. for theſe words, *he is a great rogue, and deſerves to be hanged as well as Gale, who was condemned to be hanged at Newgate-ſeſſions*, and of his further malice, *he bid T. S. ſteal what goods he could, and he would receive them.* Adjudged not actionable; for the firſt words only ſhew his opinion, and perhaps he might not think that Gale deſerved hanging, and the laſt words were only bad advice, but no act done. 2 Jo. 157. Trin. 33 Car. 2. B. R. Buſh v. Smith.

31. *You are a rogue, and you broke open a ſhop at Oxford, and your grandfather Jones brought over 20l. to make up the breach*; adjudged for Skin. 364. pl. 8. Somers v.

Houſe, S. C. It was moved in arreſt, that breaking open the houſe was but a treſpaſs, and making up the breach might be repairing; but the court ſeemed e contra, and afterwards gave judgment for the plaintiff.

for the plaintiff. Comb. 232. Mich. 5 W. & M. in B. R. Somers v. Howe.

(H. a) Where they touch not Life nor Member.

Hutt. 14. S. C. but S. P. does not appear. —See (Z. a) pl. 14. S. C. —— Action upon the caſe lies for calling the plaintiff *thief*, and that he *ſtole* 2 *ſheep* of J. S. The *defendant ſaid that the plaintiff ſtole the ſame ſheep, by which he called him thief, as well he might*; and good per cur. *without expreſſing the value*; for if they are not worth 12 d. ſo that it is only petty larceny, and no felony of death, yet it *is felony in its nature*. Br. Action ſur le Caſe, pl. 3. cites 27 H. 8. 22.

Thou haſt ſtolen hay from Mr. Bell's racks. Hobart ſaid that judgment ſhall be given for the plaintiff; for it has been lately adjudged in this court, that where a man was charged with petty larceny to ſteal under the value of 12 d. an action will lie; for the diſcredit is not in the value, but in the taking with a felonious intent. Win. 6. Paſch. 19 Jac. Wetherley v. Wells.

[1. IF one man ſays of another, *that he has ſtolen a certain thing* [the ſtealing of] which *is but petty larceny*, yet an action upon the caſe lies; for this is a kind of felony, and a great ſlander, and he ought to be whipt for this by the law. Contra Mich. 37 & 38 Eliz. B. R. between CARTER AND HUNT, per curiam.]

[419]

Hob. 184. pl. 223. Hill. 14 Jac. Male v. Kett, S. C. —— Het. 172. Trin. 7 Car. S. C. in the ſame words, and ſeems to be copied from Hob. —— Mo. 883. pl. 1240. Hill. 14 Jac. Anon. but ſeems to be S. C. and adjudged actionable. —— Poph. 120. Mich. 15 Jac. B. R. May v. Kett, S. C. adjudged that the action would lie; but if he had ſaid that *he had ſtole his corn* generally, it had not been actionable; for it might have been growing, and then it had been but a treſpaſs. —— Brownl. 2. S. C. adjudged for the plaintiff.

[2. If A. ſays of B. *he ſtole corn out of my barn*, though it might be that the corn might *not* be *worth a penny*, yet the action lies; for this is felony, though not capital. Hob. Rep. 249.]

* Cro. J. 430. pl. 9. Miller's caſe, S. C. but ſee (Y. a) pl. 16. S. C. —— † Hob. 219. pl. 291. S. C. ‡ Fol. 44. —— Brownl. 11. Paſch. 16 Jac. Cruttal v. Hoſener, S. C. adjudged for the plaintiff.

[3. If one man ſays to another, *that he has the great pox*, an action upon the caſe lies, becauſe this is a great ſlander and diſgrace, inaſmuch as this comes by fornication, and no man will converſe with him. Paſch. 15 Jac. between * MILNER AND HIS WIFE v. REEVES. Hob. Rep. caſe 290. between † CRITTAL AND HORNER, adjudged; the words being, *he hath caught the French pox, and carried them home to his wife*; for the ſlander is not ‡ by reaſon of the ill means of getting it, but for the odiouſneſs of the infection.]

Cro. J. 144. pl. 3. S. C. by the name of Taylor v. Perkins, adjudged upon the firſt motion without argument. —— —— Noy 117. S. C. adjudged. —— S. C. cited Cro. J. 430. pl. 3. in Miller's caſe, by the name of Taylor v. Banks. —— S. P. admitted, and S. C. cited in the caſe of Crittal v. Horner. Hob. 219. pl. 291.

[4. If one man ſays to another, *thou art a leprous knave, and a leper*, an action upon the caſe lies; for he ought not to come into the ſociety of men if he be ſo, though this is a natural infirmity. Hill. 4 Jac. B. R. between TAYLOR AND PERR, adjudged.]

See pl. 4. S. C. but no ſuch point appears in any of the books there cited. —— See (S. a) pl. 21. S. C.

[5. If one ſays of another, *that he has the falling-ſickneſs*, no action lies. Hill. 4 Jac. B. R. between TAYLOR AND PEER.]

[6. If

[6. If one says to another, *thou art a bankrupt*, no action lies; *if* he be *of no trade*, nor used to buy and sell. Trin. 2 Jac. B.] See the notes on pl. 1. ——S. P. but because the declaration did not set forth that the plaintiff was of any mystery or trade, it was held insufficient; and judgment was stayed. Goldsb. 84. pl. 5. Pasch. 30 Eliz. Anon. ——See (U. a) pl. 18. ——See the notes on pl. 1.

[7. If one says of another, *thou art a common barretor, and I will indict thee for it at the next assises*; no action lies for these words. Trin. 4 Jac. B. R. between HAKE AND MOLTON, adjudged.] See (U. a) pl. 3. and see (S. a) pl. 15. —— Yelv. 90. Heake v. Moulton, S. C. adjudged accordingly, though the words there are, thou art a common barretor, *and deserveſt to be hanged*; for the words (common barretor) is not any slander, the offence being only fineable, and the party to be bound to his good behaviour, and sounds only in disgrace.

It seemed to the court, that for saying, *he is a common barretor*, an action does not lie; and therefore judgment was stayed. Cro. E. 171. pl. 11. Hill. 32 Eliz. B. R. Proud v. Howes. —— See (S. a) pl. 31. and (U. a) pl. 3. ——If spoke of one that is not an attorney, it is not actionable. Agreed per cur. and judgment staid. Keb. 569. pl. 19. Mich. 15 Car. 2. B. R. Ayer v. Steeply.

[8. If one says of another, *thou art a bawd, and doſt keep a bawdy-houſe*, action upon the case lies; for this is inquirable in a leet and punishable, and is a great defamation. Hill. 4 Jac. B. R. between TURNAM AND THORNE, per curiam, 38 & 39 Eliz. B. R. Dame Bartlet's case, adjudged, Mich. 10 Car. B. R. between ARNEST AND NICHOLS, adjudged; this being moved in arrest of judgment. Intratur, Mich. 10 Car. 27 H. 8. 14 B. per Fitz.] Noy 117. S. C. by name of Thorne v. Durham, S. P. admitted, especially she having declared that she kept a victualling house as her trade. ——But Cro. E. 643. pl. 44. Mich. 40 & 41 Eliz. C. B. Anon. it was * ruled, that for saying he keeps a bawdy-house, action does not lie, for by the common law he is not punishable, but by the *custom of London*; and therefore he should have sued in the spiritual court. —— Sti. 326. Pasch. 1652. Garland v. Yarrow, adjudged actionable. ——*He is not worthy to bear an office; for he keeps a bawdy-house in London.* Adjudged actionable. Bulst. 138. Trin. 9 Jac. Simpson v. Brook.

Thou art a whore, and a bawd to thy daughter, and keepeſt a bawdy-houſe. Sty. 326. Arg. cites it as adjudged actionable. Hill. 3 Car. Elsey v. Harrison.

You are a pimp, and a bawd, and fetch young gentlewomen to gentlemen. The court thought the words not actionable, because the word (bawd) is not actionable, without saying she keeps a bawdy-house. Sid. 438. pl. 4. Hill. 21 & 22 Car. 2. B. R. Cavel v. Birket. —— Mod. 31. pl. 76. Gavel v. Perked, S. C. the court were of opinion, that taking the words all together, they explain one another; and that it is such a slander as if true she may be indicted for it, and is punishable at common law. And judgment for the plaintiff, nisi, &c. ——Vent. 53. Gavell v. Burket, S. C. says the court inclined that the action would not lie; sed adjornatur; but the reporter cites Mod. that judgment was given for the plaintiff.

*[420]

[9. But no action lies for saying, *thou art a bawd*. Mich. 38, 39 Eliz. B. R. per curiam. Trin. 8 Car. B. R. between † HICKS AND HOLLINGHEAD, per curiam, in a writ of error, but the judgment affirmed for other words. Hill. 15 Jac. B. R. between ‡ Sir WM. READ AND HIS WIFE plaintiffs.] Action lies for calling bawd, either at common law, or by the spiritual law. Br. Action sur le Case, pl. 2. cites 27 H. 8. 14.

† Cro. C. 261. pl. 5. Trin. 8 Car. B. R. S. C. but dubitatur as to the word (bawd.)

It was agreed, that to say a woman is a bawd, will not bear an action; but to say *she keeps a bawdy-house*, will. Mar. 212. pl. 249. Trin. 18 Car. Chambers v. Ryley. ——It was agreed that the word (bawd) is not actionable, and consequently calling one so by circumlocution, is not as where the words were, *thou haſt taken 5s. of 2 whores and 2 rogues to help them to a clean pair of sheets, and I will have thee carted for it.* Sid. 241. pl. 2. Pasch. 17 Car. 2. B. R. Ward v. March. —— See tit. Prohibition (N) pl. 13. and the notes there.

‡ Cro. J. 462. pl. 9. S. C. the words were, *thou art a forſworn whore, and an old bawd*; and adjudged not actionable.

Thou art a bawd, and a pocky bawd, and I will root thy whores out of thy house. Twisden conceived the words not actionable; but curia e contra; and judgment for the plaintiff. Keb. 315. pl. 36. Trin. 14 Car. 2. B. R. Rogers v. Cocke.

Cro. C. 393. pl. 5. S. C. Judgment ſtayed. ——S. C. cited Vent. 53. in caſe of Gavel v. Burket, as agreed, that no action would lie for calling one bawd or pimp.—— Noy. 85. Lewes v. Whitton, ſays it was much debated, whether the words, *thou art a pandar to J. S.* were actionable at common law; but it was agreed that a ſuit might be brought for them in the ſpiritual court.

[10. If a man ſays of T. S. who is a ſoldier, *he is a pimp*, in an action brought for theſe words, if the plaintiff *avers that in London*, where the words were ſpoken, and in places adjoining thereto, a *pimp ſignifies as much as* if he had ſaid he was *a common bawd that ſolicited women to incontinency with men*, the action lies for theſe words upon this declaration, becauſe ſuch common bawd may be indicted for this offence. Hill. 10 Car. B. R. between DIMMOCK AND FAWSET, per Cro. & Bark. contra Jones, that the action lies; but it was adjourned. Intratur Mich. 10 Car. Rot. 148. But Paſch. 11 Car. this was moved again; and then the court was divided, and no precedents could be found of any indictment for ſuch an offence, but only for keeping a bawdy-houſe.]

Roll. Rep. 255. pl. 22. Louis v. Cook S. C. adjudged for the plaintiff. —Cro. J. 399. pl. 5. Paſch. 14 Jac. S. C. by the name of Loyd v. Cook in the exchequer chamber, all the juſtices and barons held the words not actionable; for to ſay, *thou art a witch*, has been often adjudged not actionable; and the adding, I have ſeen thy imps and ſpirits, is only fancy, and not triable; and ſo no cauſe of ſlander. Wherefore † judgment was reverſed.———3 Bulſt. 74. LOWES v. J. S. adjudged in B. R. for the plaintiff, but reverſed afterwards in the exchequer-chamber.

[11. If a man ſays that *J. S. is a witch, and I will prove him ſo; and I have ſeen him and his imps and evil ſpirits in the night appear to me, and he did* * *bewitch my child*; an action upon the caſe lies for theſe words, though he does not charge him to have done any damage to any perſon, by which he ſhould be puniſhable within the ſtatute of witches; for it is a great defamation to be a witch. My Reports, Mich. 13 Jac. B. R. between LOARS AND COOK, adjudged.]

* Cro. J. is (unbewitch.) And Roll. Rep. is (unwitch.)

† [421]

Brownl. 14. S. C. held the action would not lie. For he might bewitch him by fair words, or fair looks.

[12. If one ſays to another, *thou art a witch, and didſt bewitch me*, an action lies. Contra Mich. 17 Jac. B. between HINCH AND HEALE, adjudged.]

Thou haſt ſacrificed thy child to the devil; adjudged not actionable. Poph. 128. Paſch. 15 Jac. B. R. Anon. ſeems to be S. C.——See (Q. a) pl. 1. S. C.

[13. If a man ſays to another, *that ſhe ſacrificed one of her children to the devil, to the intent to bewitch his mother*, an action upon the caſe lies; for invocation of ſpirits is puniſhable by the ſtatute of witches. Paſch. 15 Jac. B. R. between LOCK AND LOCK, adjudged.]

See tit. Prohibition (N) pl. 2. and the notes there.

[14. If one ſays to another, *that he is a witch, or the ſon of a witch*, no action lies for theſe words (becauſe it lies not for the laſt, as it ſeems.) My Reports, 14 Jac.]

‡ Fol. 45.

[15. ‡ If one ſays to another, *that he is a witch*, no action lies, becauſe it is a common word of paſſion. Hill. 15 Jac. B.]

2 Le. 30. pl. 34. Trin. 30 Eliz. B. R. in caſe of Clark v. Green Arg. cites the caſe of Smith v. Morrice 30 Eliz. that the word (witch) is not actionable.——S. C. cited Godb. 341. in caſe of Shotter v. Emmet.——Reſolved per tot. cur. that the word (witch) is too general, and will not bear an action. Palm. 297. Trin. 20 Jac. B. R. Anne Knight's caſe.———See tit. Prohibition (N) pl. 2. in the notes there S. C.

[16. But

[16. But if one man ſays to another, *thou art a witch, and an inchanter, and thou didſt bewitch the children of J. S.* action upon the caſe lies; for he ſhews his intention to be that he is a true witch, and [that the words were] not ſpoke in a paſſion, and that he has done an injury to a man. Hill. 15 Jac. B.]

Thou art a witch and a ſorcerer; reſolved that the words are actionable; for

Gawdy ſaid, if he bewitches men, ſo as they die, it is felony; if he uſes witchcraft in any other manner he ſhall ſtand on the pillory, ſo that it is a ſlander in every reſpect, and a good cauſe of action; and adjudged for the plaintiff. Cro. E. 571. pl. 9. Trin. 39 Eliz. B. R. Rogers v. Gravat. ——If the words are only (witch and inchanter) no action lies; but if it be added (and haſt bewitched J. S. &c.) though J. S. be not dead, action lies; for thereby the defendant manifeſted his intent to be of witchcraft puniſhable by 32 H. 8. cap. 8. and 1 Jac. 12. Noy 22. Mich. 15 Jac. C. B. Stone v. Roberts. ——Brownl. 2. S. C. accordingly. ——Hutt. 13. S. C. adjudged for the plaintiff, becauſe it is coupled with an act done. ——*You inchanted my bull, and made him run mad about the common*, is not actionable. Sid. 424. pl. 4. Mich. 21 Car. 2. B. R. Seamor v. Moor. ——Lev. 276. Seamon v. More S. C. accordingly.

Thou art a witch, an inchanter, a necromancer, and a ſorcerer, and thereby waſt the death of my huſband. Adjudged actionable. Cro. E. 312. pl. 2. Hill. 36 Eliz. B. R. Forteſcue v. Hext.

He is a witch, and bewitched my huſband to death; for he made his picture in wax, and roaſted it every day by the fire, until he roaſted my huſband to death. It was objected that the reaſon given ſhews it a vain conceit, and ſo no reaſon for calling him a witch. But the words were held very heinous, and adjudged actionable. Cro. E. 312. pl. 2. Hill. 36 Eliz. B. R. Forteſcue v. Hext.

[17. If one ſays of another, *thou art a ſorcerer and inchanter*, no action lies; for ſorcery or inchantment is only cozenage, as fortune-tellers, &c. Mich. 7 Jac. between * Bevies and Mutton, adjudged, Trin. 24 Car. B. R. between † Yates and Linden, adjudged in arreſt of judgment, that no action lies for theſe words, *ſhe is a ſorcerer and a witch, and can witch and unwitch; ſhe is a white witch, and can witch and unwitch.* Intratur Trin. 23. Rot. 302.]

He liveth by charming ſorcery and witchcraft; held not actionable. 2 Le. 30. pl. 34. Trin. 30 Eliz. B. R. Clark v. Green.

——* 2 Brownl. 276. Mich. 7 Jac. C. B. ſeems to be S. C. by the name of Payn v. Mutton, and agreed by all the juſtices that the action does not lie.

§ † All. 37. Hill. 23 Car. B. R. S. C. Judgment againſt the plaintiff; becauſe ſhe is not accuſed of any offence againſt the ſtatute. ——Sty. 47. S. C. adjudged not actionable.

§ [422]

[18. If one ſays of another, *thou art a witch, without more words*, no action lies. Mich. B. R. between ‡ Lewis and Cock, adjudged that the action lies; but this was after reverſed in the exchequer-chamber in a writ of error. Contra Mich. 3 Jac. B. R. between || Edwards and Usely, adjudged.]

‡ See pl. 11. S. C. —— || Cro. J. 150. pl. 11. Hill. 4 Jac. B. R. Edwards v. Ouſley S. C.

Thou art a witch, and I will prove thee a witch; all the court held that the action well lies, eſpecially the words being ſpoken ſince the ſtatute which makes every witchcraft felony; and judgment for the plaintiff. ——Noy. 22. in caſe of Stone v. Roberts cites S. C. as adjudged actionable. ——She is a witch, held actionable. Cro. J. 639. pl. 1. Trin. 20 Jac. B. R. in caſe of Hunn v. Porter.

[19. If one ſays of another, *he hath bewitched my wear, and I can take no fiſh*, no action lies. Mich. 7 Jac. B. ſaid to be adjudged.]

2 Brownl. 276. in caſe of Payn v. Mutton S. P. cited to have been adjudged.

[20. If a man ſays of a woman, *thou art a bawd, and haſt bewitched me*, an action lies not for the word *bawd*, but for the other words it lies. Trin. 8 Car. B. R. between Hicks and Hollingshead, adjudged in a writ of error. Intratur, Hill. 7 Car. Rot. 765.]

Cro. C. 261. pl. 5. S. C. adds theſe words, viz. *(by witchcraft and ſorcery.)*

Jones and Crooke held that the action well lies for the laſt words (and haſt bewitched him), and they (cæteris abſentibus) made a rule that judgment be affirmed.

[21. If one ſays of another, *ſhe is a witch, and a very ſtrong witch*, no action lies. Mich. 8 Car. B. R. between GEORGE AND HARVY, the poſtea ſtaid in arreſt of judgment; and after, ſcilicet, Mich. 9 Car. this was adjudged againſt the plaintiff per totam curiam. And ſome of the judges thought there no puniſhment of witchcraft was at the common law; and if he be not charged with any act, it is not within the ſtatute of 1 Jac. and the word (ſtrong) does not inforce the other words.]

Cro. C. 282. pl. 22. S. C. adjornatur. Ibid. 324. pl. 6. S. C. and all the court ſeriatim delivered their opinions, that action lies not for calling one witch, without alleging ſome act done by her; but if it be ſaid that ſhe bewitched any man, or any thing, it well lies. —— Jo. 325. pl. 2. S. C. held that no action lies.

[22. If A. ſays to B. *thou art a witch; for thou didſt bewitch my wife's milk*, action lies, though he did not accuſe him of having done any harm to the milk. Mich. 18 Jac. B. R. between MARTIN AND STODDING, adjudged, this being moved in arreſt of judgment.]

Cro. J. 600. pl. 25. Martin v. Stradling, S. C. it was objected that it was inſenſible; for a feme cannot have milk of cows, but it is her huſband's; and it may be intended it was the milk in her breaſts, and that being doubtful it is not actionable; wherefore the court would adviſe.

[23. If A. ſays to B. *thou art a witch; for thou didſt bewitch my mother's drink, and what wilt thou have more? and we will prove her* [thee] *one before we have done with her* [thee] an action lies. Mich. 4 Car. B. R. Intratur. Trin. 4 Rot. 1063. adjudged, this being moved in arreſt of judgment.]

Cro. C. 141. pl. 17. Mich. 4 Car. B. R. Hughs v. Farrer, ſeems to be S. C. and all, beſides Whitlock J. conceived that the action lies, and adjudged for the plaintiff. —— Jo. 197. pl. 11. S. C. adjudged accordingly.

[24. If A. ſays to B. *thou art a witch; I will make thee ſay God ſave my mare, I was forced to have my mare charmed for thee*, no action lies for theſe words, becauſe for the word witch no action lies without more words, and the other words are not actionable; * for it is not well known what is intended by the words (*I will make thee ſay God ſave my mare;*) for in the country, where the words were ſpoken, it is uſual for men, when they paſs by cattle, to ſay *God ſave them*, otherwiſe they are taken for witches; and for the other words (*I was forced to have my mare charmed*), this implies that he procured another to charm her to prevent the witchcraft. Mich. 9 Car. B. R. between BOXHAM AND HIS WIFE v. DANGERS AND HIS WIFE, per cur. in arreſt of judgment. Intratur Trin. 9 Car. Rot. 1155.]

Cro. C. 320. pl. 1. S. C. by the name of Broxon v. Dager, rule was given to ſtay judgment until, &c.

* [423]

[25. If a man ſays of A. S. *ſhe is a witch, and is convicted at this aſſiſes* (innuendo *Lincoln aſſiſes*, &c.) *and J. S. was bound for her appearance*, an action lies for theſe words; for it ſhall be intended a conviction for ſuch witchcraft, for which ſhe might be indicted; for elſe † ſhe could not be convicted thereof at the aſſiſes; and therefore a great ſlander. Mich. 9 Car. B. R. between HILL AND JOHNSON adjudged, this being moved in arreſt of judgment. Intratur Hill. 8 Car. Rot. 1203.]

† Fol. 46.

Cro. C. 474. pl. 3. S. C. adjornatur. —— Ibid.

[26. If one ſays to another, *thou art a witch, and a ſtrong witch, and haſt bewitched me and my aunt; and therefore I will not marry him*, an action lies; for this implies a witchcraft to his perſon, which is within the ſtatute, as well as if to his goods; and

and it ſhall not be intended that he intends a bewitching by love, as it was objected. Trin. 13 Car. B. R. between CEELY AND HOPKINS, by 3 judges contra Croke, who inclined that the action did not lie, this being in arreſt of judgment. Intratur Paſch. 13 Car. Rot. 171. and after Mich. 13 Car. judgment was given accordingly for the plaintiff per totam curiam, juſtice Croke mutata opinione; and they ſaid that the procuration of unlawful love is within the ſtatute alſo.]

480. pl. 1. adjudged per tot. cur. for the plaintiff. Jo. 397. pl. 6. Seeley v. Hopkins, S. C. adjudged accordingly.—*She is a great witch.* Judgment was ſtayed. Sty. 11. Paſch. 23 Car. Helſena's caſe.

[27. If A. ſays, *that B. made a libel, which was made of A. in writing*, an action upon the caſe lies for A. againſt B. though the making of a libel is not an offence that concerns life or member, but only a fine and impriſonment in the *ſtar-chamber*, or upon an indictment at the common law. Mich. 13 Car. B. R. between SIR WILLIAM RUSSELL AND LIGON adjudged and agreed. And the queſtion was only upon the declaration, whether that was good, becauſe it was not ſhewn what was the effect of the libel. But nota, that there it was put in the declaration, that the plaintiff Sir W. B. was a juſtice of peace. It was ended by compoſition.]

[28. If one ſays of another, *thou art a witch, and didſt bewitch my cattle, or my mare*, action lies. Mich. 14 Car. B. R. between SMITH AND COKER adjudged per curiam, without queſtion, in two actions. Intratur Trin. 14 Car. Rot. 1498 and 1499.]

S. C. Jo. 409. pl. 1. the words were, that *thou and thy wife did bewitch my mare.* And adjudged for the plaintiff.——Cro. C. 512. pl. 7. S. C. adjudged for the plaintiff.

Thou didſt bewitch my cattle, or *my child*; there, becauſe an act is ſuppoſed to be done, an action will lie for the words. Godb. 341. pl. 435. in caſe of Shotter v. Emmet, cites Paſch. 44 Eliz. Lowe's caſe.

She is a witch, and by her means I loſt a mare, colt, and other cattle, held actionable. 2 Roll. Rep. 86. Paſch. 17 Jac. B. R. Banes v. Murton.

Thou art a witch, and didſt bewitch my child. The words ſhall be taken in mitiori ſenſu, as that thou haſt bewitched him with pleaſure. Godb. 341. pl. 435. cites Trin. 21 Jac. Mellon v. Hern. — Sid. 53. pl. 18. Mich. 13 Car. 2. B. R. Twiſden J. cited Adamſon's caſe, in which were taken all the differences as to calling a perſon witch, and that it was held that to ſay, thou art a witch, is not actionable; but to ſay thou art a witch, and haſt bewitched my mother's milk, drink, hogs, &c. children, [is actionable.] But that to ſay (thou art a witch, *and haſt bewitched J. S.*) quære if this be actionable, becauſe he may be captivated with the amiableneſs of the perſon of the plaintiff, &c. And ſo, by ſome, the *difference* is between ſaying that ſhe has bewitched *a thing which has ſenſe and a thing which has none.*

[424]

[29. If one ſays to another, *the devil appears to thee every night in the likeneſs of a black horſe, and thou conferreſt with him; and whatſoever thou doſt aſk he gives it thee; and that is the reaſon thou haſt ſo much money*, an action lies for theſe words. Hob. Rep. 159. and 172. between MARSHALL AND STEWARD adjudged.]

Hob. 129. pl. 165. S. C. adjudged for the plaintiff. —Brownl. 8. Mich. 13 Jac. S. C. adjudged accordingly.——Mo. 868. pl. 1204. S. C. adjudged accordingly, by reaſon of the words, (thou conferreſt with him;) for this is felony by the ſtatute of 1 Jac.——S. P. by Coke Ch. J. 3 Bulſt. 74. Mich. 13 Jac. in caſe of Lowes v. J. S.——*Thou doſt work by necromancy, and doſt work by the devil.* Adjudged actionable. Yelv. 150. Mich. 6 Jac. B. R. Anon.

[30. In an action upon the caſe, if the plaintiff declares that the defendant ſaid to the plaintiff, in preſence of divers perſons, *I do count thee to be a witch;* and at another day after, that the defendant requeſted, and greatly *deſired to have the plaintiff ſearched;*

All. 20. Markham v. Adamſon, S. C. adjudged that the words did not im-

port any accuſation of any offence within the ſtatute.—— Sty. 5. Hill. 21 Car. B. R. Nulls v. Cheney, S. P. held accordingly, and ſeems to be the S. C.

ed; and thereupon the plaintiff demanded of the defendant, why he would have him ſearched; to which the defendant anſwered, *becauſe I do accuſe you to be a witch*, the action does not lie upon this declaration, becauſe partly it is not alleged that the laſt words which were ſpoken at another day, were ſpoken in the hearing of others; and then it ſhall be intended to be ſpoke at a private conference between themſelves; and ſo theſe words of no force to maintain the action, and if they were of force, and well alleged, yet it cannot appear that he intended that he was ſuch a witch, or had teats, or had any familiarity with the devil, or had done any other thing to draw him within the compaſs of the ſtatute of 1 Jac. *of witches*, but that he deſired to have him ſearched for his ſatisfaction. Mich. 22 Car. B. R. between MARCHANT AND ADAMSON adjudged, upon great debate, after a verdict for the plaintiff. Intratur Paſch. 22 Car.]

Sty. 206. Mich. 1649. S. C. the court being divided, it was adjorned for further argument.

* Fol. 47.

[31. If A. the wife of B. ſays of C. a female-ſole, *C. did bewitch my good man, and ſhe is a witch, and I will prove it*, and thereupon C. brings an action againſt A. and B. her huſband for theſe words, and there was an innuendo after the words (my good man) viz. innuendo, the ſaid B. the huſband of A. now one of the defendants; and though it was objected, that it is not certain who was intended by the words, my good man, yet this is a common phraſe * in the country for a huſband, whereof the court is to take notice. But it was adjudged upon this reaſon, by all the court, that this implied that ſhe bewitched a man, and if one ſays of another, that he has bewitched a man, without naming any man, an action lies, and here ſhe ſays that ſhe had bewitched a good man, and if ſhe bewitched any man it is felony within the ſtatute 1 Jac. and therefore the action lies in this caſe. Trin. 1650. between ADSTON plaintiff v. HUNTER AND ISABEL his wife defendants, adjudged, this being moved in arreſt of judgment.]

S. P. per cur. 4 Rep. 15. b. Paſch. 27 Eliz. in pl. 4. accordingly.

32. Action upon the caſe for calling him *villein*, the *defendant ſaid* that the plaintiff *is his villein, without ſaying and not frank*, where he pleads to the perſon; but *contra* if he had pleaded it *in bar*; for the writ ſuppoſes that the plaintiff is frank, which *ſhall be anſwered in a bar, or a negative*; contra to the perſon. Br. Nonability, pl. 47. cites 15 E. 4. 32.

33. *Men cannot have their cattle going upon the common, but John Barber and his children will kill them with Barber's dogs.* Adjudged actionable in C. B. but reverſed in B. R. D. 118. b. pl. 79. Mich. 2 & 3 P. & M. Hawley v. Barber.

*[425] S. C. cited by Popham, as adjudged actionable. Mo. 428. in pl. 597.

34. *Thou maintaineſt ſuch a ſuit*, cited by Popham Ch. J. Cro. E. 297. pl. 7. Paſch. 35 Eliz. B. R. to have been adjudged actionable upon good † deliberation, in caſe of Sir HEN. PORTMAN v. STOWELL; for maintenance is unlawful and odious.

He is a witch, and deſerves to be hanged as well as Arthur that was hanged for a witch.

35. *Thou old witch, thou old whore, leave off thy witching, or elſe thou ſhalt be hanged or burned, if I can do it.* Held not actionable. Hutt. 132. Hill. 12 Car. Souſer v. Burton.

The whole court agreed that to ſay, thou art a witch, and deſerves to

to be hanged, is actionable, becauſe the words (and deſerveſt to be hanged) explain what manner of witch he intends, and then whether Arthur was hanged or not, is not material. Sid. 52. pl. 18. Mich. 13 Car. 2. B. R. Dacy v. Clinch. ——Raym. 35. Dacy v. Linch. S. C. adjudged for the plaintiff. ——*You are a witch, and I will ſwear it, and if you croſs me too much, I will hang you for it.* The words (I will hang you for it) ſhews what witch he intends; and judgment for the plaintiff. Lev. 255. Mich. 20 Car. 2. B. R. Shagter v. Davis. ——Sid. 386. pl. 18. Slayter v. Davis S. C. accordingly. ——*Thou art a witch, and I will make thee ſuffer for a witch.* Powell J. held that the words ſhould be taken in mitiori ſenſu, and that the word (ſuffer) is wholly uncertain, as to what manner of ſuffering was intended; but the other 3 juſtices gave judgment for the plaintiff. 3 Lev. 394, 395. Paſch. 6 W. & M. in C. B. Stephens v. Corbin. ——Comb. 246. S. C. in B. R. ſays that Eyre J. conceived the words actionable, but the other 3 juſtices e contra.

36. *Thou art a regrator, and didſt regrate by ſelling at* 12*s. when thou boughteſt at* 10*s.* held not actionable, it being not malum in ſe, nor carrying a ſcandal in it, nor importing any crime that expoſed to loſs of life or limb; judgment for the defendant. 2 Show. 32. pl. 24. Hill. 30 & 31 Car. 2. B. R. Scoble v. Lee.

37. N. B. It may be impertinent to add any thing more as to witches or witchcraft, &c. ſince the ſtatute of 9 *Geo.* 2. *cap.* 5. *ſ.* 3. enacts, that *no proſecution ſhall be againſt any perſon for witchcraft, ſorcery, inchantment, or conjuration, or for charging another with ſuch offence.*

(I. a) For *Adjective* Words.

[1. IF a man ſays of J. S. *he is a baſe beggarly bankrupt-knave,* an action lies; for this is all one as if he had ſaid he is a baſe beggarly knave, and a bankrupt. Mich. 10 Car. B. R. between STILE AND FINCH, adjudged per curiam; this being moved in arreſt, upon a variance between the writ and ..... and held per curiam all one.]

Cro. C. 381. pl. 8. S. C. but S. P. does not appear. ——*Thou art a bankrupt-knave*; the court doubted if they were actionable or not. Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B. Robinſon v. Meller.

Thou art a bankrupt-rogue, and accounted a common knave, not actionable, the plaintiff being neither merchant nor tradeſman. Cro. J. 424. pl. 7. Paſch. 15 Jac. B. R. Loyd v. Pearſe.

†[426]

[2. If one ſays to another, who is a trader, *thou art a bankrupt knave,* an action upon the caſe lies againſt him. Paſch. 1 Jac. B. adjudged. Dubitatur, &c. Paſch. 44 Eliz. B. R. between GREY AND WESTON. Paſch. 12 Jac. B. R. between * SELBY AND CARRIER, adjudged. Mich. 7 Jac. B. Trin 8 Car. in the exchequer-chamber, between BEARE AND ROWE, adjudged per totam curiam, in a writ of error; for here *bankrupt is* not an adjective, but a *ſubſtantive,* and knave another ſubſtantive.]

* Cro. J. 345. pl. 13. S. C. adjudged for the plaintiff. ——2 Bulſt. 210. S. C. adjudged accordingly. —— Roll. Rep. 22. pl. 28. S. C. accordingly. ——S. P. doubted Cro. E. 843. pl. 23. Trin. 43 Eliz. C. B. Robinſon v. Meller. ——Cro. E. 911. pl. 23. Mich. 44 & 45 Eliz. B. R. Woolverſton v. Meres, S. P. adjudged that the action lay, he ſhewing that he was a merchant; and affirmed in a writ of error. ——S. C. cited Roll. Rep. 22. in caſe of Selby and Carrier, as adjudged, and affirmed in error.

† A tanner brought action for ſaying, *thou art a bankrupt-knave,* held not actionable, but quære. Brownl. 16. Mich. 14 Jac. York v. Cecil.

So of *he is a bankrupt-ſlave,* though the defendant juſtified for that the plaintiff had been formerly a bankrupt, becauſe he does not allege that he ſtill continues ſo. Cro. J. 578. pl. 7. Trin. 18 Jac. B. R. Upſheer v. Betts.

So of *bankrupt-rogue,* adjudged actionable. Godb. 151. pl. 196. Paſch. 5 Jac. C. B. Langley v. Colſon. ——S. P. where the words were ſpoke of a ſhoemaker, adjudged actionable; for the addition of rogue is an aggravation. Cro. C. 31. pl. 1. Paſch. 2 Car. C. B. Crumpe v. Barne. —— Hutt, 124, 125. Paſch. 10 Car. Dawe v. Palmer. S. P. ——See (K. a) pl. 2.

You

You are a bankrupt-ſkrub, held actionable; for the word bankrupt in itſelf is not an adjective, and the joining it with ſkrub does not make it ſuch, but it ſhall be taken as if he had ſaid you are a ſkrub, and alſo a bankrupt; and judgment accordingly. Sty. 75. Hill. 23 Car. B. R. Wilſon v. Crow.

So of *traitor-knave*, becauſe here are 2 nouns; otherwiſe if the words are *a traiterous knave*, there the words are not actionable, becauſe the adjective word has reference to the ſubſtantive; per Coke Ch. J. to which the whole court agreed clearly. 2 Bulſt 210. in caſe of Selby v. Carrier.

Thou art a bankrupt-knave, and a pocky knave, and let them that ſtand by bear witneſs, and I will prove it. Adjudged for the plaintiff. Cro. E. 99. pl. 1. Trin. 30 Eliz. B. R. Inglebath v. Jones.

S. P. Cro. J. 345. pl. 13. in caſe of Selby v. Carrier. ——Godb. 151. pl. 196.

[3. If a man ſays to a merchant, *thou art a bankruptly knave*, no action lies; for this is but as much as to ſay, *thou art a bankrupt-like knave*, and is not actionable. Paſch. 5 Jac. B. between AND PERKINS, per curiam. Contra Co. 4. 19.]

Paſch. 5 Jac. C. B. in caſe of Langley v. Colſon, the words were, thou art a bankruptly knave, *and canſt not be truſted in London for a groat*, adjudged not actionable.——Sid. 103. pl. 10. Hill. 14 & 15 Car. 2. B. R. in caſe of Booth v. Seele, the court admitted the words bankruptly knave to be actionable.——Lev. 90. Booth v. Leach, S. C. It was ſaid by Allen that the words (bankruptly knave) had been adjudged actionable.

See (B. b) pl. 2. S. C.

[4. If one ſays to another, *thou art a murderous quean*, no action lies for theſe words, becauſe the words are adjectively ſpoken. Hill. 11 Jac. B. R. PETT'S CASE, adjudged.]

Thou art a ſheep-ſtealer, adjudged actionable. 3 Bulſt. 303. Mich. 1 Car. B. R. Parret v. Parret. ——

[5. If one ſays to another, *thou art a ſteal-ſheep, and a ſteal-calf, and partner with a coiner*, an action lies for the words ſteal-ſheep and ſteal-calf, though they are adjectively ſpoken; for in ſenſe it is as much as to ſay thou art a ſtealer of ſheep, and a ſtealer of calves. Mich. 5 Jac. B. between ASTON AND GOFFE per curiam.]

So of *ſheep-thief*, it was argued that theſe words were well underſtood in the country where ſpoken, and where they are laid to be ſpoken, viz. in Weſtmoreland, and adjudged actionable. 2 Bulſt. 145. Mich. 11 Jac. Steeneman v. Richardſon.

* Cro. C. 318. pl. 11. B. R. S. C. adjudged accordingly.—Jo. 326. pl. 7. Mich. 9. Car. B. R. adjudged for the plaintiff per tot. cur. ——All. 61. Paſch. 24 Car. B. R. in the caſe of Chappel v. Goodhouſe,

[6. If a man ſays of J. S. *where is that long-locked, ſhag-haired murdering rogue?* and *being aſked what perſon he intended thereby, he anſwers* the ſaid *J. S.* an action lies for theſe words, though they are adjective words. Trin. 9 Car. B. R. between * GREEN AND LINCOLN; this being moved in arreſt of judgment upon ſuch a declaration, and ſtaid; but Mich. 9 Car. judgment was given for the plaintiff per totam curiam, præter Bark, who ſeemed e contra. Intratur Hill. 8 Car. Rot. 1252. But it was ſaid by ſerjeant Hendon, that it was adjudged in B. this term, that an action lies for theſe words, *thou art a murdering knave*, between † WILSON AND MINSHAWE, which Intratur Paſch. 8 Car. B. Rot. 724. But there the words were further, and if it had not been for me, thou hadſt been hanged.]

S. C. cited by Roll Ch. J. as adjudged actionable.——See (H. b) pl. 11. S. C.

† S. C. cited Cro. C. 318. pl. 11. as adjudged Hill. 7 Car. C. B. between Wilſon & Meaſon. ——S. P. cited by Henden as adjudged in C. B. Jo. 326. pl. 7.

See (I. a) pl. 4. S. C. — *He is a rogue, a baſe rogue, a cozening rogue,*

[7. If one ſays to another, *thou art a coney-catching cheating thief*, an action lies for theſe words; for this is as much as if he had ſaid thou art a thief, and a coney-catcher, and cheater. Hill. 9 Car. B. R. between BEDHEAD AND SMITH, adjudged; this being

being moved in arreſt of judgment. Intratur Trin. 9 Car. B. R. Rot. 1248.] *a coney-catching rogue, and*

a cut-purſe rogue. Judgment quod querens nil capiat per breve. Palm. 10. Mich. 17 Jac. B. R. Trevillian v. Betty.——Cro. J. 536. pl. 1. Betts v. Trevanian, S. C. It was argued that the firſt words (he is a rogue) are but words of ſpleen, and the ſubſequent words rely upon the word (rogue,) and are but additions and adjectives to that word; adjudged not actionable.——2 Roll. Rep. 91. Brett v. Trevillian, S. C. but ſeems not very clear.

Cheating knave, ſpoken of a lime-burner, or of any man of any trade or profeſſion, in reference to his trade, is actionable; admitted. Lev. 115. Mich. 15 Car. 2. B. R. in caſe of Terry v. Hooper.——Raym. 87. S. P. by Windham and Twiſden J. in S. C.

[8. If one ſays to another, *thou art a falſe, forſworn whore-thief*, an action lies for theſe words. Mich. 14 Car. B. R. between COKE AND * BRAMPTON, adjudged in a writ of error upon a judgment in LUDLOW, and the firſt judgment affirmed accordingly. Intratur Trin. 14 Car. Rot. 1494.] *Thou art a thief, and* * Fol. 48. *a main-ſworn thief,*

judgment was arreſted upon the pleadings, ſo that whether the action lay or not is not determined. Brownl. 6 Hill. 1 Jac. Smalles v. Belt.——S. C. cited by the name of Small v. Bell, Hob. 126. in pl. 156.

Thou art a main-ſworn lad, adjudged actionable. Hob. 126. pl. 156. Trin. 14 Jac. Slater v. Franks.

9. *G. is a couzening knave, and ſo I have proved him before my lord mayor, for ſelling me a ſaphire for a diamond*, the action does not lie. Hutt. 13. cites 26 Eliz. in the exchequer, Gittings v. Redſerve. And by Manwood, if A. ſays of B. *thou art a couzening*

knave, and haſt couzened me of 500 *l.* no action lies, which the court agreed. Ibid.

He is a cozening knave; for he had me to Coventry, and there cozened me of 40 *s.* adjudged actionable; but the judgment was reverſed in the exchequer-chamber. 3 Le. 171. pl. 222. Mich. 29 Eliz. B. R. Middlemore's caſe.——S. P. cited Arg. Hutt. 52. as adjudged in caſe of Middlemore v. Warlow.——S. C. cited by Wray Ch. J. by the name of Warker v. Middlemore, Cro. E. 95. pl. 7. and ſaid that judgment was given for the plaintiff in B. R. and that a writ of error was then pending thereof in the exchequer-chamber, but never was moved; for if it had, they would not have given judgment. And the reporter ſays, nota, Trin. 30. that judgment was reverſed in the exchequer-chamber.——S. P. accordingly, Mo. 261. pl. 410. Paſch. 30 Eliz. George's caſe.——Cro. E. 95. pl. 7. George's caſe, S. C. accordingly.——Hutt. 14. George v. Whitlock, S. C. accordingly.——S. P. adjudged not actionable, and judgment affirmed in the exchequer-chamber, and it is ſaid that *our law takes no notice what a cozener is.* Hutt. 14. Hill. 30 Eliz. B. R. Walcot v. Hind.

He was ſuitor to a widow in S. and cozened her of her money, in procuring falſe witneſſes to cozen her, adjudged not actionable. Ow. 47. Trin. 30 Eliz. Gilbert's caſe.

He is a very bad fellow; for he made J. S. drunk in the night, and couzened him of 100 *marks*; not actionable. Goldſb. 125. pl. 12. Hill. 43 Eliz. Somerſtaile's caſe.

Thou art an arrant knave; for thou haſt couzened all Coventry, ſpoke of a merchant, and cited by Williams J. Bulſt. 173. to have been adjudged not actionable.

And in the principal caſe there the words were, *he hath couzened the earl of H. of as much as he* (innuendo the plaintiff) *is worth*, not actionable, though the plaintiff was high ſheriff of the county, and a juſtice of peace. Bulſt. 172. Trin. 9 Jac. Tut v. Kerton.

You are a couzening knave, and did couzen me of 1200 *l. at one time, and that was in making an account in the year* 1648, being ſpoke by defendant who had been *copartner* in trade with the plaintiff, adjudged actionable; and ſo by Roll Ch. J. it would, had the copartnerſhip continued. Sty. 388. Mich. 1653. Townſend v. Barker.

Your maſter is a couzening cheating knave, and a rogue to boot, and couzened and cheated all the pariſh, (innuendo the pariſh of W.) *and all perſons he deals with*, not actionable, and judgment ſtayed. Show. 181. Mich. 2 W. & M. Tamlin v. Hamlin.

He is a couzening knave, and lives by couzenage, adjudged not actionable, though ſpoke of a knight, and one of the gentlemen of his majeſty's privy-chamber. Godb. 284. pl. 407. Mich. 15 Jac. B. R. Sir Wm. Bronker's caſe.——Cro. J. 427. pl. 1. Sir Wm. Brunkard v. Segar, S. C. Mountague held that the quality of the perſon ought to be conſidered; but the other juſtices doubted, and willed that precedents be ſearched.——S. C. cited per cur. Cro. J. 619. (bis) Mich. 18 Jac. B. R. in pl. 9. that ſuch words were not actionable.

10. *Rebellious and traiterous knave.* It was inſiſted that rebellious may be upon a proclamation of rebellion out of chancery, *Traiterly knave*, was held action-

or

able, and ſo affirmed a judgment in C. B. Sid. 103. pl. 10. Hill. 14 & 15 Car. 2. B. R. Booth the words are the plaintiff, niſi, &c.

or other courts, and when rebellious and traiterous are coupled together, they are of the ſame ſenſe. But per cur. action lies not for the words (rebellious knave,) but (traiterous) being joined with it, action lies; * and the plaintiff had judgment. Cro. E. 171. pl. 14. Hill. 32 Eliz. B. R. Ward v. Thorne.

v. Seele.——Lev. 90. Booth v. Leach, S. C. *traitorly rogue*, the court ſeemed that actionable.—Keb. 439. pl. 28. S. C. adjornatur. Ibid. 469. pl. 77. Judgment for

Thou art a thieving rogue, was held actionable, becauſe it implies an act done; and ſo for the words, *thou art a buggering rogue, and I could bang thee.*

11. Adjective words are actionable, when the *adjective preſumes an act committed*, and alſo when it *ſcandalizes one in his office, or function, or* in the *trade by which he acquires his living;* as if A. ſays that B. is a *perjured knave*, there muſt be an act done, or otherwiſe he cannot be perjured; ſo if he ſays of an officer or judge that he is a *corrupt officer or judge*, action lies for both cauſes; as, firſt, becauſe it implies an act done; and 2dly, it is ſlanderous to him in reſpect of his office; per cur. 4 Rep. 19. a. Mich. 44 & 45 Eliz. B. R. in pl. 15.

Sid. 373. pl. 13. Trin. 20 Car. 2. B. R. Collier v. Burrel.——2 Keb. 377. pl. 36. Collier v. Bourn, S. C. accordingly.———The court were of opinion that the words, (buggering rogue) were actionable. All. 61. Paſch. 24 Car. B. R. Chapple v. Goodhouſe; ſed adjornatur.——— Per 3 juſtices, thieving rogue, imports an act, but, thieviſh rogue, only an inclination, and therefore inclined that calling the plaintiff, thieving rogue, &c. was actionable; but Charleton e contra. Freem. Rep. 279. Paſch. 1681. C. B. Dorrel v. Grove.

* Cro. J. 65, 66. pl. 5. Paſch. 3 Jac. S. P. ſeems admitted, Robins v. Hildredon.——— S. P. Arg. ſaid to have been adjudged.

12. *But where it does not imply an act done*, but an inclination only to an act, which does not ſcandalize the party in the duty of any office or function, or in his trade, there an action does not lie; as by ſaying that he is a *ſeditious* or * *thieviſh knave*, which do not import any act done, but an intent or inclination only to it, which is not puniſhable by the common law. 4 Rep. 19. b. Mich. 44 & 45 Eliz. B. R. per cur. in pl. 51.

2 Bulſt. 138.—S. P. by Jones J. Lat. 47. Adams's caſe.——S. P. per cur. Sid. 373. Trin. 20 Car. 2. B. R. in pl. 3.——But to ſay, thou art a *thieviſh pirate*, is actionable; per Jones J. Lat. 47.———Same difference taken and agreed per tot. cur. Ld. Raym. Rep. 236. Trin. 9 W. 3. C. B. in caſe of Oſborn v. Poole.

Cro. J. 120. pl. 1. S. C. adjudged for the defendant per tot. cur. becauſe it did not appear that he was ſworn, nor

13. Words ſpoken of a church-warden were, viz. *thou haſt perjuredly preſented me at the viſitation.* Williams and Yelverton held, that becauſe the words were adjectively ſpoke, and likewiſe not ſhewing what thing he preſented, ſo as it might appear to the court to be within his charge, and preſentable by him, the action did not lie; but Fenner ſaid nothing, & adjornatur. Cro. J. 80. pl. 3. Mich. 3 Jac. B. R. Stile v. Heath.

what he ſwore, ſo as he might commit perjury; nor that it was in any judicial proceeding. Cro. J. 120. pl. 1. Trin. 4 Jac. B. R. Sill v. Heath.———Yelv. 72. S. C. per Fenner, Yelverton, and Williams, abſente Popham.

14. *Thou haſt thieviſhly taken my money out of my purſe.* Not actionable. Yelv. 72. Arg.

15. *Thou haſt dealt traitorouſly with J. S.* is not actionable. Arg. But Yelverton J. made it a quære, if the words were, *thou haſt dealt traitorouſly with the king.* Yelv. 72. Mich. 3 Jac.

16. *Thou art a roguiſh knave and a thief.* Per cur. though this is ſpoke in the adjective ſenſe, yet the word (thief) here is a diſtinct

ſtinct word by itſelf, and ſcandalous. And judgment for the plaintiff. 2 Bulſt. 134. Mich. 11 Jac. Baily v. Maynard.

17. *Thou art N.'s hackney*, (innuendo) *thou art a thieviſh whore and a pocky whore, and I will prove thee a pocky whore.* Adjudged not actionable, becauſe ſpoken adjectively. 2 Roll. Rep. 71. Hill. 16 Jac. B. R. Gulford's caſe.

* 18. Action lies for ſaying of a merchant, *he is a broken merchant*, it being all one as the calling him a bankrupt. Agreed per tot. cur. Jo. 321. pl. 5. Trin. 9 Car. B. R. in caſe of Leycroft v. Dunkin. Cro. C. 317. pl. 14. S. P. in S. C.

19. *Thou art a perjured prieſt.* Adjudged actionable; for the words muſt mean that he was guilty of perjury, for which he might be indicted. Sty. 6 Hill. 21 Car. Hogg v. Vaughan.

20. *Thou art a baſtard-bearing whore, and hadſt two baſtards by a butcher; and I will prove it.* It was objected that the words were ſpoken of a feme covert, who cannot have a baſtard. At another time Roll Ch. J. agreed, that if ſhe were married at the time of the words ſpoken, ſhe could not have a baſtard, but aſked why they ſhould not be actionable; for the words purport that ſhe was not married when ſhe had the baſtards, and the jury have found for the plaintiff, and judgment for her niſi. Sty. 424, 425. Mich. 1654. Stevens v. Aſk.

21. *You are a thieving rogue, and get your living by filching and ſtealing.* It was moved that the words imply only an inclination. Sed non allocatur; for they imply a habit and a trade of thieving. And judgment for the plaintiff. 2 Keb. 440. pl. 94. Mich. 20 Car. 2. B. R. Hunt v. Merry-church. *Thou haſt no more than what thou haſt got by cozening and cheating*; per cur. not actionable, becauſe he did not aver that he was of any trade, or that he had any thing. 12 Mod. 307. Mich. 11 W. 3. Bromfield v. Snoke.

(K. a.) *Interrogative* Words.

See (I. a) pl. 6.

[1. IF one ſays to another, *when wilt thou bring home the 9 ſtolen ſheep which thou ſtoleſt from J. S.?* an action lies for theſe words. Mich. 37 & 38 Eliz. B. R. between HUNT AND THIMBLETHORP adjudged.] Mo. 418. pl. 573. S. C. adjudged accordingly. ——*Have you brought home the* 40*l. you ſtole?* Adjudged for the plaintiff, and affirmed in a writ of error. Cro. J. 568. pl. 5. Paſch. 18 Jac. B. R. May v. Gybbons.——2 Roll. Rep. 165. Mayott v. Gibbons, S. C. adjudged for the plaintiff.——Palm. 66. Gibbon v. Magot, S. C.

2. *Where is that bankrupt knave? where is that pillory knave?* (innuendo the plaintiff) and averred he was a merchant. Adjudged actionable. Cro. E. 26. pl. 7. Paſch. 26 Eliz. C. B. Griffith v. Moriſon.

3. *What art thou? a bankrupt, and waſt a bankrupt.* The court held that the anſwer to the interrogation is a direct affirmative, but they would adviſe, &c. Cro. E. 273. pl. 1. Paſch. 35 Eliz. B. R. Jordan v. Lyſter.

4. *Did you not hear that C. is guilty of treaſon? &c.* Reſolved that this is tantamount to a ſcandalous publication. 12 Rep. 134. Mich. 10 Jac. in the earl of Northampton's caſe.

5. *Hath that baſtard B. N. cauſed you to be arreſted? is that all the ſpight that baſtard can do you?* Reſolved that theſe words are ſpoken affirmatively, and not by way of interrogation; and having loſt his marriage by reaſon thereof, a judgment given in C. B. for the plaintiff was affirmed. Cro. J. 422. pl. 3. Paſch. 15 Jac. B. R. Nelſon v. Staff.

6. *Did not you ſteal 40l.?* Per Dodderidge J. theſe words are not actionable; for this is nothing more than an interrogation. 2 Roll. Rep. 166. Trin. 18 Jac. B. R. in caſe of Mayott v. Gibbons.

7. *Haſt thou been at London to manage the money thou ſtoleſt from me?* Barkley and Jones (the other juſtices being abſent) held
[430] the words actionable; for the firſt words are the words of interrogation, and the ſubſequent words, viz. the money thou ſtoleſt from me, is a poſitive affirmation. Mar. 58. pl. 90. Mich. 15 Car. Anon.

8. *You are no thief?* Theſe words, with an averment that they imply an affirmative, will bear an action. Per Barkley J. Mar. 8. Paſch. 15 Car. in pl. 18.

9. *B. thou rogue, wilt thou murder my ſiſter, as thou didſt thy wife?* (innuendo A. then dead.) Adjudged actionable; for the ſcandal is the greater if ſhe be not dead; and being ficta & falſa, they ſhall be intended ſcandaloſa. Keb. 359. pl. 52. Mich. 14 Car. 2. B. R. Brown v. Charlton.

(L. a) Words *in the Preter Tenſe.*

Sty. 22, 23. Paſch. 23 Car. S. C. Roll Ch. J. held it not actionable; but Bacon J. contra. Curia adviſare vult.——

[1. IF a man ſays of J. S. a juſtice of peace, *J. S. was a debauched man, and* * *was not fit to be a juſtice of peace*, no action lies for theſe words; becauſe it might be that he was ſuch a debauched perſon in time paſt, and was not then worthy to be a juſtice of peace. Paſch. 1650. B. R. between HAMOND AND KINGSMILL, adjudged per curiam in arreſt of judgment, intratur. Hill. 22 Car. Rot. 735.]

Sty. 210. Paſch. 1649. S. C. Judgment quod querens nil capiat per billam.

* The word in Sty. 22. & 210. is (*is* not fit, &c.)——S. C. cited Lev. 52. as adjudged not actionable, and there the words are, *he is a debauched man, and unfit to be a juſtice.*

Noy 157. Smith's caſe, *thou haſt had the French pox*, not actionable. And Coke Ch. J. took this *difference* of ſuch a ſlander de tempore præterito, *when it touches the mind*, and when it *touches the body*. If it be a ſcandal to the mind and the affections, as perjury, felony, &c. there the mind that remains is ſlandered; but if it be of an accidental infirmity or diſeaſe of the body, it is otherwiſe; for none now will forbear his company, though he had the plague in times paſt.——S. P. held not actionable. Ail. 31. Mich. 23 Car. B. R. in caſe of Dutton v. Eaton.——See (Y. a) pl. 24. S. C.

[2. If one ſays to another, *thou art a baſe fellow, and haſt the French pox*, no action lies; for peradventure he had the pox, but is now cured of it, and ſo no one will avoid his company. Paſch. 6 Jac. between ALLEN AND SMITH adjudged.]

3. *I will prove that E. had been a bankrupt, and had agreed wit his creditors for a noble in the pound.* Theſe words are actionable, being ſpoken of a merchant. D. 72. marg. pl. 6. cites it as adjudged Hill. 3 Jac. B. R. Rot. 855. Edmonds v. Whetſtone.

4. *Thou waſt perjured, and haſt much to anſwer for before God.* It was objected that it is in the time paſt, and is extenuated by the ſubſequent words, quaſi diceret, although not anſwerable before men, yet [he was] before God; ſed non allocatur. And adjudged for the plaintiff. Cro. C. 199. pl. 12. Trin. 6 Car. B. R. Smart v. Eaſdale.

5. *Thou cameſt a broken merchant from Hamburgh,* (innuendo at his return from Hamburgh into England) *and that I will juſtify.* It was objected that the plaintiff having ſhewn in his count that he came over about eight years ſince, he might become a rich perſon and of good credit ſince that time, and ſo no action; and of that opinion was Richardſon Ch. J. for that ſlander ought not to be taken by intendment; but the plaintiff having charged that the words were ſpoken maliciouſly and to impair him in his credit, it was adjudged by the other three juſtices for the plaintiff. Cro. C. 317. pl. 14. Trin. 9 Car. B. R. Leycroft v. Dunker. Jo. 321. pl. 5. S. C. and it being found that the plaintiff was damnified by reaſon of the words, judgment was given by 3 juſtices for the plaintiff, Richardſon contra.

Hutt. 125. in caſe of Dawe v. Palmer, cites Dunkin v. Leycroft S. C. as adjudged and affirmed in the exchequer chamber.

[431]

6. Caſe by huſband and wife, for ſaying of her, viz. *ſhe is a ſtrumpet and a bawd, and kept a bawdy-houſe;* it was moved in arreſt of judgment that the laſt words only are actionable, and thoſe are of the time paſt, and ſo may be intended that ſhe kept a bawdy-houſe before the general pardon; but per cur. the ſcandal remains, and it ſhall not be ſo intended, unleſs it appears plainly to be ſo ſpoken and intended. 2 Lev. 233. Mich. 30 Car. 2. B. R. Newton v. Maſters. The words are actionable; for if ſhe did formerly keep a bawdy-houſe, ſhe is ſtill puniſhable for it Freem. Rep. 278. pl. 312. (bis) Mich. 1678. Anon. ſeems to be S. C.

(M. a) *Conditional* Words.

[1. IF a man ſays, *if J. S. might have his will, he would kill the king,* an action upon the caſe lies for theſe words, though he refers it to the will of J. S. for it is a great offence to have ſuch a will. My Report, 14 Jac. between Sir J. Sydnam and Mayo.] Cro. J. 407. pl. 4. Sir John Sydenham v. Man S. C. and the whole court held the words actionable. ——— Ibid. 408. in a note at the end it is ſaid that error was brought, and the judgment was affirmed Mich. 16 Jac. ——— Hob. 180. pl. 217. Sydenham v. May S. C. ſays that Paſch. 16 Jac. the court inclined that the words were actionable. ——— S. C. 3 Bulſt. 260. adjudged that the words are actionable. ——— Roll. Rep. 417. pl. 20. S. C. adjudged for the plaintiff. ——See (O. a) pl. 1. and tit. Trial (K. g. 2) pl. 15.

(N. a) *Diſjunctive* Words.

[1. IF A. ſays of B. to C. the brother of B. *Sirrah, thy brother B. was whipt* about Taunton Caſtle, *for ſtealing of ſheep, or elſe was burnt in the hand or ſhoulder,* whereas he never did any ſuch felony, B. ſhall have action for theſe words; for though peradventure if he had ſaid that he was whipt about *Taunton-Caſtle* for ſtealing of ſheep, or elſe was burnt in the hand, without Cro. C. 283. pl. 25. Stirley v. Hill, S. C. adjudged for the defendant. —— Jo. 308. pl. 21. S. C.

adjudged accordingly.— out more, it ſhould be intended that he meant that he was burnt in the hand for ſtealing of ſheep, and ſo the action ſhould lie; yet when he adds the laſt words, or ſhoulder, this makes the words uncertain; for he could not be burnt in the ſhoulder for ſtealing of ſheep, and then to ſay a man ſtole ſheep, or was burnt in the ſhoulder, this implies no certainty; for to ſay that he ſpoke ſome words that will bear an action, or other words that will bear an action, an action does not lie. Mich. 8 Car. B. R. between CHURLY AND HILL, adjudged in arreſt of judgment againſt the plaintiff, I myſelf being de concilio querentis. Intratur Trin. 8 Rot.]

See (P. a) pl. 9. S. C. and S. P.— S. P. does not appear either in Cro. C. 283. or Jo. 308. S. C. [2. But after he brought a new action, for ſaying that *he was whipt about* Taunton Caſtle *for ſtealing of ſheep*, and Mich. 9 Car. adjudged in B. R. that the action lies, this being moved in arreſt of judgment.]

3. *Thou haſt ſtole my mare, or was conſenting to it.* It was held by Fenner and Clench that no action lies; for he may conſent tacendo and yet be faultleſs. Noy 172. Anon.

[432] 4. *She had a child, and either ſhe or ſomebody elſe made it away.* Adjudged not actionable by 3 juſtices, contra Bridgman Ch. J. Cart. 55. Hill. 17 & 18 Car. 2. C. B. Falkner v. Cooper.

5. J. S. is killed, and one ſays *A. or B. killed J. S.* A. may bring an action, and ſo may B. and there muſt be an averment that neither did it, per Bridgman Ch. J. Cart. 56. Hill. 17 & 18 Car. 2. C. B. in caſe of Falkner v. Cooper.

(O. a) For what Words it lies, in Reſpect of the *Uncertainty of the Time.* In *futuro.*

See (M. a) pl. 1. S. C. [1. IF one ſays of another, *if he might have his will he would do ſuch a thing, which is a matter actionable*, action lies, though they are ſpoke in futuro, becauſe they prevent occaſionem ruinæ. My Reports, 14 Jac. Sir J. SYDNAM AND MAYO adjudged, and ſo it was reſolved per tot. curiam, Paſch. 16 Jac. in a writ of error upon this in the exchequer chamber.]

S. P. D. 72. b. pl. 6. Mich. 6 E. 6. cites Kempe's caſe; and ſays he heard that judgment was given for the plaintiff.——S. C. cited Yelv. 160. in caſe of Staverton v. Relfe, Mich. 7 Jac. by Williams J.——S. P. per cur. Arg. Roll. Rep. 427. pl. 20.——S. C. cited by Haughton J. 3 Bulſt. 262. [2. So if a man ſays of a merchant, that *he will be a bankrupt within* 2 *days*, an action lies, though the words are ſpoken in futuro. My Reports, 14 Jac.]

J. S. will be a bankrupt. Henden ſerjeant ſaid, theſe words are not actionable; but if the words are, *J. S. will be a bankrupt within* 3 *days*, it is otherwiſe. 2 Roll. Rep. 433. in caſe of Thompſon v. Twenge.

S. P. or if he ſays, *he will lie in wait to rob J. S. within* 2 *days*, action lies; per Dodderidge J. Roll. Rep. 427. in caſe of Sidnam v. Mayo.——3 Bulſt. 261. by Dodderidge J. in S. C. accordingly. [3. So if a man ſays, that *he will rob J. S. within* 2 *days*, an action lies. My Reports, 14 Jac. per Dod.]

4. *He*

4. *He will break ſhortly*, is actionable; per Dodderidge and Jones J. Lat. 114. Paſch. 2 Car. in Hill's caſe. But to ſay, *I will make him break*, is not actionable; per Dodderidge and Jones J. Ibid.

5. *Thou art a forſworn fellow, and we will prove thee ſo, and thou canſt take no benefit of the law.* Adjudged not actionable, becauſe it is in the future tenſe. Sid. 48. pl. 9. Mich. 13 Car. 2. B. R. Daniel's caſe. Judgment was arreſted, becauſe the words were not actionable, and eſpecially as they are here alleged to be *ſpoken by baron and feme* [meant by the word (we) in Sid.] Keb. 124. pl. 36. S. C. by the name of Daniel v. Turpin.

(P. a) For what Words it lies in Reſpect of the *Uncertainty*. Where there are *not direct affirmative* Words. [*And what ſhall amount to an Affirmation.*] [433]

[1. IF one ſays of another, *I think in my conſcience, if he might have his will he would kill the king*, or ſuch ſcandalous matter, an action lies, though he does not ſay them preciſely, but refers them to his conſcience, and to the will of another. My Reports, 14 Jac. Sir J. SYDNAM AND MAYO adjudged. And ſo it was reſolved per totam curiam at Serjeant's-Inn, in a writ of error. Paſch. 16 Jac. B. R. in the ſame caſe. Vide ſame caſe, Hob. Rep. 243.] See (M. a) pl. 1. S. C. (O. a) pl. 1. S. C.—— Hob. 180. pl. 217. S. C. the court inclined that they would bear an action.—— See tit. Trial (K. g. 2) pl. 15. S. C. and the notes there.

[2. If a man ſays of J. S. *he is in Warwick gaol for ſtealing of a mare*, and *other beaſts*, no action lies for theſe words, becauſe they do not directly affirm that he hath ſtole the cattle, as if he had ſaid *he ſtole them, and was in gaol for it*; but they only are reported of his impriſonment, and of the ſuppoſed reaſon thereof. Hob. Rep. 239. between STEWARD AND BISHOP adjudged.] Hob. 177. pl. 200. Trin. 14 Jac. S. C. accordingly, per tot. cur. ſeriatim.— Brownl. 16. S. C. adjudged accordingly.——Noy 24. S. C. accordingly.—— Hutt. 2. S. C. adjudged accordingly.—S. C. cited Palm. 68, 69. in caſe of Brown v. Audley, and the court agreed to it.——S. C. cited by the name of Steward v. Butler. 2 Sid. 16.——Lev. 82. in caſe of Crawford v. Middleton, cites S. C. and ſays the court queſtioned the caſe of Steward and Biſhop, whether it be law or no.

He was in priſon in a gaol for ſtealing P.'s beaſts. Adjudged for the plaintiff; for by Fenner a man cannot be impriſoned for ſtealing, if he did not ſteal. Goldſb. 130. pl. 26. Hill. 43 Eliz. Parloir's caſe.——Mo. 401. pl. 531. Paſch. 37 Eliz. Barler's caſe, S. C. ſays it was doubted if action lies, becauſe he did not ſay he had ſtole the beaſts.——Mo. 866. pl. 1196. Anon. S. P.——He was in N. gaol *for a robbery committed upon A. B.* Adjudged for the plaintiff. Cro. J. 247. pl. 6. Trin. 8 Jac. B. R. Heynes v. Sprott.——Bulſt. 40. Anon. ſeems to be S. C. but the court differing in opinion, ordered to ſearch for precedents.——S. C. cited in caſe of Kamelford v. Tuke. 2 Roll. Rep. 104.—— Thou haſt been in gaol *for ſtealing of a pan*, is actionable. Cro. J. 154. pl. 3. Paſch. 5 Jac. B. R. Showel v. Haman.

[3. If a man ſays of B. *he was taken for ſtealing of two horſes, and I have ſuſpected him theſe* 4 *years*, in an action upon the caſe for theſe words, though B. avers that he has been at all times free from any ſuſpicion of felony, yet the action does not lie, becauſe this is not any affirmative that he ſtole the horſes; for a true and good man may be ſuſpected and taken for ſtealing of horſes, as a man *I have ſerved thee with the queen's letter, for ſtealing of goods out of my mother's houſe.* Up-

on not guilty pleaded, and found for the plaintiff, it was adjudged that the action did not lie;

may be impriſoned or indicted for the ſtealing of things, and yet may be free from the felony. Paſch. 16 Car. B. R. between CURSON AND WOOD adjudged per curiam, in arreſt of judgment, but quære if he had averred that he never was taken for the ſtealing of any horſes.]

for the defendant doth not ſay expreſsly that he had ſtolen the goods, but that he had ſerved him, &c. which may be, though he did not ſteal them; ſo it is only a charge by implication. Cro. E. 234. pl. 6. Paſch. 33 Eliz. C. B. Atkinſon v. Atkinſon.

Thou waſt arraigned for ſtealing a horſe. Arg. Palm. 68. Mich. 17 Jac. B. R. cited as adjudged not actionable; to which the court agreed.

[4. If A. ſays of B. *thou art a baſe rogue, and a dogged rogue, and I will make thee an example and precedent for a perjured rogue,* action lies for theſe words; for they are affirmative, with an aſſeveration. Paſch. 16 Car. B. R. between DANIEL AND ROOKES, per curiam adjudged, this being moved in arreſt of judgment.]

[434]

Sty. 199. Hobſon v. Hudſon, S. C. adjornatur.—— Ibid. 219. S. C. Jerman J.

[5. If A. ſays of B. *ſhe went to the Spa to be cured of the French pox,* an action lies; for none go to be cured of a diſeaſe which he has not; and therefore this is an implied affirmative that ſhe had this diſeaſe; for this is ſtronger than to ſay ſhe was laid for the pox. Trin. 1650. between HOBSON AND JUDSON adjudged per curiam, this being moved in arreſt of judgment.]

doubted; but judgment was given for the plaintiff. —— *He hath been in F.'s tub,* (innuendo the tub of one Fowler a ſurgeon, in which tub no perſon had been but thoſe which were laid of the pox) *I will not ſay of the pox, but he lay in the tub at the time that L.'s wife was laid of the pox.* Adjudged not actionable. Goldſb. 135. pl. 34. Hill. 43 Eliz. Bury v. Chappel.

[6. If a man ſays, *I do accuſe J. S. of poiſoning his aunt,* action upon the caſe lies; for this is an affirmative that he had poiſoned his aunt. Trin. 39 Eliz. per Fenner.]

Fol. 50.

[7. So if one ſays to another, *I will prove you have poiſoned my aunt,* action upon the caſe lies; for this is a more vehement affirmative that he had poiſoned her, than to ſay that he had poiſoned her. Trin. 39 Eliz. B. R. per Poph.]

I will prove thee a perjured knave; per tot. cur. this is a vehement affirmative, and imports not only that perjury was committed, but that the defendant would openly traduce the plaintiff by it, in ſuch manner that it ſhould be openly proved. Yelv. 160. Mich. 7 Jac. B. R. Staverton v. Relfe.

I will prove *that he hath ſtolen my books,* is actionable; for they imply an affirmative, and are as much as if he had ſaid that he had ſtolen his books. Mar. 19. pl. 4. Paſch. 15 Car. pl. 44. Anon. —— S. P. Per cur. Arg. in caſe of Bury v. Wright. Yelv. Paſch. 6 Jac.

I will bring him before a juſtice of peace; for I will prove that he hath ſtolen, &c. Per cur. though the firſt words are not actionable, the laſt are. Mar. 20. in pl. 44. Paſch. 15 Car. Anon.

I will prove thee a thief, and a plotter of thievery; and I will prove it by thine own ſin; or elſe I will ſend him to the devil. Reſolved not actionable, and ſo reverſed a judgment in B. R. Cro. J. 214. pl. 11. Mich. 6 Jac. B. R. Frank v. Alſop.

I doubt not to prove but he has ſpoken treaſon. Adjudged actionable. Win. 123, 124. Hill. 22 Jac. C. B. Hitcham v. Brook. —— Hutt. 75. S. C. Paſch. 1 Car. Reſolved by all that the plaintiff ſhall have his judgment.

For my ground A. Hext ſeeks my life, and if I could find J. S. I do not doubt but within 2 days to arreſt Hext for ſuſpicion of felony. Adjudged the firſt words not actionable; but for the laſt words action lies, becaute for ſuſpicion of felony he ſhall be impriſoned, and his life drawn in queſtion. 4 Rep. 15. b pl. 5. Paſch. 27 Eliz. B. R. Hext v. Yeomans.

I have indicted B. of perjury, and I doubt not but to prove him a perjured perſon to all intents and purpoſes. Judgment was arreſted; for otherwiſe no man can proſecute perjury, nor inquire for evidence to prove it, without danger of an action. Sid. 220. pl. 7. Mich. 16 Car. 2. B. R. Bull v. May. —— Keb. 797. pl. 63. S. C. the parties agreed to begin de novo, and diſcontinue by conſent.

I will arreſt J. S. for felony, and after prove Mr. Heale acceſſory. Cited as adjudged that action lies. Mo. 428. in pl. 597.

[8. So

[8. So if one ſays of another, *I will call him in queſtion for poiſoning his own aunt; and I make no queſtion but to prove he hath poiſoned his aunt*, action upon the caſe lies; for this is a direct affirmative that he hath poiſoned his aunt, and more vehement than the other before, inaſmuch as he ſays, I make no queſtion but to prove it. Trin. 39 Eliz. B. R. between WEBB AND POORE adjudged.]

See (E. b.) pl. 7. S. C. —Cro. E. 569. pl. 3. S. C. adjudged for the plaintiff; for his credit is impeached, though he never did any ſuch fact. —— Noy. 63. S. C. adjudged accordingly.

[9. If A. ſays of B. *he was whipt* about Taunton-Caſtle *for ſtealing of ſheep*, though this is not a direct affirmative that he ſtole the ſheep, yet it is a direct allegation that he was whipt for ſtealing of ſheep, which is a great ſlander. Mich. 9 Car. B. R. between CHURLY AND HILL adjudged, this being moved in arreſt of judgment.]

[11. If A. ſays to B. the wife of C. *wherefore will your huſband hang J. S.?* to which *B. anſwers, for coming in the night, and breaking our houſe, and ſtealing our goods*, J. S. ſhall have an action for theſe words againſt B. and C. her huſband; for though the words are ſpoke by way of anſwer to a queſtion, yet this is a direct affirmative. Paſch. 11 Car. B. R. between HAYWOOD AND NAYLER adjudged in a writ of error, and the judgment given in B. affirmed accordingly. Intratur Hill. 11 Car. Rot. 527.]

[435]

[11. If A. ſays of B. and C. *we will have them ſtand upon the pillory, and have their ears for perjury, and ſubornation of perjury*, action lies: for this is a direct affirmative that he was perjured, and guilty of ſubornation of perjury. Trin. 15 Car. B. R. between PELL AND JELLOW, and another action between PELL AND CHAPMAN, adjudged in a writ of error, and the firſt judgment affirmed. Intratur Paſch. 15 Car. B. R. Rot. 162, 163.]

12. *That thief A. hath ſtolen away my goods, and delivered them to Bacon.* An action was brought by Bacon for theſe words, but becauſe the words do not charge him with having any notice of the ſtealing, ſo that he is not touched as acceſſory, he took nothing by his writ. Dal. 41. pl. 21. 4 Eliz. Bacon's caſe.

13. The defendant hearing that his father's *barns were burnt*, ſaid *I cannot imagine who ſhould do it but the lord Sturton*, this is actionable. Mo. 142. in pl. 283. Arg. cites 5 Eliz. Ld. Sturton v. Chaſin.

14. *H. is infected of the robbery and murder lately committed, and doth ſmell of the murder.* The plaintiff having ſet forth that a certain robbery and murder was lately committed, he had judgment after long deliberation and argument; and this was by reaſon of the word (infected,) contrary to the opinion of Catlyn. D. 317. b. pl. 8. Mich. 13 & 14 Eliz. Hawley v. Sidenham.

Dal. 41. pl. 27. S. C. argued. —— Ibid. 103. pl. 41. but I do not obſerve any opinion of the court.

—— D. 317. b. marg. cites Mich. 40 & 41 Eliz. C. B. that Anderſon and Owen, in the argument of Grimſton's caſe, held this caſe not to be law. —— S. C. cited Arg. Mo. 142. in pl. 283. by the name of Hawley v. Simbart. —— S. C. cited by the reporter, D. 72. b. pl. 6. at the end of Kempe's caſe, as actionable. —— S. C. cited Arg. 3 Bulſt. 249. in the caſe of Lewknor v. Godnam. —— S. C. cited Godb. 90. pl. 100. per Clench J. Mich. 28 & 29 Eliz. as actionable. —— S. C. cited

cited in the caſe of Meredith v. Bonell, Arg. Hutt. 58.——Cart. 214. in caſe of Anniſon v. Bloſield, cites S. C. as actionable.——S. P. cited and admitted per cur. Goldſb. 138. pl. 42. Hill. 43 Eliz. in Redfrein's caſe, where the words were, *I was robbed, and you was privy thereto, and had part of my money*, adjudged for the plaintiff.—— S. C. cited 3 Bulſt. 249.

15. Saying that the *plaintiff cauſed the defendant to be arreſted with forged writs*, is actionable; for the word (cauſed) extends as well to the forgery as to the arreſt, and ſo amounts to the ſlander of forgery. 4 Le. 181. pl. 279. Mich. 26 Eliz. C. B. Hungerford v. Watts.

S. C. cited by Periam accordingly. Cro. E. 234. in pl. 6.

16. *Thou waſt cooped up for forging of writs*, adjudged not actionable. Cro. C. 268. pl. 2. Arg. in caſe of Halley v. Stanton, cites 31 Eliz. Noel's caſe.

4 Le. 121. pl. 245. Ratcliffe v. Shirley, S. C. held accordingly.

17. *She is as very a thief as any* (or *ſhe is a worſe thief than any*) *that robbeth by the highway ſide.* Per cur. clearly, the words in both caſes are actionable. Cro. E. 224. pl. 8. Paſch. 33 Eliz. B. R. Ratcliff (Lady) v. Shubley.

You might have known your own ſheep, and not have ſtolen mine.

18. *You never thought well of me ſince G. did ſteal my lamb*, adjudged actionable, though objected that it was not a direct affirmance that G. did ſteal it. Cro. E. 289. pl. 7. Mich. 34 & 35 Eliz. B. R. Graves's caſe.

Fleming and Yelverton held the words actionable, but Williams and Crooke contra. No judgment. Yelv. 144. Mich. 6 Jac. B. R. Thompſon v. Knott.

I dealt not ſo unkindly by you when you ſtole a ſack of corn, is actionable. 2 Mod. 58. Mich. 27 Car. 2. C. B. Cooper v. Hawkwell.

[436]

19. Defendant ſaid, *thou art a forſworn fellow*; the plaintiff ſaid, *will you ſay that I am perjured?* the defendant ſaid, *yes, if you will have it*; adjudged not actionable. Cro. E. 297. pl. 6. Paſch. 35 Eliz. B. R. Levermore v. Martin.

Goldſb. 186. pl. 127. S. C. but varying a little in words, though not in the meaning. adjudged for the plaintiff.

20. *Many an honeſter man hath been hanged, and a robbery hath been committed, and I think he was at it, and I think he is an horſe-ſtealer.* The court held this a great ſlander, unleſs the defendant ſhews good cauſe of his thinking; and judgment for the plaintiff. Cro. E. 348. pl. 20. Mich. 36 & 37 Eliz. B. R. Stich v. Wiſdome.

——Ow. 18. Wiſdome's caſe, S. C. adjudged for the plaintiff.

4 Rep. 16. pl. 8. S. C. adjudged not actionable; and ſays that every one

21. *Thou wert detected of perjury in the ſtar-chamber.* It was held, on motion, not actionable, for an honeſt man may be detected, but not convicted, and ſo no ſlander; ſed adjornatur. Cro. E. 371. pl. 12. Hill. 37 Eliz. B. R. Weaver v. Cardan.

who has a bill of perjury there againſt him, is detected.——S. C. cited 2 Roll. Rep. 142. and per curiam, detected of perjury is very uncertain; for a man may be arreſted for a crime, and yet not be guilty of it.——S. C. cited Cro. C. 268.

22. *He ſhould have been hanged for a rape, but it coſt him all the money in his purſe.* Adjudged actionable. Cro. E. 589. pl. 26. Mich. 39 & 40 Eliz. B. R. Redfern v. Todd.

23. *Go follow ſuit againſt W.* (innuendo the plaintiff) *for ſtealing thy 2 kine, and hang him, or I will hang thee.* Theſe words import

import as much as if he had feloniouſly ſtole them, otherwiſe he could not hang him; and therefore it was adjudged by Fenner and Yelverton (only in court) for the plaintiff. Cro. E. 904. pl. 9. Mich. 44 & 45 Eliz. B. R. Willymote v. Wetton.

24. D. *aſked B. why the plaintiff did not come to church. B. anſwered, it is no marvel* ſhe comes not to church; *for it is thought ſhe is with child, and I fear it is true*, by which ſhe loſes her marriage with the ſaid D. not actionable; for it does *not appear* that B. knew of any marriage to be between C. and D. nor *that the words were ſpoke maliciouſly*, and B. had no intention to ſlander C. For the words aroſe upon the queſtion of D. and the anſwer does not impart any direct ſlander; for her honeſty was not in queſtion, but her abſence from church, and he affirmed nothing preciſely, but only tells his thoughts and fears, which looks as if he rather wiſhed that there was no ſuch cauſe. Adjudged per curiam, præter Fenner. Yelv. 114. Mich. 5 Jac. B. R. Brinſby v. Balgy.

But if D. aſks B. concerning a robbery, and he anſwers that *he believes the robbery was done by C. and fears it is too true*, an action will lie. Yelv. 113, 114. ſaid arguend.

25. *Bear witneſs, he hath ſtolen my, &c.* Adjudged not actionable, it not being alleged expreſsly that he ſtole his cloth. Arg. Palm. 68. To which the court agreed. Cited as Trin. 7 Jac. B. R. Birch v. Writts.

Yelv. 126. Paſch. 6 Jac. B. R. Bury v. Wright, S. C. not actionable.

26. *It would be proved by many vehement preſumptions, that the plaintiff was a plotter and contriver of the death of one P. becauſe he would not ſell him his land*, is not actionable; for it affirms nothing but uncertain preſumptions, whereas words of ſlander ought to be affirmative. Yelv. 153. Paſch. 7 Jac. B. R. Weblin v. Mayer.

27. *Thou doſt lead a life in manner of a rogue. I doubt not but to ſee thee hanged for ſtriking Mr. Sydnam's man, who was murdered.* Theſe words are not actionable, for they are not poſitive for the murder of Mr. Sydnam's ſervant; he might be beaten by the plaintiff, and murdered by * another: actions of ſlander do not lie upon inferences. Jenk. 302. pl. 72.

A. was murdered, and the plaintiff knocked him on the head. Mo. 428. at the end of pl. 597. ſays this was adjudged good cauſe of action.

* [437]

28. A. ſaid to B. *my ſheep were feloniouſly ſtole away. B. replies, I know who took them, it was J. S.* (the plaintiff.) Crooke J. aſked if theſe words are not ſcandalous? Doderidge held them not actionable, becauſe *nothing is ſaid of the felony*. Crooke ſaid that this is a direct anſwer to the complaint of B. But Doderidge and Haughton held clearly that ſuch words are not actionable, they being a ſcandal by inference only. 3 Bulſt. 83. Mich. 13 Jac. in caſe of Helly v. Hender, S. P.

29. *If thou hadſt had thy right thou hadſt been hanged for breaking P.'s houſe*, is actionable. Brownl. 3. Harris v. Adams.

Plaintiff declared that he had been arraigned of robbing the defendant before the juſtices of peace of N. and acquitted, and the defendant ſaid of him, *if Mr. H. and one A.* (juſtices of peace of the ſaid county of N.) *had done juſtice, R.* (the plaintiff) *had been hanged for robbing me.* Theſe words are quaſi a preciſe affirmative that he was the party that robbed him; and adjudged for the plaintiff. Cro. E. 786. pl. 24. Mich. 42 & 43 Eliz. C. B. Royal v. Peckham. —— 3 Bulſt. 260. Arg. cites Royal and Virtue's caſe as not actionable becauſe conditional words.

Thou

Thou and thy father had been hanged for coining of money, if you had had your deſert, long ſince; adjudged actionable, becauſe it is a condition which binds an affirmation. Palm. 68. Mich. 17 Jac. B. R. Brown v. Audley.

30. *S. did ſteal a mare, or elſe G. is forſworn*; adjudged not actionable, though the plaintiff in his declaration averred that G. never ſwore any ſuch matter; for it is not a direct ſlander, and his life or name cannot be drawn in queſtion upon this matter, and ſo can be no loſs to him. Cro. J. 532. pl. 10. Paſch. 17 Jac. B. R. Sparham v. Pye.

31. *As ſure as you believe that God rules the world, and the king rules the kingdom, ſo ſure did W. ſteal ſuch goods.* Win. 124. Arg. cites it as adjudged in Whorewood's caſe.

32. *I do not know but J. S. is a bankrupt*; cited Sid. 434. pl. 27. as adjudged actionable 5 Car.

33. *If I liſt I can prove him perjured*, not actionable; for there is no affirmative that he was perjured, but a thing which is arbitrary, and ſays not that he would do it; judgment for the defendant. Hutt. 127. Hill. 11 Car. Davis's caſe.

Raym. 51: S. C. adds, *for he and F. ſwore for one another.* ——Keb. 293. pl. 16. S. C. adjornatur. ——Ibid. 302. pl. 9. S. C. adjudged for the plaintiff.

34. *O. ſays I am a perjured rogue; he is a perjured rogue as well as I.* It was moved that the words are not poſitive, but relative only to the defendant, and it is not averred that the defendant is a perjured rogue. But per cur. the words (as well as I) by which he confeſſes himſelf to be a perjured rogue, ſupply the want of an averment; and judgment for the plaintiff. Lev. 65. Paſch. 14 Car. B. R. Orton v. Fuller.

Keb. 776. pl. 12. Dolewright v. Barwell S. C. Judgment for the plaintiff.

35. *You P. you will lie with a cow again as you did; if you had your deſerts you deſerve to be hanged*; is actionable, and a great ſcandal. Sid. 220. pl. 6. Mich. 16 Car. B. R. Poturite v. Barrel.

36. *J. W. was queſtioned for ſtealing a grey mare with a ſnip in her ear, and hue and cry went out after him, and he durſt not ſhew his face hereabouts*. Roll Ch. J. held the words actionable, but Nichols J. doubted, and Aſk J. ſaid nothing. Sty. 159. Mich. 1649. Gray v. Walye.

37. Caſe for charging him with felony, and accuſing him before a juſtice of peace thus, *he came to my door and ſet a piſtol to my breaſt and demanded money of me, and I for ſafeguard of my life, gave him what money he deſired.* Per Roll Ch. J. if the words found to charge him with felony the action will lie, and we
[438] cannot conceive otherwiſe but that he would have robbed the party; 2 others agreed with Roll, but Jerman differed. Judgment for the plaintiff, niſi, &c. Sty. 350. Mich. 1652. Neve v. Croſs.

38. *I hold it not fit this girl ſhould live with her aunt, ſhe keeping a bawdy-houſe.* No judgment was given, becauſe the defendant offered to bring the monies given in damages, viz. 100 l. into court, and ſo to go to a new trial. 2 Sid. 15. 33. Mich. 1657. Hobſon v. Blackwell.

39. *I know*

39. *I know what I am, and I know what Snell is; I never buggered a mare;* adjudged for the plaintiff; for this by implication is a charge of buggery upon the plaintiff, which the ſtanders-by well underſtood to be ſo. 2 Lev. 150. Mich. 27 Car. 2. B. R. Snell v. Webbling.

Vent. 276. S. C. held actionable, or elſe there might be ſly ways to defame any man and evade an action.——3 Keb. 546. pl. 46. S. C. adjudged for the plaintiff.

40. *You may well ſpend money at law, for you can coin money out of halfpence and farthings;* this was held to import an act done, becauſe by a bare power he could never be able to ſpend money at law, cited 2 Salk. 697. in pl. 10. by Powell J. as Trin. 12 W. 3. C. B. Horne v. Powell.

S. C. cited 2 Ld. Raym. 1185. Trin. 4 Ann. and Holt Ch. J. agreed it was a caſe in point with the principal caſe thereof, Speed v. Parry.

You are a raſcal and a villain, you have forgot ſince you lived in Black-Bull Yard, there you could procure bread money for gold, and clip it when you had ſo done, and then the ſhears could go. Per cur. where the matter imputed is confined to a particular place, as here (you could in ſuch a place) they muſt be underſtood to imply an act done; for the power is the ſame in all places; and ſo actionable. 2 Salk. 697. pl. 10. Trin. 4 Ann. B. R. Speed v. Perry.——2 Ld. Raym. 1185. S. C. the court all along inclined for the plaintiff, but took time to conſider, and afterwards gave judgment for him.

41. *You are a great rogue and raſcal, as great a rogue as your maſter, who is a rogue, for that your maſter and dame ſtole ruggs and quilts;* the plaintiff made proper averments, and the words held actionable; and judgment for the plaintiff. Comyn's Rep. 267. Mich. 4 Geo. 1. C. B. Apton v. Pinfold.

42. I *will have him tranſported for perjury and forgery.* Special damages were found, and judgment given for the plaintiff in C. B. and that judgment (the Ch. J. being abſent) affirmed in B. R. 2 Barnard. Rep. in B. R. 101. Hill. 5 Geo. 2. Floyd v. Jones.

(Q. a) For what Words it lies. In what Caſes where there is but an *Intention only*.

[1. IF one man ſays to another, that *he ſacrificed or gave one of his children to the devil, to the intent to bewitch the mother of the ſpeaker*, though here was only an intent to do ill, and no act of witchery done, yet becauſe there is an ill act, ſcilicet, the ſacrificing and the giving of an infant, joined with an ill intention of witchery, action upon the caſe lies; for invocation or conference with ſpirits is puniſhable by the ſtatute of 1 Jac. Paſch. 15 Jac. B. R. between LOCK AND LOCK, adjudged, this matter being moved in arreſt of judgment.]

See (H. a) pl. 13. S. C. —S. P. as to the firſt part of the words, and ſeems to be S. C. Poph. 128. Anon.

[2. If one ſays of another, that *he lay in wait at Shooter's-Hill to rob him*, action upon the caſe lies, becauſe there is an ill act done, ſcilicet, the lying in wait. Paſch. 15 Jac. B. R. in LOCK AND LOCK'S CASE, agreed per Mount. & Hought.]

*[439] *He lay in wait in the highway, intending to murder me.*

Wray held theſe words actionable. Cro. E. 6. Trin. 24 Eliz. C. B. in pl. 1.——Cro. J. 108. S. P. cited as in Stroughton's caſe.——Godb. 43. in pl. 51. cites S. P. as in Ramſey's caſe.

* *Thou art a knave, and haſt laid in wait to kill me, and thou haſt hired one W. to kill me.* Coke Ch. J. and Houghton held theſe words not actionable, becauſe here was only an intention to do it, but no act laid to be done, and a bare intent is not puniſhable by the law; and ruled quod querens nil

nil capiat, &c. 2 Bulſt. 206. Paſch. 12 Jac. Murrey's caſe.——Win. 98. S. P. cited by Baron Snig, Hill. 8 Jac. as adjudged in B. R. and affirmed in the exchequer that ſame term.——Cro. E. 618. pl. 3. Mich. 40 & 41 Eliz. B. R. cites S. P. adjudged actionable in this court.——S. P. per Wray Ch. J. that action lies, though no robbery nor aſſault was committed. Mo. 186. pl. 332. Mich. 26 Eliz.

He hath laid in wait to rob, and was one of them that would have robbed me, adjudged actionable. Mo. 409. pl. 555. Trin. 37 Eliz. Weeks v. Taylor.——Cro. E. 249. pl. 24. S. P. Per cur. Arg. in Weekes's caſe.

Cro. C. 140. pl. 15. Lewknor v. Cruſhley, S. C. accordingly; for he charges him not only with the intention, but with a fact which is as near felony as may be, and is ſuch an offence as is more than an intent only, and more than riot, and for which fine and impriſonment are due.——Jo. 195. pl. 6. S. C. adjudged accordingly.

[3. If a man ſays of A. that *he and J. S. knowing that B. a goldſmith carried plate, they lay in wait, and attempted to rob him, but B. raiſed the country upon them, ſo that they were compelled to fly both upon one horſe*, an action lies for A. For though this was not felony, yet was it a great offence, and ſlandered him as much as if he had charged him with felony. Mich. 4 Car. B. R. between Lewkenor and Burchley, adjudged; this being moved in arreſt of judgment.]

Fol. 51. This ſeems to intend the caſe of Sir Herbert Croftes v. Brown, the words there being the ſame; and per tot. cur. the words are not actionable.

[4. If one ſays to another, that *he keepeth men to rob me*, no action lies, becauſe there is only a naked intention, without any act. Paſch. 15 Jac. B. R. in Lock's case, put per Hought' to have been lately adjudged.]

He keepeth thieves to rob my maſter, adjudged actionable. Palm. 278. Hill. 19 Jac. B. R. Bennet's caſe.——Cro. J. 629. pl. 1. Bennet v. Tabram, S. C. where the words are, *thou art a maintainer of thieves to ſteal my maſter's goods*. It was objected that he did not ſay, that he maintained them in the felony, nor knew them to be thieves; ſed non allocatur; for the words are to be taken in the moſt ſlanderous part as he ſpoke them; and adjudged for the plaintiff.

Cro. J. 158. pl. 10. Paſch. 5 Jac. B. R. S. C. and though the ſame objection was made, and alſo that it was not alleged that the biſhop of Winchester was ſuch a perſon, before whom perjury might be committed; yet the court held it a great imputation, and that it ſhall be intended in the worſt part; and ſo adjudged for the plaintiff.——Yelv. 72. Mich. 3 Jac. S. C. and the words there are (procured *and ſubborned*,) but the objection is ſaid there to be allowed by Fenner, Yelverton, and Williams, Popham being abſent.

[5. If one ſays to another, *thou haſt procured J. S. to come thirty miles to commit perjury againſt his father before the lord biſhop of Winchester, and haſt given him* 10 *l. for his pains*, no action lies for theſe words; for he does not ſay that J. S. committed the perjury, and then the hiring without the committing of perjury is not any offence. Paſch. 3 Jac. B. R. between Harris and Dixon, adjudged.]

A. did hire a man to rob me. Per Haughton J. theſe words would be actionable; to which Coke Ch. J. agreed, becauſe an act was done. 3 Bulſt. 167, 168. Paſch. 14 Jac.

He procured one to murder J. S. Action lies, though no murder was committed. Adjudged, and affirmed in error. Mo. 186. pl. 332. Mich. 26 Eliz. Anon.

Thou haſt given J. S. 9 l. for forſwearing himſelf in chancery, and haſt hired him to forge a bond. Adjudged actionable, though he never was ſworn in chancery; and the ſame as to the other words of forging the bond. Cro. C. 337. pl. 23. Mich. 9 Car. B. R. Anon.

Cro. E. 618. pl. 3. Theobald v. Brooke, S. C. where the words are, *bring*

[6. If a man ſays to B. *I charge you in the queen's majeſty's name to aid me, for I am ſet upon to be robbed; and I charge you to go with me to Bonaventure Tibbal's houſe to apprehend him; for old Tibbals* (innuendo dictum Anthonium) *hath been a ſetter on of them* (innuendo *the ſaid* Bonaventure *and another*) *often times to rob me*, action

action upon the caſe lies for *Anthony Tibbals* for theſe words. Mich. 40 & 41 Eliz. B. R. between TIBBALS AND BROOKE, adjudged; for though he was * not robbed by them, yet the action lies for the ſlander of ſetting on of others to rob him.]

me to the conſtable's houſe: for I am robbed this night; and bring me to B. T.'s houſe to arreſt him; *for old Theobalds* (innuendo the plaintiff) *ſetteth his ſons to rob me* (innuendo dictum B. & quendam Johannem filium ipſius Anthonii) *from time to time*; adjudged actionable. But upon error brought it was aſſigned, that it is not preciſely affirmed of the plaintiff, but it is ſaid, *old Theobalds*; and he does *not name the plaintiff*, and an *innuendo will not ſerve*; whereupon judgment was reverſed.

He ſent his man A. to kill me. The court was divided as to its being actionable or not. Mo. 63 pl. 174. Trin. 6 Eliz. Bray v. Andrews. —— Dal. 66. pl. 29. S. C. in the ſame words.

You ſet on folks to murder J. S. Wilde conceived the words actionable, fine and impriſonment being due, without averring J. S. to be dead. Judgment for the plaintiff. Keb. 253. pl. 22. Paſch. 13 Car. 2. B. R. Weſt v. Philips.

[7. If one ſays of another, *he would have robbed me if J. S. would have conſented to it; and he perſuaded J. S. to go with him, and ſaid unto him that he ſhould have money enough*, action upon the caſe lies for theſe words. Mich. 41 & 42 Eliz. B. R. LEVERSETT'S CASE, adjudged.]

Cro. E. 710. pl. 33. S. C. by the name of Leverſage v. Smith, adjudged actionable; for the words are of great diſcredit and ſlander.

W. aſſaulted me and others to have robbed us, but we were too ſtrong for them, and eſcaped; adjudged actionable. Cro. E. 349. pl. 24. Mich. 36 & 37 Eliz. B. R. Weeks's caſe. —— Mo. 409. pl. 555. Weekes v. Taylor, S. C. *he laid in wait to rob me, and was one of them that would have robbed me*, held actionable, though he was not robbed. ——— S. C. cited by Jones, Cro. C. 140. in pl. 15. where the words are, *nine perſons ſet upon me, to have robbed me, and you* (innuendo W. the plaintiff) *was one of them*; and that the words were adjudged actionable.

Aid me to Stoner, for I have felony to lay to his charge; *for he would have robbed me.* It was objected, that though perhaps the words (I have felony to lay to his charge) are of themſelves actionable, yet the next words (for he would have robbed me) prove no felony, but extenuate the firſt words, and ſhew what he intended; and that to ſay (one would have robbed me) is not actionable without ſhewing ſome overt-act put in ure, which is felony, or cauſe to bind one to their good behaviour; for though he had an intent, perhaps he repented of it, and did no evil act. And Lea cited a caſe adjudged 27 & 28 Eliz. TITTUL v. OSBORNE, that the words *thou wouldſt have murdered me*, are not actionable; and for this cauſe the court inclined that an action did not lie. Cro. E. 250. pl. 16. Stoner v. Audley.

Thou wouldſt have taken my purſe from me on the highway, is not actionable; per Coke Ch. J. Godb. 202. pl. 289. Trin. 10 Jac. C. B. Anon.

[8. If one ſays to another, *thou wouldeſt have killed me*, no action lies, becauſe he charges him only with an intention. Hill. 11 Jac. B. R. POTT'S CASE, adjudged.]

S. C. cited by Coke and Haughton, by the name of Dr. POE'S caſe, as adjudged not actionable. 2 Bulſt. 206.

She went about to kill me, actionable; for if true, ſhe ſhould be bound to her good behaviour. 3 Le. 231. pl. 313. cites the caſe of Warner v. Cropwell.

He ſought to murder me, and I can prove it, adjudged actionable. Cro. E. 308. pl. 12. Mich. 35 & 36 Eliz. B. R. Preſton v. Pindar.

[9. If one ſays of another, *ſhe would have cut her huſband's throat, and did attempt to do it*, action lies for the attempt; for this is a great ſcandal, and good cauſe for the huſband to be divorced. Hill. 8 Jac. in the exchequer, SCOTT v. HILLIERS, per curiam.]

Lane. 98. S. C. in the exchequer; but ſays it was adjudged that for the words *ſhe would have cut her huſband's throat*, no action would lie.

10. *E. did wrap gunpowder in a piece of tow, and laid it under my window, and put fire to it, minding to burn my houſe.* By ſuch words the plaintiff's good name is impaired, and he had judgment. Cro. E. 6. pl. 1. Trin. 24 Eliz. C. B. Edward's caſe.

S. P. *and the houſe was not burnt.* Adjudged not actionable.

Godb. 43. cited in pl. 51. —— Certain colliers having been burnt feloniouſly in a houſe, and ſome perſons

perſons executed for the murder, the defendant ſaid, *thou didſt bring faggots a mile and a half to the burning of the colliers*, adjudged actionable. Hutt. 122. Paſch. 9 Car. Glaſier v. Heliar.

If a manſion-houſe be burnt feloniouſly, and one ſays, *you brought fire to ſet in the thatch of the houſe which is burnt*, it is actionable. Hutt. 123. Paſch. 9 Car. in caſe of Glaſier v. Heliar.

S. C. cited 4 Rep. 16. b. in pl. 10. —S.C. cited Mo. 419. pl. 574. by the name of Lady Coffin's caſe. — 3 Bulſt. 167. Arg. cites Lady Cockaine's caſe. —— 2 Bulſt. 206. S. C. cited by Coke and Haughton, and ſaid it was an odious fact; but if this caſe was now to come in queſtion, they ſhould be very well adviſed of it. —— S. C. cited Godb. 43. in pl. 51. as adjudged that the words were not actionable.

* 11. *My lady C. offered 2s. to a woman with child to get her a drink to kill her child, becauſe it was gotten by J. S. Sir T. C.'s Butler.* Adjudged actionable; for the words impair the lady's credit, and, if true, might be bound to her good behaviour; though it was not ſaid that ſhe did give money, or that any hurt was done, but that ſhe offered, &c. Cro. E. 49. pl. 4. Trin. 28 Eliz. B. R. Sir T. Cockaine & Ux. v. Witnam.

S. C. cited 4 Rep. 16. b. in pl. 10.

12. *T. and one G. agreed to have hired a man to kill me, and that G. ſhould ſhew me to the man hired to kill me.* Adjudged by Wray and Fenner for the plaintiff, againſt the opinion of Gawdy. Cro. E. 191. pl. 3. Mich. 32 & 33 Eliz. B. R. Tibbot v. Haynes.

Cro. E. 684. pl. 17. S.C. ſays all the judges, præter Glanvile, held the words not actionable; and judgment for the defendant. —— Cro. C. 140. in caſe of Lewknor v. Cruchley, Arg. cites S. C. as adjudged not actionable.

13. *He is a brabler, and a quarreller; for he gave his champion counſel to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preſerved me.* Adjudged not actionable; for the purpoſe or intent of a man, without act done, is not puniſhable by the law; and though for ſuch conſpiracy he may be puniſhed in the ſtar-chamber, yet that is by the abſolute power of the court, and not by the ordinary courſe of the law. 4 Rep. 16. b. pl. 10. Trin. 40 Eliz. C. B. Eaton v. Allen.

Mrs. P. wrote a letter to J. S. to poiſon her huſband, adjudged for the plaintiff, and judgment affirmed in the exchequer chamber. Cited by Williams J. Bulſt. 201. as Mrs. Paſfield's caſe, and ſeems to be S. C. —— S. C. cited in caſe of Dean v. Eaton, by Williams J. Bulſt. 201. as adjudged actionable, where the caſe was, that *A. placed a woman in B.'s houſe, with an intent to poiſon him.* It was objected that no act was laid here to have been done, but an intention only; but adjudged actionable. Paſch. 10 Jac. Dean v. Eaton.

14. *P.* (innuendo the plaintiff) *ſent a letter to my maſter, and therein willed him to poiſon his wife.* All the juſtices and barons reſolved the words actionable, and ſo affirmed a judgment in B. R. Cro. E. 747. pl. 27. Hill. 42 Eliz. in the exchequer-chamber. Paſſie v. Mondford.

Yelv. 57. S. C. and the three juſtices held, that the words ſhall not be taken dividedly, but altogether as they were ſpoke; as if he had ſaid Sir J. H. *procured B. to caſt his dagger at me to kill me*; and then there is no queſtion but the words are actionable. Quod fuit conceſſum ab omnibus. And judgment accordingly againſt the defendant.

15. *I am in danger of my life, my blood is ſought, and I was like to have been murdered. I was at Sir John Harpur's houſe, and J. H.* (innuendo the plaintiff's ſon) *drew me forth to ſee a gelding in the ſtable, and then T. B. drew his dagger at me twice, and thruſt me through the breeches twice with his rapier, to have killed me. All this was done by the inſtigation of Sir J. H. and I can prove it.* Adjudged by 3 J. againſt 2, that action lies, it being alleged that Sir J. H. is a juſtice of peace; ſo that ſuch inſtigation being againſt his oath, is a great miſdemeanor, for which he is fineable, and to be put out of the commiſſion. Cro. J. 56. pl. 1. Hill. 2. Jac. B. R. Sir J. Harper v. Beamond.

16. *He*

16. *He assaulted my wife with an intent to ravish her.* Glyn Ch. J. inclined that the action lay. 2 Sid. 76. Pasch. 1658. B. R. Langly v. Clark.

Ibid. 100. Trin. 1658. B. R. the S. C. adjudged actionable.——2 Mod. 51. Arg. S. C. cited as adjudged for the plaintiff, after a long debate.—— *He pulled 3 women off from their horses, with intent to ravish them,* this is actionable. 2 Sid. 100. Per Glyn Ch. J.

* 17. There being a colloquium of besetting a house, in order to rob it, the defendant said, *it was T. M.* (the plaintiff) *and J. D. that were about to rob E. C.'s house.* Atkins J. held the words actionable; for the charging the plaintiff with something done, though the thing be not absolutely effected, it is more than a bare intention, and then actionable; but Archer and Vaughan (Wylde absente) gave judgment for the defendant; but they agreed, that if the words had implied any act done, they would be actionable; as to *lie in wait to kill a man,* there the lying in wait is indictable; but per Vaughan, *going with an intent to lie in wait* is not sufficient, but it must be such a kind of act for which a man is indictable. Freem. Rep. 46. pl. 56. Trin. 1672. in C. B. Mayne v. Diggle.

18. *He would have given D. money to have robbed G.'s house, and he did rob the house.* The court said the words might be construed, that the plaintiff offered D. money, and that D. refusing it, the plaintiff robbed the house himself. Vent. 323. Mich. 29 Car. 2. B. R. Frowd v. Frowd.

2 Jo. 84. S. C. and the court agreed that the first words would not maintain the action, because they import an intention only, without any act done by the plaintiff. And upon the last words judgment was stayed till moved by the plaintiff.——2 Lev. 205. S. C. adjudged per tot. cur. viz. Rainsford, Twisden, and Jones for the plaintiff, and that the first words alone had been actionable, and are made worse by the second, be the robbery intended to be done by the plaintiff himself, or by any other by his procurement, which shall be intended.—3 Keb. 841. pl. 5. S. C. adjudged that the words are actionable, taking them altogether.

19. Words which *charge men with evil inclinations and principles,* will be actionable; as where it was said of the plaintiff, that *he is a Jacobite, and is for bringing in the prince of Wales and popery, to the destroying our nation.* 2 Ld. Raym. Rep. 812. Mich. 1 Ann. in case of How v. Prinne.

(R. a) In what Cases the subsequent Words shall be *Explanatory* of the former.

[1. IF one says to another, *thou art a thief,* or such like words as will bear an action, *and hast stolen my trees,* action lies; for the last words are by way of addition, and not given as a reason of the first. Mich. 4 Jac. B. R. between * MINORS AND LYDFORD. Hob. Rep. 106. there cites a judgment in B. R. 7 Jac. accordingly. Contra Mich. 13 Jac. B. between † COOTE AND GILBERT adjudged. See the same case Hob. Rep. 106.]

Thou art a rogue and a thief. The court held, that for the word thief an action is maintainable, unless it be coupled with other words, which prove it to be no felony intended. And judgment for the plaintiff. Cro. E. 857. pl. 23. Mich. 43 & 44 Eliz. C. B. Robins v. Franks.

* Cro.

* Cro. J. 114. pl. 13. Minors v. Leeford, S. C. and by Tanfield, though the ſtealing the trees is not felony, yet the action lies for calling him thief generally; and the addition of (and thou haſt ſtolen) is another diſtinct ſentence by itſelf, and not the reaſon of the former ſpeech, nor any diminution thereof, but an addition thereto; and cited 7 Eliz. C. B. Stanley's caſe accordingly, and ſo he conceived here; and of that opinion were Fenner and Williams, but Yelverton doubted thereof; and (abſente Popham) it was adjudged for the plaintiff.——S. C. cited Hob. 331. pl. 410.

† Hob. 77. pl. 100. S. C. where the ſame words were adjudged not actionable; for the word (and) is to be underſtood to be but a verifying and making good of the general word (thief;) and then (trees) ſhall be rather underſtood trees ſtanding than felled; and the law ſtrains not to hurt but to heal; and diſapproved a ſtronger caſe cited to have been adjudged actionable in 7 Jac.——Brownl. 2 Cowte v. Gilbert, Hill. 10 Jac. S. C. adjudged not actionable.——Godb. 241. pl. 335. Mich. 11 Jac. C. B. Colt v. Gilbert, adjudged that the action lies; for the latter words do not extenuate the former.

§ *Thou art a thieviſh knave, and haſt ſtolen my wood.* Adjudged not actionable, by 3 J. contra 2; and by the 3 J. though the words had been, *thou art a thief*, &c. yet it would not be actionable; and they held that the word (and) is all one as if he had ſaid (for.) Cro. J. 65. pl. 5. Paſch. 2 Jac. B. R. Robins v. Hildredon.

Thou art a thieviſh rogue, *and haſt ſtolen bars of iron out of other men's windows.* Adjudged not actionable; for ſtealing bars of iron, parcel of the freehold, is not any felony, and it ſhall not be intended bars lying in the windows; for it ſhall be taken in the beſt ſenſe for the defendant. Cro. J. 204. pl. 9. Hill. 5 Jac. B. R. Powell v. Hutchins.

He is an *arrant thief, and hath ſtolen divers apple-trees out of J. S.'s garden*, is actionable; otherwiſe if he had ſaid, *for he hath ſtolen, &c.* for then it ſhould not be felony to ſteal trees; and (for) ſhews the reaſon of calling him thief, which the word (and) does not. 2 Brownl. 280. Mich. 7 Jac. C. B. Ayre's caſe.

She is a *thief, and has ſtolen my wood, and I will ſend her to bridewell.* The court held the firſt words actionable, but whether coupled with the other they were actionable, the court was divided, viz. Bacon againſt the action, and Roll Ch. J. for it. Sty. 24. Paſch. 23 Car. Drake v. Whitacre.—Ibid. 27. S. C. by the name of Whitacre v. Hillwell; and Bacon J. ſaid, that the laſt words explained the former, that he meant not the fact charged upon the plaintiff to be felonious; for that cutting wood ſtanding is to be puniſhed with whipping, and ſo the party may be ſent to bridewell for that offence; but Roll Ch. J. held them cumulative, and not interpretative, and ſo actionable; and that where there are expreſs precedent words to make one a thief, there ought to be violent words ſubſequent to give them another interpretation, and not words which may be taken by implication, as they are in this caſe. Adjournatur. All. 11. S. C. accordingly.

[2. But if one ſays of another, *thou art a thief, for thou haſt ſtolen my trees*, no action lies; for the laſt words are explanatory, and given for a reaſon of the firſt. Mich. 4 Jac. B. R. between MINORS AND LYDFORD agreed.]

Godb. 241. pl. 335. Colt v. Gilbert, S. P. accordingly.—The diſtinction between the word (and) and the word (for) is cited by Tanfield J. Cro. J. 114. in caſe of Minors v. Leeford, to have been agreed 7 Eliz. C. B. in Stanley's caſe.——S. P. agreed, in caſe of Harbart v. Angel, Mich. 8 Car. Hutt. 113.——Same diſtinction Noy 135. Ayres v. Oſwell.——2 Brownl. 280. Mich. 7 Jac. in C. B. Ayre's caſe, S. C. accordingly.——S. P. and ſame diſtinction taken. Cro. J. 231. pl. 11. Mich. 7 Jac. B. R. S. C. Gyer v. Ormſted.——S. P. and ſame diſtinction taken, and adjudged for the plaintiff. 2 Bulſt. 141. Mich. 11 Jac. Painter v. Warn.

He is a thief, for he hath ſtolen corn from Mr. Key. (Quendam Richardum Key innuendo.) Adjudged for the plaintiff. Cro. J. 673. pl. 7. Mich. 21 Jac. and the judgment affirmed in error in B. R. Smith v. Ward.

Thou art as arrant a thief as any is in England; for thou haſt broken up J. S.'s cheſt, and taken away 40 l. Held that the firſt words, without an averment, will not maintain an action, and the laſt words import no felony; for the breaking the cheſt, and taking the money, may be upon a pretence of title, and in mid-day, and upon pretence of title; and judgment for the defendant. Cro. J. 687. pl. 2. Trin. 22 Jac. B. R. Foſter v. Browning.——Hutt. 72. Potter v. Brown, S. C. adjudged accordingly; for the latter words are ambiguous, and admit of a double interpretation, and ſo the better ſhall be taken.——Win. 70. 89. S. C. and judgment was arreſted.

Thou art a *thief, and has broke my cheſt.* Roll Ch. J. ſaid, that notwithſtanding Lord Hobart's opinion, he held the words actionable, and the word (and) is cumulative, and aggravates the former words, and not barely explanatory; and the ſubſequent words are violent, and may very well ſtand with the former, therefore let the plaintiff take his judgment. Sty. 115. Trin. 24 Car. Wainwright v. Whitley.

Though it was formerly held that there was a difference between *(and)* and *(for)* yet of late it has been taken otherwiſe; for they both are explanatory, and mean both the ſame thing; per Powell J. 2 Ld. Raym. Rep. 959. Trin. 2 Ann. in caſe of Baker v. Pierce.——2 Salk. 696. in pl. 9. S. C. & S. P.——6 Mod. 23. 24. S. C. & S. P. by Holt Ch. J.

3. If

[3. If one says to another, *thou art a thief, for thou takest my sheafs by reason of an execution, and I will hang thee*, no action lies, because all the words together are not actionable, and the last words are explanatory of the first. Mich. 7 Jac. B. WILK's case held.]

Thou art a thief; for thou hast taken away my corn, is not actionable, for the

taking may be lawful; but if the words had been, *for thou hast stolen my corn*, action lies; for it shall be intended corn thrashed, and not in the sheafs; per Hobart Ch. J. Cro. J. 688. pl. 2. Trin. 21 Jac. C. B. in the case of Foster v. Browning. ——So where the additional words were, *for thou hast broken up J. S.'s chest, and taken away 40l.* Adjudged for the defendant; for the words do not import any felony committed; for the money may be taken, and the chest broke open, upon pretence of title, and in the mid-day, and presence of divers, and so no felony. Cro. J. 687 Foster v. Browning.

[444]

[4. If one says to another, *thou art a coney-catching and a cheating thief, and didst cheat the company of 20 nobles*, (innuendo *the company of watermen of Newcastle upon Tyne*) action lies for these words; for the last words are *not explanatory* of the first words, *but cumulative*. Dubitatur Mich. 9 Car. B. R. between REHEAD AND SMITH. Intratur Trin. 9 Rot. 1248. but Hill. 9 Car. judgment in this case was given for the plaintiff.]

Hard. 7. in pl. 8. cites Mich. 9 Car. B. R. the S. C. as adjudged not action-

Fol. 52.

able, because the word (thief) is qualified, and refers only to cheating and couzening, which is not felony; and the main of the charge is cheating.

[5. If a man says to J. S. *thou art a thief, and hast stole my dung*, action lies; for these words *(and hast stole my dung)* do not take away the force of the word (thief;) for dung may be a chattel, and may be stole, and so a felony may be committed thereof. Mich. 23 Car. B. R. between YERWORTH AND PEARCE adjudged, this being moved in arrest of judgment after a verdict for the plaintiff.]

All. 31. S.C. adjudged for the plaintiff. ——Sty 66. S. C. by the name of Carver v. Pierce, but there the words are

(for thou hast stolen, &c.) But ibid. 73. S. C. the words are as here, viz. (and hast, &c.) And adjudged for the plaintiff.

[6. If one says to another, *thou art a thief, and hast stole 20 load of my furze*, action lies; for the last words shall be taken cumulative, and also the words rather imply that they were furze cut rather than growing, inasmuch as he says 20 load. Contra Hob. Rep. case 406. between CLARKE AND GILBERT.]

Hob. 331. pl. 410. S.C. ——Jo. 11. pl. 11. Mich. 18 Jac. C. B. S. C. ad-

judged against the plaintiff.—Poph. 152. Trin. 17 Jac. C. B. Gilbert de Hopton's case, S. C. adjudged that the action lies; for the word (and) shall be taken as the word (for.)——Win. 3. Goddard v. Gilbert, adjornatur. And ibid. 10. S. C. adjudged, quod quærens nil capiat per billam. —— S. C. cited per Bacon J. and denied the difference between (and) and (for) upon the authority of that case; but Roll Ch. J. said that case had been often denied to be law. All. 31.—Hutt. 13. S. P. cited as adjudged accordingly 19 Eliz. Arrow's case.

[7. If one man says to another, *thou art a thief, and hast stolen my corn*, action lies; for the last words abridge not the force of the first words. 2 Jac. B. R. between KELHAM AND MAUDI adjudged. Contra Hob. Rep. case 406.]

Cro. J. 39. pl. 2. Kellan v. Maneſby, S. C. adjudged

actionable; for stealing corn shall be intended reaped corn, in the worst sense.——S. C. cited Hob. 331. pl. 410. by the name of Kelham's case; and says the court denied the words to be actionable, unless there were some further words of explanation, as corn in my barn, or the like; for otherwise in words meerly indifferent, the more easy sense, and farthest from the more heinous charge, shall be taken; per Hobart Ch. J.——Sty. 24, 25. cites S. P. as adjudged, in the case of Ayre v. Higgins,

gins, to be actionable; and Roll Ch. J. said it was a strong case.——S. P. cited by Bacon J. to have been adjudged. Sty. 73.

He is a thief, and I will prove him to be a thief; for he hath stolen my corn. Adjudged by Ley and Doderidge for the plaintiff. 2 Roll Rep. 440. Trin. 21 Jac. B. R. Smith v. Shortred.——S. P. by Doderidge and Jones J. Lat. 176. Mich. 2 Car.

He is a thief; for he hath stolen my sheaf of corn. Adjudged actionable, because it was corn lying on the ground, and the party had a special property; and so it is felony. Bulst. 173. Trin. 9 Jac. Petty v. Waight.

Sty. 231. Bynion v. Trotter, S. C. and Roll Ch. J. said the turnips shall be intended pulled up, and the grass mowed; and judgment for the plaintiff nisi causa.

[8. If one says of another, *he is a thief, and hast stolen my turnips several nights, and my grass*, though the last words may imply that the turnips and grass were growing when he stole them, yet it may be otherwise; and this is spoken cumulative; for he had called him thief absolutely, and has added further, that he *stole his turnips and grass*, which is for *aggravation* thereof, and *not* by way of *explanation*; for we cannot pervert the words, and alter the ordinary * construction of them, as where the words imply an aggravation, to interpret them to extend to an explanation, which was contrary to the intent of the defendant, for any thing appearing to us. Mich. 1650. between Bonyon and Trotter adjudged, this being moved in arrest of judgment. Intratur Trin. 1650. Rot.]

* [445]

Goldsb. 56. pl. 11. Norman's case; but there the words are, *thou wouldest have stolen a piece of cloth, or else thou wouldest have delivered it to my wife's daughter, and thou art a thief, and an arrant thief, and I will prove it.* Adjudged by 3 justices (absente Anderson) for the same reason; but Rhodes said it would be otherwise if the words had been, *and therefore thou art a thief.*

9. *Thou wouldest have stolen my cloak, if J. S. had not come in the way; and thou art a thief, and I will prove it.* The whole court held, that the last words should be taken and construed in abstracto by themselves, as in gross, and not to be dependent on the former words. And adjudged for the plaintiff. 4 Le. 181. pl. 278. Trin. 29 Eliz. C. B. Anon.

10. Saying of a *surgeon*, that *he did poison the wound of his patient*, it is not actionable; for it might be in order to cure it. Het. 175. Arg. cites Suego's case in the Book of Entries; but adds, that saying he did poison the wound of his patient *to get money*, it is actionable. Het. 175. cites 33 & 34 Eliz. C. B.

So, *thou hast broken my shop, and taken my goods*, (innuendo that he had robbed him of them) not actionable; cited Cro. E. 192. in pl. 5. as adjudged in the case of George v. Parker.——Noy 57. cites S. C. as adjudged accordingly.

11. If A. says, *B. hath broken my house, I will hang him for it*; this will not maintain an action; per Popham Ch. J. Cro. E. 834. Trin. 43 Eliz. B. R. in pl. 4.

Thou hast taken my money, and I will carry thee before a justice [and] lay felony to thy charge, are actionable; per Coke Ch. J. Godb. 202. pl. 289. Trin. 10 Jac. C. B. Anon.

12. *Thou hast cut my purse, and I will charge thee with felony*, adjudged not actionable, it not being said (feloniously.) Cro. E. 890. pl. 5. Trin. 44 Eliz. B. R. Latham v. Humphrey.

Thou art not so honest a man as thou takest thyself to be; for thou hast drawn J. S. to perjury.

13. *Thou art a lewd fellow, for thou hast drawn such a man to perjury.* Adjudged in B. R. and affirmed in error that the words are actionable; for by all the justices and barons, it is all one as if he had said, thou hast suborned a man to perjure himself. Cro. E. 899. pl. 44 & 45 Eliz. Clark v. Penkeven.

Cro. E. 906. pl. 14. Dag v. Penkeven seems to be S. C. and adjudged accordingly.

14. *Thou*

14. *Thou art a perjured knave, and that will be proved by a ſtake that ſtandeth between the ground of J. S. and J. D.* Adjudged not actionable; for though the firſt words are actionable by themſelves, yet the ſubſequent words qualify them; for the word (and) is the ſame as (for), and ſo the perjury charged is referred to the proof of a thing inſenſible, viz. a ſtake. Yelv. 34. Paſch. 1 Jac. B. R. Lewis v. Acton.

Yelv. 10. Mich. 44 & 45 Eliz. B. R. Brecheley v. Atkins S. C. the court divided.—Mo. 666. pl. 912. Bridge v. Atkins S. C. adjudged not actionable, and this particular addition corrects the generality of the words before.—4 Rep. 18. b. pl. 5. Brittridge's caſe S. C. adjudged not actionable.—But ibid. 19. b. at the end of the caſe, it was ſaid that the truth of the caſe was, that in an action between MARTIN AND WRIGHT, the ſtate of the controverſy was, whether the ſaid ſtake ſtood upon the land of the one or the other, or whether it was indifferent as a boundary between them, and in this action the plaintiff depoſed as a witneſs, and as the defendant pretended, had perjured himſelf in his depoſition; and it was ſaid that if the plaintiff's counſel had diſcloſed this matter in the count, the ſaid words would have maintained the action; and for want of ſhewing this ſpecial matter, it was adjudged againſt the plaintiff.—Brownl. 7. cites S. C. and ſays one judge was for the plaintiff, and one for the defendant.

15. F. ſaid, *N. is a felon.* A. ſaid to F. take heed what you ſay. *Why?* (replied F.) *Is not he a felon that knew of a murder, and concealed it? He* (innuendo N.) *knew of the murder of L. and did not reveal it till long after it was openly known.* Adjudged for the plaintiff, becauſe the firſt words are actionable, and the ſubſequent words enlarge the ſlander; for though concealing felony is only finable, &c. yet it is a great imputation. Judgment for the plaintiff, per tot. cur. præter Yelverton. Yelv. 154. Paſch. 7 Jac. B. R. Newlyn v. Faſſet. [446]

16. There is a *diverſity* between words *uttered continuata voce*, and *at ſeveral times*, as to ſay, thou art a felon, for that thou ſtoleſt my apples off my trees, are not actionable; for the reaſon of the ſpeaking inſtantly annexed qualifies the precedent words; but if a man ſays, thou art a thief, and a ſtander-by ſays, beware what you ſay, and the other replies, I will juſtify he is a thief, for he ſtole my evidence; this is inepta ratio of the firſt words, not voluntarily proceeding from the party, but as it were urged by the other, and therefore *pronounced too late to qualify the firſt words.* Yelv. 154. Paſch. 7 Jac. B. R. per cur. in caſe of Newlyn v. Faſſet.

If words that are not actionable are joined with words that are actionable, but ſpoke at different times, and under different colloquiums, one part ſhall not be taken to explain the other. Arg. And Holt Ch. J. ſaid it would be hard to explain words ſpoke at one time by what is ſaid after. 11 Mod. 256. pl. 9. Mich. 8 Ann. B. R. in caſe of Stebbing v. Warner.

17. *J. S. is a traitor, for he robbed a man by the highway.* Yelverton J. ſaid theſe words were not actionable; becauſe the reaſon does not concur nor depend upon the firſt words; but Fleming Ch. J. e contra; for both the words are ſlanderous, and though the reaſon of the parlance depends not on the word (traitor), yet it ſhall be conſtrued only as the greater malice, becauſe he charges him with 2 ſeveral matters which deſerve death. Yelv. 154. in caſe of Newlyn v. Faſſet, and the reporter ſays the laſt ſeems good law.

18. *Thou haſt ſtolen my goods, and I will have thy neck,* is actionable. 2 Brownl. 280. Mich. 7 Jac. C. B. Fleming v. Jales.

Roll. Rep. 104. Kamelford v. Tuke S. C. and Mountague held the words actionable, to which Haughton

19. *Thou was in L. gaol for coining;* the plaintiff answered him, *if I was there I answered it well enough;* the defendant replied, *yes, you were burnt in the hand for it.* Resolved, that those are malicious words, and shew an intent to accuse him of being imprisoned for coining, and the subsequent words exaggerate and diminish not the former; and therefore adjudged actionable. Cro. J. 536. pl. 2. Trin. 17 Jac. B. R. Gainford v. Tuke.

J. agreed, and that the last words maintain the action, but the first will not; for coining money may be done lawfully; but Doderidge contra. Mountague ordered judgment to be entered for the plaintiff, unless Crooke J. on his coming, should be against his opinion. —— The reporter makes a quære if coining of money shall be taken in meliori sensu, for if so, why then should he be sent to gaol for it? Ibid.

20. *Thou hast picked my pocket, and taken away* 10*s.* not actionable; for he did not say that he had *stolen* 10*s.* But if he had only said, thou hast picked my pocket, it would have been actionable. Godb. 287. in pl. 413. Arg. cites it as adjudged in C. B. Humfries's case.

2 Roll. Rep. 153. Arg. cites S. C.

21. *He received goods that were stolen, and will be hanged for them.* Adjudged not actionable, it not being said that *scienter receipit.* Palm. 67. Mich. 17 Jac. B. R. Arg. cites the case of Ratcliff v. Long.

Thou hast ravished a woman twice, and I will make thee stand in a white sheet.

22. *Thou perjured beast, I will make thee stand upon a scaffold in the star-chamber.* Adjudged actionable; for the last words do not mitigate the former, but shew what the intent was in these words. Cro. J. 613. pl. 1. Pasch. 19 Jac. B. R. Benson v. Hall.

It was argued not to be actionable, because the last words expound the former. Et adjornatur. * Cro. J. 666. pl. 2. Pasch. 21 Jac. B. R. Ridges v. Milles. —— Godb. 287. pl. 413. Bridges v. Mills S. C. adjornatur. But the opinion of the court seemed to be, that the action would lie for the words.

* [447]

2 Roll. Rep. 380. Ayrye v. Higgens S. C. and though Hobart said he was not satisfied, yet he consented

23. *He is a thief, he stole my corn, and never made me satisfaction;* 3 justices held that an action will lie, but Hobart e contra; and per Jones J. the word (thief) will maintain it, and the last words shall not extenuate it. And judgment absolute was given for the plaintiff. Jo. 43. pl. 1. Mich. 21 Jac. C. B. Arys v. Higgyns.

that judgment be entered for the plaintiff. —— Hutt. 65. S. C. says nothing of any judgment given, but that they all agreed that that which qualifies or extenuates words ought to be full, and not ambiguous.

You did rob me, and took away my evidences and a subpœna, not actionable cited

24. *He is a thief, for he hath stolen my evidence,* or my lead *off my house,* no action lies. Cro. J. 674. pl. 7. Mich. 21 Jac. C. B. Arg. and agreed by the court to be good law; for in those cases it is not shewn that any felony was committed, and the words do not import any.

&c. Godb. 89. in pl. 90. as adjudged, Osborne v. Frittell.

You have stole the shutters of my window; held not actionable, because the shutters are parcel of the house; but if he had said, *you are a thief; for you have stolen the shutters off my window,* it seems they are actionable, because the precedent words shew, that he intended such shutters which were not parcel of the house. Sid. 104. pl. 12. Hill. 14 & 15 Car. 2. B. R. Hall v. Hammond. —— Keb. 449. pl. 36. S. C. the court inclined the words not actionable; sed adjornatur.

25. Thou art a *thief, and haſt couſened my couſin B. of his land.* Crawley and Vernon J. held the former words extenuated by the ſubſequent words; but Heath Ch. J. and Hutton e contra, and that (and) and (for) in this caſe have one effect, and declare what thief he intended, and upon conference with the judges, all agreed that the ſubſequent words explained his intent, viz. the robbery and couzening of the land. Judgment againſt the plaintiff. Hutt. 113. Mich. 8 Car. Harbert v. Angell.

26. *He hath ſtolen a tree, formerly cut down, which is felony, and I will cauſe him to be indicted for felony;* adjudged, and affirmed in error, that the words are actionable; for (formerly cut down) is to be intended a long diſtance of time, eſpecially when he adds (which is felony, and I will indict him of felony.) Cro. C. 572. pl. 11. Hill. 15 Car. B. R. Bryon v. Wilkes.

27. *He got Mary Nabb with child, and the child is his, and I have tried it with a ſieve and a pair of ſheers.* Roll Ch. J. held the firſt words poſitive ſcandalous words, and the ſubſequent not material; but if they are, then they are in confirmation of the former; for it ſeems he put confidence in the ſieve and ſheers, and that made him ſpeak the words, and it matters not whether his confidence be true or falſe; and judgment for the plaintiff. Sty 379. Trin. 1653. Sherecroft v. Weekes.

S. C. cited Keb. 137. in pl. 66. by Twiſden J. as adjudged actionable

28. *Thou haſt ſtolen our bees* (innuendo a ſtock of bees,) *they are hid under the old woman's hemp-ſeck, and thou art a thief.* It was inſiſted that after verdict they ſhall be intended ſuch bees of which felony may be committed; and judgment was given for the plaintiff, niſi, &c. Raym. 33 Mich. 13 Car. 2. B. R. Tibbs v. Smith.

Keb. 136. pl. 66. Sle v. Smith, S. C. Windham conceived, that if it were impoſſible for the former words to ſupport the latter, the words will not be actionable; but contra where they may ſupport the latter words; and it was adjudged for the plaintiff.

29. *I will indict R. at the next ſeſſions, and he ſhall loſe his eſtate, and it ſhall go hard with him for his life; but his eſtate he ſhall ſurely loſe for marking my ſheep.* It was inſiſted that theſe words tantamount to felony; but by Windham J. the latter words mitigate all, and therefore judgment was ſtayed until, &c. Raym. 12. Paſch. 13 Car. 2. B. R. Rawlins v. Hill.

Keb. 17. pl. 47. S. C. adjudged not actionable

[448]

30. *Thou art a rogue, and receivedſt ſtolen mutton of Beſs Gamble, and ſhe ſtole it, and thou was partner with her, and hadſt part of it.* It was moved in arreſt of judgment, that the plaintiff was not charged with any crime, but Beſſe Gamble; but adjudged for the plaintiff, becauſe here the partnerſhip relates to the other words, and ſo muſt mean partners in theft. Sid. 413. pl. 12. Paſch. 21 Car. 2. B. R. Gamble v. Dana.

2 Keb. 494. pl. 46. Gamble v. Jenney, S. C. adjudged accordingly for the plaintiff.

31. *He is a great rogue, and killed a man on ſhip-board, and if he had not given money to have taken himſelf off, he had ſuffered for it;* actionable by reaſon of the laſt words, which ſhew that he intended a felonious killing. Judgment for the plaintiff. Freem. Rep. 278. pl. 313. Trin. 1679. B. R. Banſield v. Lincoln.

32. The plaintiff alleged a diſcourſe between W. and the defendant, concerning the plaintiff and a baſtard of hers, and that

W. ſaid, *I hope ſhe did not murder her child;* to which the defendant anſwered, *but ſhe did, and blood requires blood* (innuendo that ſhe had murdered her baſtard). Adjudged actionable, and the judgment affirmed. 2 Jo. 211. Trin. 34 Car. 2. B. R. Nailor v. Clarke.

2 Jo. 235. Trin. 36 Car. 2. C. B. Walker v. Beaver, S. C. adjudged for the plaintiff.

33. *Thou art a clipper, and ſhalt be hanged for it*, adjudged actionable; for it ſhall not be intended clipper of cloth, but of ſuch a thing for which he ought to be hanged, and that is only of money. 3 Lev. 166. Mich. 35 Car. 2. C. B. Walter v. Beaver.

——*So thou art a clipper, and thy neck ſhall pay for it*, adjudged actionable; for by the ſubſequent words it cannot be intended other clipper than of money. 3 Lev. 166. Mich. 35 Car. 2. C. B. Naden v. Micocke.——2 Jo. 235. Trin. 36 Car. 2. C. B. Moyden v. Mycocke. S. C. adjudged actionable by 3 juſtices, Windham diſſentiente.——Skin. 183. pl. 1. Naben v. Miecock. S. C. and 3 juſtices held the words actionable.—— S. C. cited 3 Lev. 395.

Thou art a clipper and coiner. The court held the words actionable, in regard of the ſtrong intendment, and ſuch words are underſtood by thoſe that hear them to mean clipping and coining of money. 2 Vent. 172. Paſch. 2 W. & M. in C. B. Anon.

Thou art a coiner of falſe money, and I have money to ſhew which thou coinedeſt. It was objected, that it did not ſay money current in England, otherwiſe it is only miſpriſion of treaſon; but adjudged for the plaintiff, abſentibus Popham & Gawdy. Cro. E. 629. pl. 24. Mich. 40 & 41 Eliz. B. R. Blake v. Stanley.

34. *You are a break-lock, and a pick-lock, and keep pick-locks in your houſe, and I will arraign you, and have you whipped, and ſwing for it.* It was urged that the laſt words import felony. Judgment for the plaintiff. Comb. 52. Trin. 3 Jac. 2. B. R. Peat v. Parry.

(S. a) For Words *in Diſgrace of a Profeſſion.*

The pleas under this diviſion are not confined ſtrictly to a profeſſion, but contain other matters.

Cro. C. 459. pl. 4. Webb v. Nicholls, S. C. adjudged for the plaintiff in B. and that judgment affirmed in B. R.

[1. IN an action upon the caſe, if the plaintiff declares that whereas he was an attorney de B. for ſeveral years before, and whereas he was retained ſuch a day by one Helmes, to proſecute a ſuit for him againſt J. S. in B. the defendant præmiſſorum non ignarus, yet of his malice to ſlander him, having a communication with the ſaid Helmes concerning the plaintiff, ſaid theſe words of the plaintiff, *you may be aſhamed to employ that knave*, (naming him) *for you will receive diſgrace and ſhame by it; for he is a knave, and a proclaimed knave in open market*, by which he *loſt ſeveral clients*, &c. Action lies for theſe words; for it appears upon the whole matter, that this is ſpoke of him in his profeſſion of an attorney, inaſmuch as it is alleged that the defendant was not ignorant of the employment of the plaintiff by the ſaid Helmes, and the words that he ſhould not employ him, &c. Paſch. 12 Car. B. R. between NICHOLS AND DR. WEBBE, adjudged in a writ of error upon a judgment in B. and a judgment given in B. affirmed, per curiam. Trin. 11 Car. Rot. 372. B. R.]

[449]

[2. [So]

[2. [So] If A. having communication of B. an attorney, and of his ſaid office of an attorney, ſays before the clients of B. *that B. is a baſe rogue and knave, and maintains his wife and children by his knavery and cheating tricks*, action lies for theſe words. Mich. 14 Car. B. R. between SHAW AND WAKEMAN, per curiam, adjudged in a writ of error upon a judgment * in Bath, and the judgment affirmed accordingly. Intratur Trin. 12 Car. Rot. 125.]

Cro. C. 515. pl. 15. Anon. ſeems to be S. C. adjudged, and affirmed in error; for the words

* Fol. 53.

touch him in his profeſſion.

An attorney of C. B. recovered, in action on the caſe, on theſe words, *he is the falſeſt knave in England, and by God's blood he will cut thy throat.* Mo. 61. pl. 171. Trin. 6 Eliz. Anon. ——— Dal. 63. pl. 22. S. C. in the ſame words. ——— S. C. cited Het. 140. as adjudged in the caſe of Diſtrey v. Dorrel, in C. B. and that the words ſhall be underſtood (falſe, as an attorney.)

[3. In an action upon the caſe, if the plaintiff declares that he was an attorney of B. R. and a ſilizer there, and retained to ſolicite cauſes in the exchequer, C. B. and ſpiritual court, for one *Jones*, and was to receive 15l. of him for proſecution thereof; and that the defendant having a diſcourſe of the plaintiff, and of the ſaid 15l. and of the ſaid ſuits, ſaid of the plaintiff *he is a couzening cheating knave, and Mr. Jones hath left with me 15 l. but I will not deliver it him, but I will ſee the laying it out; for he is a couzening knave;* an action upon the caſe lies for theſe words, for this diſgraces him in his profeſſion; for it is lawful for an attorney to proſecute ſuits in other courts as a ſolicitor, he being retained to do ſo. Trin. 16 Car. B. R. between EVEIEIGH AND PARKER, adjudged per curiam, this being moved in arreſt of judgment.]

Thou haſt couzened Mr. W. of his fee, and I will ſue thee for it in the ſtar-chamber, for that thou didſt not come for W. Adjudged for the plaintiff, an attorney. Brownl. 3. Trin. 11 Jac. Stephens v. Battyn.

——— S. C. cited 2 Roll. Rep. 72, 73.

The plaintiff declared that he was an attorney, and that there being a colloquium concerning his office, the defendant ſaid, *he is a couzener, and hath couzened me of* 20 s. is actionable; and judgment for the plaintiff. Het. 123. Mich. 4 Car. C. B. Litman v. Weſt.

He (meaning the plaintiff) *is a couzener, and couzened his clients in the ſheriff's-court at London, and was for that cauſe diſcharged of that court*, were ſpoke of an attorney of C. B. and the court held the words were ſcandalous words, and touched him in his profeſſion; and ſo a judgment in C. B. was affirmed. Cro C. 261. pl. 6. Trin. 8 Car. B. R. Mead v. Perkins.

Words of an attorney, *he is a baſe, cheating, couzening knave, and hath cheated me as never any man was cheated.* The queſtion was, whether an action would lie for theſe words; for if he had not ſhewn that he was an attorney, an action would not have lain; and if it is laid barely without any circumſtance, it doth not appear that it toucheth him in his profeſſion, and therefore the court would adviſe. Cro. C. 510. pl. 4. Mich. 14 Car. B. R. Jefferies v. Payhem.

[*But* then was vouched a caſe about 2 years paſt of one *Pain*, an attorney of B. R. v. where it *was ſurmiſed that he proſecuted a cauſe in a court of requeſts*, &c. *and that ſuch words were ſpoke of him* in the proſecution of the ſaid ſuit; and the court was of opinion, upon my motion for Pain, that the action did not lie, and gave a peremptory rule accordingly for judgment againſt the plaintiff; but now the court retracted this opinion; and after, this ſame term, Pain moved for judgment in this cauſe alſo; but it was adjourned; but after judgment was given for the plaintiff.]

This plea is not marked in roll with any number.

[4. If A. ſays of an attorney, having communication with the attorney concerning 20 s. due to J. S. in full diſcharge of a judgment obtained by the ſaid J. S. againſt the ſaid A. in treſ-

paſs, *you are a ſherking attorney;* and at another time ſays of him, *he is a cheating attorney*, and he may be thrown over the bar, an action lies. Hill. 18 Car. Rot. . . . . B. R. between BIRD AND WOODCOKE, adjudged, this being moved in arreſt of judgment.]

Hob. 8. pl. 18. S. C. The court were at firſt divided, but afterwards they gave judgment for the plaintiff.—Brownl. 6. S. C.—Mo. 855. pl. 1173.

[5. If A. has parlance with B. touching C. an attorney, who before was retained by B. to be his attorney, and A. ſays to B. *your attorney* (innuendo *the ſaid* C.) *is a bribing knave, and hath taken* 20*l. of you to cozen me*, theſe general words will maintain an action, and the laſt words do not extenuate them; for if any one has any intermeddling in caſe of juſtice, be he judge, officer, or attorney, if he receives any undue reward for any thing contrary to juſtice, this is a bribe. Hob. Rep. 13. between YARDLY AND ELLIS, adjudged.]

Mich. 11 Jac. S. C. and after ſeveral arguments adjudged actionable.——Win. 39. S. C. cited Arg. as adjudged not actionable; but Winch interrupted him, and ſaid it was adjudged the contrary.——S. C. cited as actionable, Het. 173.

He (innuendo the plaintiff) *took corruptly 5 marks of B. T. being againſt his own client, for putting off and delaying an aſſiſe againſt him.* It was moved, that the declaration did not expreſsly allege that he was an attorney at the time of ſpeaking the words, but laid it that he had been an attorney. The court held the words actionable; but it is ſaid in marg. that judgment was arreſted on the exception. Brownl. 1. Smayles v. Smith.

Hob. 117. pl. 145. S. C.—Mo. 867. pl. 1200. Paſch. 14 Jac. C. B. Cox's caſe, S. C. adjudged actionable.—Brownl. 15. S. C. adjudged for the plaintiff, by reaſon of the word champertor only.——S. C. cited per Hobart Ch. J. Win. 40.

[6. If a man ſays of an attorney, *thou art a common maintainer of ſuits, and a champertor, and I will have thee thrown over the bar next term*, action lies for theſe words, *thou art a champertor;* for this is againſt his office and the ſtatute; but no action lies for the other words, *thou art a maintainer of ſuits;* for this is lawful for him to do, and juſtifiable, and the other words of throwing over the bar are of an uncertain ſenſe. Hob. Rep. 163. between BOX AND BARNABY adjudged.]

Cro. E. 602. pl. 15. S. C. and the words there are, *thou art a cozening knave, and getteſt thy living by extortion, and didſt cozen one P. in a bill of coſts of* 10*l.* All the court held, that for the words (thou art a cozening knave) no action lies, for they are too general; and for the words (thou getteſt thy living by extortion) no action lies, for he may do ſo, and be no extortioner; but the laſt words touched him in his profeſſion, and were adjudged actionable for the reaſon above.

[7. If a man ſays of an attorney, *he is an extortioner, and one J. S. told me, that he had cozened him in a bill of coſts of* 10*l.* action lies for theſe words; for it is againſt the oath of an attorney to commit a falſity. Hill. 40 Eliz. B. between STANLEY AND BOSWELL adjudged.]

All. 13. Trin. 22 Car. B. R. * Fol. 54. S. C. and becauſe no colloquium was laid of his profeſſion, Bacon J. was of opinion againſt the plaintiff, but Roll Ch. J. e contra, becauſe the ſubſequent words declare, that the word (knave) was intended of him in his profeſſion, and therefore needed no colloquium of his profeſſion; and afterwards Bacon J. having changed his opinion, judgment, with his aſſent, was given for the plaintiff.

[8. If one ſays to an attorney, *you are a knave; you were an attorney for my mother againſt my huſband, and ſet her on to ſue him, and made him ſpend* 1000*l. and ſuch knaves, as you are, have made my huſband ſpend almoſt all his eſtate*, action lies for theſe words; for this diſgraces him in his office of an attorney. Paſch. 23 Car. B. R. between HILTON AND PLAYTERS adjudged per curiam, in a writ of error upon a judgment in B. and the judgment affirmed accordingly. Intratur Hill. 21 Car. Rot. 30.]

[9. If

[9. If a man ſays of an attorney, *he keepeth many markets, and ſtirreth up men to ſuits, and promiſeth if he do not recover in their cauſe he will take no charges; and he once promiſed me, that if he did not recover in a cauſe for me he would take no charges of me; yet afterwards he proſecuted a ſuit, and obtained judgment, and got charges of me for that cauſe; and that I can prove. Now there are ſuch articles againſt him, that if he were worth* 3000*l. he would not be left worth one groat.* Action lies for theſe words, becauſe for an attorney to ſtir up men to ſuits, is not lawful, but is a badge of a barretor; and to contract beforehand not to take charges if he does not recover, is a badge of maintenance, and not lawful. Mich. 1649, between SMITH AND ANDREWS adjudged, in a writ of error upon a judgment in B. and the judgment affirmed accordingly. Intratur Trin. 1649. Note, the action was alſo brought for other words mentioned in the declaration to be ſpoke at another time, of which no queſtion was but that they were actionable; but the only queſtion was upon the words here before mentioned.]

Sty. 183. S. C. adjudged for the plaintiff in C. B. and affirmed in B. R.—— (I. b) pl. 7. S. C. but S. P. does not appear. ——(K. b) pl. 7. S. C. but S. P. does not appear.

[10. If a man ſays to a doctor of phyſic, *thou art a quackſalver*, an action upon the caſe lies; for it is well known what is intended thereby, and it is a great diſgrace to him. Mich. 5 Car. between ALLEN AND EATON adjudged, this being moved in arreſt of judgment, where the plaintiff was phyſician to the king; and the defendant ſaid, *he is not the king's phyſician but a quackſalver.*]

[11. If a man ſays to a doctor of phyſic, *thou art a drunken fool, and an aſs; thou never waſt a ſcholar, thou art not worthy to ſpeak to a ſcholar; this I will prove and juſtify.* Action lies for theſe words, though there was no diſcourſe of his profeſſion before; for he cannot be a good phyſician if he be not a ſcholar in other matters. Mich. 8 Car. B. R. between CAWDRY AND CHICKLY, this being moved in arreſt of judgment. And after Trin. 9 Car. judgment was given per curiam for the plaintiff.]

Cro. C. 270. pl. 5. Cawdry v. Highley, alias Tythey, S. C. Richardſon at firſt was of opinion the words were not actionable, but he would adviſe; and afterwards Trin. 9 Car. it was adjudged for the plaintiff. —— Godb. 441. pl. 509. Cawdry v. Tetley, S. C. held actionable by Crooke and Jones J.

[12. If a man ſays of a doctor of phyſic, *he is an emperic and mountebank, and a baſe fellow*, action lies, without any averment of the ſignification of the words; for theſe are terms of diſgrace well known, and in diſgrace of his profeſſion. Paſch. 12 Car. B. R. between DR. GODDART AND HASELFOOT adjudged, this being moved in arreſt. Intratur Trin. 11 Car.]

[13. If A. having communication with B. about his attorney, ſays to him, *your attorney is a bribing knave, and hath taken* 20*l. of you to cozen me*, an action lies for the attorney, becauſe this diſgraces him in his profeſſion; for it is a ſcandal to him to give any bribe to any. Paſch. 12 Jac. B. Trin. 12 Jac. B. between YARDLEY AND ELLETT, per curiam adjudged.]

See pl. 5. S. C. and the notes there.

[14. If a man ſays to an utter barriſter, *thou art no lawyer, thou canſt not make a leaſe, thou haſt that degree without deſert; they are*

You a counſellor? a fool, an aſs,

a hangman, a counſellor at law, a fool in the profeſſion.

are fools that come to thee for law. Action lies. Mich. 13 Jac. B. between BANKS AND ALLEN.]

Adjudged actionable. Poph. 207. per Jones J. Trin. 2 Car. B. R. Cary's caſe.

*[452] Cro. C. 192. pl. 1. Taylor v. Starkey, S. C. it was objected that there was no

[15. If a man ſays to an attorney, *thou art a common barretor, a Judas, and a promoter*, action lies for theſe words; for to be a common barretor is a great diſgrace to an attorney. Trin. 6 Car. * B. R. between STARKY AND TAYLOR adjudged, in a writ of error, and the firſt judgment given in B. per curiam affirmed.]

colloquium of the plaintiff as attorney. But all the court conceived the action well lies, and words are to be conſtrued ſecundum conditionem perſonarum of whom they are ſpoken. Whereupon the judgment was affirmed.——Hutt. 104. Trin. 5 Car. S. C. and the Ch. J. ſeemed to be of opinion that the words are no more than if he had ſaid, that he was a common brabler or quarreller; but it was afterwards ſtrongly urged by ſerjeant Hitcham that the words are actionable; [and I do not obſerve that any thing more was ſpoken by the court, the reſt of the report ſeeming to be only the argument of the ſerjeant.]——Het. 139. S. C. Richardſon doubted, and queſtioned whether the words ſhould have relation to him as attorney, but Hutton and Harvey thought the words as well applicable to his profeſſion as if it had been found that there was a colloquium of him as attorney, it being laid that he was ſuch, and that he lived by that profeſſion, and that the defendant maliciouſly to hinder him in his profeſſion ſpoke thoſe words. Adjornatur.——Ibid. 143. S. C. adjudged for the plaintiff.

You have plaid the Judas with your client, was ſaid by Hutton and Harvey, and agreed by Richardſon, to be actionable without doubt. Het. 141. in the caſe of Starkey v. Taylor.

Fol. 55.

Cro. C. 382. pl. 11. Peard v. Johns, S. C. adjudged for the plaintiff. ——*He is a paltry lawyer, and has as much law as a jackanapes*, being ſpoken of a counſellor at law, and ſteward to J. S. of his manors, was adjudged actionable, the

[16. In an action upon the caſe for words, if the plaintiff declares that he is an utter barriſter of the Middle-Temple, and a practiſer of the common law for ſeveral years, and the defendant of purpoſe to defame him, maliciouſly ſaid of him to J. S. his father-in-law, did Mr. Pearce, the plaintiff, marry your daughter? to which J. S. ſaid, yes; to which the defendant replied, *he is a dunce, and will get nothing by the law;* to which J. S. anſwered, other men have a better opinion of him; to which the defendant replied, *he was never accounted otherwiſe in the houſe.* The action lies upon this declaration; for a man may be heavy, and not ſo ready as others are, and yet a good lawyer. But here, it appears, upon the whole matter, that it was ſpoke maliciouſly, and he ſaid that he would not get any thing by the law, which diſgraced him in his profeſſion. Mich. 10 Car. B. R. between PEARES AND JONES adjudged, this being moved in arreſt of judgment, after a verdict for the plaintiff. Intratur 10 Car. Rot. 411.]

words being ſcandalous, and touching him in his profeſſion. Cro. E. 342. pl. 9. Mich. 36 & 37 Eliz. B. R. Palmer v. Bowyer.——Goldſb. 126. pl. 17. S. C. adjudged for the plaintiff.——Ow. 17. Palmer's caſe, S. C. but there the words are, *I marvel you will have ſuch a paltry fellow for your ſteward; for he hath as much* law as a jackanapes. The plaintiff ſhewed, that by reaſon of ſuch words he was diſplaced of his office. Judgment for the plaintiff. But if he had ſaid, that *he had no more law than J. S.* it is not actionable, though J. S. be no lawyer.——S. C. cited Mo. 409. pl. 553. as adjudged actionable.——Win. 40. S. C. cited by Hobart Ch. J. as adjudged actionable.——S. C. cited as actionable. Godb. 411. pl. 509. but that an action would not have laid, if he had ſaid *no more wit* than, &c.——Mar. 59. pl. 93. S. P. cited by Berkley as adjudged not actionable; but if he had ſaid, that he hath no more law than a monkey, the words would be actionable.

Cro. C. 382. pl. 11. Peard v.

[17. If a man ſays of a counſellor of law in the north, *thou art a daffa-down-dilly*, an action lies, with an averment that the

words

words ſignify that he is an *ambodexter*. Mich. 10 Car. B. R. in PEARE's caſe, ſaid to have been adjudged in ſcaccario, and agreed per curiam.] Johns, S. C. but S. P. does not appear.——S. P. cited by Tanfield J. to have been adjudged in Preſton's caſe, Noy 98.——S. P. cited by Richardſon, Het. 127. as adjudged actionable, becauſe the word being ſpoken in the north, it ſignifies there an ambodexter.——Dal. 97. in pl. 27. cites Neverel's caſe, S. P.——S. P. in a nota of the reporter. Mo. 409. in pl. 553.——S. P. cited as adjudged actionable. Cart. 214.

Thou art an ambodexter, being ſpoke of an attorney, was adjudged actionable, becauſe it ſlanders him in his profeſſion, and is as if he had ſaid that he was corrupt in his office. Godb. 214. pl. 304. Mich. 11 Jac. C. B. Anon.

B. is a good attorney, but that he will play on both ſides, is actionable. Brownl. 5 Paſch. 13 Jac. Brown v. Hook.

You are a paltry lawyer, and uſe to play on both hands, being ſpoke of a counſellor, were held not actionable; but there being other words added, viz. *he is a furtherer and maintainer of felonies*, are actionable, though it was inſiſted he was no juſtice of peace nor public officer. Cro. J. 267, 268. pl. 30. Mich. 8 Jac. Rich v. Holt.

[453]

[18. If a man ſays to an attorney, *thou ſayeſt thou art an attorney, but I think thou art but an attorney's clerk; and if thou be, I will have thee picked over the bar next term.* No action lies for theſe words, becauſe it is uncertain whether he intends that he himſelf will pick him over, or the court. Paſch. 7 Jac. B. TOOTMAN's caſe adjudged.] 2 Brownl. 253. Trotman's caſe, S. C. it ſeems the words are not actionable.—*Is M. your attorney? he is the fooliſheſt and ſimpleſt attorney towards the law, and if he does not overthrow your cauſe I will give you my ears; he is a fool and an aſs.* Theſe words are actionable, being ſpoke of an attorney; for it is a great ſlander, and touches him in his place. And he had judgment, though the court upon the firſt motion conceived the words not actionable.——Cro. E. 589. pl. 25. Mich. 39 & 40 Eliz. B. R. Martyn v. Burlings.——Goldſb. 128. pl. 21. S. C. accordingly, and adjudged for the plaintiff. And Popham ſaid, that to ſay an attorney *will overthrow his client's cauſe*, is an actionable ſlander.

[19. If a man ſays to an attorney, *that he is a common maintainer of ſuits*, no action upon the caſe lies, becauſe it is not any diſcredit; for it is his profeſſion to maintain ſuits. Hill. 14 Jac. B. between BOXE AND]. Saying of an attorney, that *he is a common ſtirrer up of ſuits, and a diſturber of the peace, and ſo a mover of unjuſt actions*, without doubt is actionable. Said by counſel. Arg. Het. 140. Trin. 5 Car. C. B.

He ſets people together by the ears, and we ſhall have him indicted for a common barretor. The words being ſpoke of an attorney, are actionable, notwithſtanding Box and Barnaby's caſe. And judgment for the plaintiff. Cart. 214. Paſch. 22 Car. 2. C. B. Anniſon v. Bloſield.

[20. If a man ſays to an attorney, *that he is a common champertor*, action upon the caſe lies; for this is to have part of the thing in demand pending the writ, which is not lawful for an attorney to do, and ſo a diſgrace to his profeſſion. Hill. 14 Jac. B. between BOXE AND adjudged.] See ſupra, pl. 6. S. C.

[21. If a man ſays of an attorney, *that he has the falling ſickneſs*, an action lies, becauſe this diſables him in his profeſſion, for by reaſon thereof he cannot follow the duty of his profeſſion. Hill. 4 Jac. in † TAYLOR AND PERR's caſe held.] Noy. 117. Taylor v. Perkins S. C. but S. P. does not appear.——Cro. J. 144. S. C. but S. P. does not appear.——† See (H. a) pl. 4. S. C. but not exactly S. P.

[22. If a man ſays to a counſellor, *thou a barriſter? thou a barretor? thou called to the bar? thou wert put from the bar.* Action upon the caſe lies, though the words are not certain; nor is it ſaid that he is a common barretor in his profeſſion. Paſch. 8 Jac. Noy. 98. S. C. by the name of PRESTON's caſe, adjudged for

the plaintiff, and affirmed in error. ——— 13 Rep. 71.

8 Jac. in the exchequer-chamber adjudged. See the ſame caſe among the Reports de Paſch. 8 Jac. B. between BESTLEY AND DISON.]

Diſon v. Beſtney S. C. and with theſe further words, viz. *and thou dareſt ſhew thyſelf there, thou ſtudy the law? thou haſt as much wit as a daw.* Adjudged in B. R. for the plaintiff, and affirmed in error in the exchequer-chamber.

See ſupra, pl. 7. S. C. and the notes there.

[23. If a man ſays to J. S. an attorney, *he is an extortioner, and one P. told me that he had cozened him in a bill of* 10*l.* an action lies for theſe words; for it is againſt the oath of an attorney to commit a falſity. Hill. 40 Eliz. B. between STANLEY AND BOSWELL, adjudged.]

See (U. a) pl. 24.

[24. If a man ſays to a common ſmith, *thou art a rogue, and a cozening rogue, and in one tire of wheels which thou didſt ſend to J. S. thou didſt cozen him of a noble,* no action lies for theſe words; for it may be intended (and the words in themſelves import that they intended) that he had cozened J. S. in the price only, and not in the ill making of the wheels; and for ſaying to ſuch men of trade who ſell * things that they cozen in the price is no diſgrace, for every trader cozens in the price when he ſells for more than the thing is worth, and here it is not ſaid that the ſmith made this tire of wheels, and if he did not make it, it can be no diſgrace of his trade. Paſch. 16 Jac. B. between TICKNELL AND SNELLING, per cur.]

[454]

* Fol. 56.

Poph. 139. S. C. by the name of Powell's caſe, and Mountague Ch. J. ſaid that all the words beſides the words (*corrupted knave*) are idle, but theſe words impeach him in his office; for it has reference to that, and therefore is actionable; and judgment was given accordingly. ——— 2 Roll. Rep. 23. Powell v. Cole S. C. it was objected that it is not ſhewn that there was any colloquium between the defendant and the party that the words were ſpoke of the offices which the plaintiff had, or of his exerciſe of them, and ſo it is as if ſpoke of a private perſon. Sed non allocatur, but judgment was given for the plaintiff.

[25. If a man ſays to an utter barriſter, who is a town-clerk of the town, and a ſteward of the town-court, *thou art a preciſion knave, a puritan knave, a bribing knave, a baggage knave, a diſſembling knave, a corrupt knave, and I will prove it, &c. and thou haſt not carried thyſelf as thou oughteſt, and I will make thee know that thou haſt wronged me in the court of Plymouth* (where he was, before and at the time of the ſpeaking, town-clerk and ſteward, as he avers in the declaration), *and thou haſt not performed thy office according to law;* action lies for theſe words, for it appears by the laſt words that he was corrupt in regard of his miſdemeanor in his court and office. Paſch. 16 Jac. B. R. between FOWELL AND COWE adjudged, this being moved in arreſt of judgment.]

Cro. J. 65. pl. 4. S. C. and Williams J. held the words not actionable, but the other 4 e contra, and judgment for the

[26. If there be a matter depending in chancery between A. and B. and thereupon a commiſſion is directed to G. M. who is a juſtice of peace, and others to examine witneſſes therein, and alſo to hear and determine the ſame cauſe, and G. M. and the others act in the execution of this commiſſion, and afterwards A. ſays of G. M. Sir G. Moore (which was his name at large) *is a corrupt man, and hath taken bribes of B.* innuendo, *bribes for favour to be done to B. in the execution of this commiſſion;* and at another time he ſays, *B. hath ſet Sir* G. Moore *on horſeback with bribes,*

bribes, whereby to defraud equity and good conſcience. Though it doth not appear that the commiſſion was returned, yet it is alleged that he dealt in the execution thereof, in which he might act corruptly, and though he was not any judge nor officer ſworn in this commiſſion, but elected by one party, and ſo might be partial to this party, and take a reward for his pains, yet the action upon the caſe lies for theſe words, inaſmuch as by this commiſſion of oyer and terminer the king intruſts him, corrupt dealing therein, and in the examination of witneſſes, as in taking of bribes, is puniſhable. Paſch. 3 Jac. B. R. between SIR GEORGE MOORE AND FORSTER, adjudged.] plaintiff.—Yelv. 62. S. C. ſays that Fenner and Williams held the words not actionable, but the other 3 e contra, and judgment for the plaintiff.—

So ſaying to an arbitrator by him that choſe him, that he *has taken bribes of the other party, ſo that he is fallen from hearing any thing of his ſide*, is a ſlander puniſhable; for by the common law ſuch corruption in matters of reference may be puniſhed by indictment. By Popham, Gawdy and Yelverton. Yelv. 62. Paſch. 3 Jac. B. R. in caſe of Moore v. Foſter.

[27. If a man ſays of a juſtice of peace, *he was the true patron of advowſon of S. but he hath loſt that patronage and preſentation by being a ſimoniſt and recuſant, both which I will prove him to be*, yet no action lies for theſe words, for though the *recuſancy*, which is the moſt material word, be a good cauſe to depoſe him from his office, yet this does not touch him in the male-adminiſtration of his office, nor in his oath nor allegiance, and it is *not certain what recuſant he intends*, for perhaps he intends a recuſant according to 1 Eliz. Trin. 16 Jac. B. R. between SIR JOHN TASBORROUGH plaintiff, AND adjudged.] See (D. a) pl. 24. S.C. and the notes there.

[455]

[28. If a man ſays of a ſteward of a court baron and leet, *he hath put a preſentment into the jury's verdict againſt me of 3s. 4d. for ſuing of P. W. out of the court contrary to a pain, without the conſent of the jury*, action lies for theſe words; for this deceit diſgraces him in his profeſſion. Mich. 4 Jac. B. R. between CARR AND READ, per curiam præter Popham.] See (Y. a) pl. 7. S. C.

[29. If a man ſays of a juſtice of peace and judge of the court of the *marches of Wales, he is a blood-ſucker, and ſeeketh after blood,* † *if a man will give him a couple of capons, or half a ſcore of weathers, he will* * *take them*, yet no action lies, becauſe the words cannot have any ill ſenſe. Mich. 37 & 38 Eliz. B. R. between SIR CHRISTOPHER HILLIARD AND CONSTABLE, adjudged.] † *But if any man, &c.* * Fol. 57. Mo. 418. pl. 574. S.C. adjudged not actionable; becauſe a man may thirſt after blood in caſe of juſtice.——Cro. E. 306. pl. 5. S. C. *But if any man will give him a bribe, as ſheep, &c.* the court was of opinion that the laſt words not being found, no action lay for the firſt; for it cannot be intended what blood he ſucked, and by advice of the greater part of the juſtices of England, it was adjudged for the defendant.——Ibid. 433. pl. 41. Mich. 37 & 38 Eliz. B. R. S. C. and as to the words, *he is a blood-ſucker and ſeeketh others blood*, Gawdy and Fenner held thoſe words not actionable; but Popham and Clench e contra. But this being moved at Serjeants Inn, before all the juſtices of England there aſſembled, the greater part of them reſolved that the action lay not, and judgment was entered (with conſent of Popham and Clench) for the defendant.

[30. If a man ſays to a juſtice of peace, *thou art a blood-ſucker, and art not worthy to live in a commonwealth, the child not born will curſe thee*, no action lies for theſe words. Mich. 38 & 39 Eliz. B. R. between PINCHBACK AND WARWICK, adjudged upon a ſpecial verdict cites Mich. 37 & 38 Eliz. B. R.] S. P. held accordingly, Noy. 64. THIMMELTHORP's caſe, and the words being the very ſame, it ſeems to be S. C.——2 Mod. 163. S. C. cited Hill. 28 & 29 Car. 2. C. B. by Atkins.

Atkins J. in caſe of Townſend v. Hughs, that the words were not held actionable, becauſe they neither relate to his office, nor fix any crime upon him.

S. P. per curiam, obiter. Hob. 140. pl. 191. Hill. 14 Jac. in caſe of Thornton and Jebſon.

[31. If a man indicts a *juſtice of peace* for a common barretor, and he upon this is found not guilty, and afterwards the indictor calls the ſaid juſtice, *common barretor*, action upon the caſe lies againſt him; becauſe this diſcredits him in his offices. Paſch. 38 Eliz. B. R. between POOLE AND BENBRICKE, adjudged.]

—*So* if the words had been ſpoken *of a public officer, or an attorney or the like.* Hob. 140. per cur. in caſe of Thornton v. Jebſon, obiter.——See (U. a) pl. 3. S. C.——See (H. a) pl. 7.——See ſupra, pl. 15.

Mo. 695. pl. 965. S. C. by name of MARITER v. COTTON, adjudged in B. R. and judgment affirmed in the exchequer-chamber.

[32. If a man ſays of a juſtice of peace, *he hath taken money of a thief that was brought before him for ſtealing of ſheep, to deliver him and keep him from the gaol;* action upon the caſe lies for theſe words. Trin. 38 Eliz. B. R. COTTON's caſe adjudged.]

Mo. 141. pl. 283. Paſch. 25 Eliz. Broughton's caſe, *he is a vermin in the commonwealth, a falſe and corrupt man, an hypocrite in the church of God, a diſſembler; he hath uſed many corrupt practices to work his will; he procured my regiſter to be indicted of extortion; he willingly and wilfully hath boulſtered up one G. a lewd man, convicted of many offences, and knowing him to be an evil man, maintaineth him againſt me, without law, conſcience, or honeſty.* Theſe words were wrote in a letter of the plaintiff, a juſtice of peace, by the biſhop of L. and C. to the earl of Leiceſter. All the court held the words actionable, though wrote in a letter to a ſtranger; otherwiſe if in a letter to the party himſelf; and though ſome of the words are not actionable, yet the damages were well given.

[33. If a man ſays of a juſtice of peace, *he is a corrupt man, he is a vermin in the commonwealth, &c.* action upon the caſe lies. Mich. 42 & 43 Eliz. B. R. between the Biſhop of COVENTRY AND LITCHFIELD AND WORTLY dubitatur.]

——And. 119. pl. 168. Boughton's caſe, S. C. all the court held that ſome of the words were not actionable by themſelves, yet ſome held that all of them together would bear an action, ſeveral of them touching him * as a juſtice of peace, in doing things corruptly and injuriouſly. And afterwards, upon a conference with all the juſtices met at Serjeant's-Inn, all (except 2) agreed the action lay for the reaſon before, and that judgment ought to be given, notwithſtanding ſome of the words divided are not actionable, and notwithſtanding the damages were taxed generally.——S. C. cited Cro. E. 192. pl. 5. as adjudged actionable upon the words (he is a vermin in the commonwealth, and a corrupt man.)

Thou dealeſt corruptly, being ſpoke of a juſtice of peace, action lies; per Anderſon. Cro. E. 258. in pl. 18. Mich. 36 & 37 Eliz. C. B.

* [456]

Cro. J. 308. pl. 6. S. C. adjudged for the plaintiff, becauſe it touched him in his place, in charging him of procuring one to take a falſe oath before himſelf.

[34. If at a quarter-ſeſſions J. S. makes information upon oath againſt J. D. of a miſdemeanour, whereupon the juſtices bind him to his good behaviour, and after J. D. ſays to one of the ſaid juſtices, *by your means I had wrong at the ſeſſions, and there you cauſed J. S. to ſwear that which was untrue againſt me*, the ſaid juſtice ſhall have an action upon the caſe againſt him for theſe words, becauſe a juſtice ought not to procure any man to make a falſe oath, and ſo it is againſt his office. Mich. 10 Jac. B. between Sir WALTER CHETWIN AND MEESON, adjudged.]

——Yelv. 220. S. C. adjudged accordingly.

Caſe, &c. for theſe words ſpoken of a juſtice of peace, *he makes uſe of the king's commiſſion to worry me out of my eſtate*, and held actionable. 3 Mod. 71. Mich. 1 Jac. 2. B. R. Newton v. Stubbs.

Palm. 67. S. C. adjudged for the plain-

[35. If a man ſays of a commiſſioner upon a commiſſion returned by him into chancery, *he hath put out ſome depoſitions that were taken, and added others that were not*, action lies; for this diſgraces

graces him in his reputation ſo as not to be a commiſſioner again, and ſubjects him to a fine in the ſtar-chamber. Hill. 17 Jac. B. R. between Sir NICHOLAS PARKER AND LARGE, per curiam.]

tiff.——2 Roll. Rep. 153. S. C. ſays the opinion of the court was that the action lies; but judgment was arreſted, becauſe the defendant [who was a miniſter, as Palm. 68. ſays] offered to make public ſubmiſſion to the plaintiff at the aſſiſes.

Where the plaintiff was a commiſſioner of the exchequer to take examinations of witneſſes, the defendant ſaid of him, *he hath returned witneſſes that never were examined*, it was adjudged actionable. Palm. 67. Arg. cites 31 Eliz. Thoroughgood v. Fiſh.——Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fiſh v. Thorowgood, S. C. that he *hath returned, as the depoſitions of witneſſes* into the exchequer, *the examination of perſons who never were ſworn*; and reſolved to be actionable, and judgment for the plaintiff.——S. C. cited Palm. 67. Arg. as adjudged actionable.——S. C. cited 2 Roll. Rep. 153. Arg. but Haughton J. ſaid he believed the caſe was not ſo adjudged.

[36. If there be a diſcourſe between C. and D. of M. F. and C. ſays to B. [D.] *Mr. Deceiver hath deceived and cozened the king, and I have him in queſtion for it, and I doubt not but to prove it againſt him*, M. F. ſhall have an action, averring that he was the king's receiver of the court of wards, and that the words were ſpoken of him; for it appears by the nick-name given to him, ſcilicet, Deceiver, that he intends the deceit to have been in his office of receiver, and by the other words alſo. Hill. 17 Jac. B. R. between Sir MILES FLEETWOOD AND AUDITOR CURL., adjudged in a writ of error upon a judgment in B. where it was ſo adjudged alſo per curiam. See the caſe adjudged Trin. 17 Jac. B.]

Cro. J. 557. pl. 3. S. C. adjudged in C. B. and judgment affirmed, and all the court held that it is good enough without any innuendo.—Palm. 69. S. C. and judgment affirmed. And Doderidge J. ſaid that if the defendant had ſaid to the auditor, *Mr. Frauditor*, inſtead of *Mr. Auditor*, an action would well lie.——2 Roll. Rep. 148. Curle v. Fleetwood, S. C. and judgment affirmed.——Hob. 267. pl. 352. Hill. 16 Jac. S. C. adjudged in C. B.——Godb. 341. in pl. 435. S. C. cited as adjudged actionable, becauſe it was in his calling by which he got his living.——Mar. 82. in pl. 135. S. C. cited.

* [457]

[37. If a man ſays of a counſellor of law, *go you to him to be of your counſel? He will deceive you; he was of counſel with me, and revealed the ſecrets of my cauſe*, action lies for theſe words; for it appears by all the words, that he intended a ſlander by the * revealing of that which he ought not. Trin. 13 Eliz. B. R. Rot. 114. between SNAG AND GREY, adjudged, this being moved in arreſt.]

He diſcovered all my counſel to my adverſary. The plaintiff recovered. Dal. 97. in pl. 27. cites 11 Eliz.

Snagg's caſe.——If one ſays to a counſellor, *thou didſt diſcloſe my counſel*, an action lies; per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B.

So of a counſellor or attorney, *thou didſt deliver my evidence to my adverſary*, an action lies; per Beamond. Ibid.

Saying of a lawyer, *he did reveal the ſecrets of my cauſe*, is not actionable; for he ought to reveal it to a judge; but ſaying, *go not to him, he did reveal the ſecrets of my cauſe*, is actionable. Het. 174. Arg. *He hath dealt falſely with me, being his client, and hath joined with my adverſary.* Per cur. the words are clearly actionable; but it being objected that the plaintiff was ſequeſtered, and did not practiſe at the time of bringing the action, Roll Ch. J. ſaid that the plaintiff ought to *aver that he is a practiſer*; for he may be a barriſter, and not practiſe; but as to this the court would adviſe. Sty. 231. Mich. 1650. Gibbs v. Price.

[38. If a man ſays of a juſtice of peace, *I have often been with him for juſtice, but could never have juſtice at his hands, but always injuſtice*, action lies. Mich. 3 Car. between Sir JOHN ISAM AND YORK, adjudged, this being moved in arreſt of judgment.]

Cro. C. 14. pl. 5. S. C. The court held that it could not be ſpoken of him as a private perſon, or for any private occaſion, but as he was a juſtice of peace; and ſo gave judgment for him.

Fol. 58.

Sty. 22. Paſch. 23 Car. S. C. adjudged actionable.—Sty. 210. Paſch. 1649 S. C. adjudged accordingly.

[39. In an action upon the caſe by a juſtice of peace, if he declares that he was a juſtice of peace, and that one J. S. was brought before him to be examined touching the ſtealing of a lamb, whereupon he was examined accordingly; and after the defendant ſpoke theſe words of him falſely and maliciouſly, *he did of his own head put into J. S.'s examination that he had confeſſed he had ſtolen the lamb*, action lies for theſe words; for this diſgraces him in his office of a juſtice of peace; for theſe words imply that he put it in his examination without the confeſſion of J. S. for if he put it in of his own head, this could not be upon confeſſion of the party; for this is as much as to ſay he deviſed it of himſelf. Paſch. 1650. between HAMMOND AND KINGSMILL, adjudged per curiam, this being moved in arreſt of judgment. Intratur Hill. 22 Car. B. R. Rot. 735.]

Thou haſt forged a recognizance taken before F. and others, adjudged actionable; for (forged) ſhall be intended *(falſely certified,)* and (taken) ſhall be intended for *(acknowledged)*. And the plaintiff being a juſtice of peace, who had authority to take recognizances, it is a great ſlander to him; and he had judgment. Cro. E. 883. pl. 16. Paſch. 44 Eliz. B. R. Chichely v. Barker.

40. Words ſpoken of a *chirurgeon* were, that he was not a good ſubject; for *he hath poiſoned the wound of A. for gain of money.* Agreed to be actionable. And. 268. pl. 277. Mich. 33 & 34 Eliz. Anon.

[458]

See pl. 1, 2, 3, 4, 5, 6, 7, 8, 9. 13. 15, 16. 19, 20, 21. 23.

(S. a. 2) Words ſpoken of an Attorney.

Dal. 63. pl. 22. S. C. accordingly.

1. *HE is the falſeſt knave in England, and he will cut your throat*, being ſpoke of an attorney, with an oath as to cutting the throat, was held actionable. Mo. 61. pl. 171. Trin. 6 Eliz. Anon.

S. C. cited by Hobart Ch. J. Hob. 9. in pl. 18. —S. C. cited by Hobart Ch. J. Win. 40, 41.

2. *You are well known to be a corrupt man, and to deal corruptly*, being ſpoke of a ſworn attorney, are actionable, becauſe it touches him in his oath, and alſo in the duty of his profeſſion, whereby he acquires his living. 4 Rep. 16. pl. 6. Mich. 27 & 28 Eliz. B. R. Birchley's caſe.

———*But if the preceding parlance had been that the plaintiff was an uſurer, or was an executor, and would not perform the teſtament, &c.* and thereupon the defendant had ſaid the ſame words, they would not be actionable. 4 Rep. 16. a. pl. 6. Mich. 27 & 28 Eliz. B. R. in Birchley's caſe.

3. *He deſerves to have his ears nailed to the pillory*, is actionable, being ſpoke of an attorney. Mo. 401. pl. 529. Paſch. 37 Eliz. Jenkinſon v. Wray.

Cro. E. 914. pl. 3. S. C. by the name of King v. Shore, adjudged and affirmed in

4. *Thou art a paltry fellow, thy credit is fallen; for thou dealeſt on both ſides, and doſt deceive many that truſt thee.* Adjudged and affirmed in error to be actionable, being ſpoke of an attorney; for though an attorney may deal on both ſides as an arbitrator, yet all the words being coupled together muſt refer to his calling, and cannot

cannot be taken but in malam partem. Yelv. 32 Hill. 45 Eliz. B. R. Shire v. King. error accordingly. —Noy 11.

S. P. adjudged for the plaintiff, nisi. Thompson's case.

5. Saying of an attorney that *he suppressed a will*, is actionable; for it is a defamation to him in a thing concerning and belonging to his profession; but to say so of a tradesman it is otherwise, because such words do not extend to his trade or profession; per Mountague Ch. J. and judgment accordingly as to the tradesman. Palm. 21. Mich. 17 Jac. in case of Godfrey v. Owen.

6. *Thou hast made false writings between J. S. and his brother*, Arg. Win. 39. cites it as adjudged that * an action lies. Hill. 17 Jac. B. R. ELLIOTT v. BROWN. But ibid. 40. Hobart Ch. J. said he agreed the case of Elliot v. Brown, that to say he made false writings, no action will lie; for it is no scandal to him in his profession, because it does not appertain to an attorney to make writings, no more than to an apothecary to give physic.

* It seems that the word (an) should be (no.)

7. *Is W. your attorney? Take heed and follow him well; for else he will make you throw your purse over your bosom*, actionable; for it is a scandal to him in his profession, and is as if he had said he will make you spend all your money; per Winch J. Win. 41. cites it as adjudged in B. R. Wingate's case.

8. *Thou art a false knave, a cozening knave, and hast gotten all that thou hast by cozenage, and thou hast cozened all those that have dealt with thee.* These words spoken of an *attorney* are slanderous, and touch him in his profession, and therefore adjudged that the action well lay. Cro. J. 586. pl. 8. Mich. 18 Jac. B. R. Jenkins v. Smith.

To say of an attorney, that *he is a false attorney*, an action lies; per Richardson. Het. 141. Trin. 5 Car. B. R. in case of Starkey v. Taylor.

9. *G. is a forger of writings, and deserves to lose his ears*, being spoke of an attorney, is not actionable; and because he did not say † deeds, judgment was arrested. Win. 90. Trin. 22 Jac. C. B. Godsel's case.

Win. 90, 91. Arg. cites it as adjudged in the case of Brown v. Ellis,

that for saying an attorney had forged writings, no action lies, because too general; and besides it doth not at all appertain to him to make writings.

† [459]

10. *Thou art a knave of record, and a forgering knave*, was spoke of an attorney, but no communication of him as such. The parties agreed, and so the court did not speak to the question, whether actionable or not. Lat. 20. Pasch. 2 Car. Dawburn v. Martin.

Poph. 177. Dabborne v. Martin, S. C. but no opinion.—Palm. 441. Daubney v. Martin, S. C. but there instead of (forgering knave) it is (forgery knave,) which Crew Ch. J. said was not sense; and says the opinion was that it would scarce bear an action.

He is a forging knave. The plaintiff counted that he was an attorney of C. B. and the court held the words actionable. Brownl. 16. Smails v. Moor. ——Het. 140. Arg. cites Small v. Moon, S. C 14 Jac. C. B. adjudged actionable.

I never forged any man's hand, but you are a forging rogue, being spoke of an attorney, is actionable, though no colloquium was alleged of his profession; for it is a great defamation, and the words import that he forged another's hand; for the antithesis by common intendment amounts to a charge that the plaintiff did what he denied of himself, and those words spoke of another import scandal and defamation

defamation of him; per tot. cur. And the plaintiff had his judgment. Comyns's Rep. 262. pl. 144. Paſch. 3 Geo. 1. Anon.

Ley's Rep. 70. S. C. by the name of Roberts v. Lord, adjudged accordingly.—If the defendant in this caſe had ſaid that *he would have his ears*, this might be intended by violence; per the Chief J. Lat. 220. in the S. C.——S. C. cited by Twiſden J. Vent. 117. and ſaid it was as much as to call him knave-attorney.

11. *Go tell your lawyer that he is a baſe raſcal, and that I will make him loſe his ears, and teach him, or any lawyer of them all, how they dare to ſerve a writ on me*, being ſpoke of an attorney, were adjudged actionable, becauſe they diſgrace him in his profeſſion. Lat. 220. Mich. 3 Car. Trowbridge v. Hard.

12. *He hath cheated me of a great deal of money, &c.* being ſpoke of an attorney generally, without ſpeech of his office, are not actionable; for he may have cheated at dice, or in a bargain, &c. And though the words were laid to be ſpoke upon a conference of a bill of coſts laid out by him, yet it not being ſaid laid out by him as attorney, action does not lie; per Richardſon. And the whole court ſeemed to be of the ſame opinion. Sed adjornatur. Het. 169. Trin. 7 Car. C. B. Gee v. Egan.

But if he had ſaid *he cheats his clients*, it would be actionable.

13. Saying of an attorney, that *he is a cheating knave*, is not actionable, if it was not upon ſpeaking of him as an attorney. Het. 167. Paſch. 7 Car. C. B. Alleſton v. Moor.

Het. 167. Per cur. in caſe of Alleſton v. Moor.

14. A lawyer [but not ſaid whether barriſter or attorney] was *competitor to be choſe ſteward* of a corporation, and they being aſſembled to make an election, one of the corporation ſaid to his brethren, *he is an ignorant man, and not fit for the place*; by which he was refuſed. The court ſeemed to incline, that the words were actionable, but gave no judgment. Mar. 146. pl. 217. Trin. 17 Car. C. B. Sanderſon v. Ruddes.

So to ſay that he has no more law *than a gooſe*, has been adjudged actionable. Sid. 127. pl. 8. ſo ſaid per cur. in the S. C.——There is a quære added, as to ſaying, he hath no more law *than the man in the moon*. Ibid.——2 Keb. 202. pl. 35. S. C. adjudged for the plaintiff by 3 juſt. contra Keeling Ch. J. for if C. had no bull, the ſcandal is the greater.

15. *He hath no more law than Mr. C.'s bull*, being ſpoke of an attorney, the court inclined that they were actionable, and that the plaintiff ſhould have judgment, though it was objected that the plaintiff had not declared that C. had a bull. Sid. 327. pl. 8. Paſch. 19 Car. 2. B. R. Baker v. Morſue.

[460]

Vent. 98. Jones v. Powell, S. C. the court inclined that the words were not actionable; for the declaration might be ſo written, that he might not be able to read it.——Raym. 196. S. C. that the words were ſpoke in auditu quamplurimorum. Adjudged for the plaintiff, and the judgment affirmed.——Mod. 272. pl. 23. Trin. 29 Car. 2. B. R. the S. C. and the court held the words actionable, though there had been no ſpecial damages; for they ſpeak him to be ignorant in his profeſſion, and the court would not intend that he had a diſtemper in his eyes, &c. and judgment for the plaintiff.——2 Keb. 710. pl. 84. Mich. 22 Car. 2. B. R. the S. C. and per cur. the *colloquium* being *of his ſkill*, the words are actionable. And judgment for the plaintiff.

16. *Thou canſt not read a declaration*, being ſpoke to an attorney, in diſcourſe of him and his profeſſion, by means whereof he loſt S. his client. Twiſden J. at firſt held the action lay not for want of an *averment* that he could read a declaration, but afterwards it being *found to be falſe*, judgment for the plaintiff in C. B. was affirmed. Lev. 297. Mich. 22 Car. 2. B. R. Powell v. Jones.

17. To

17. To ſay, *he arreſteth without taking out writs*, &c. is actionable, without any colloquium, becauſe they neceſſarily relate to his employment; per cur. Freem. Rep. 277. pl. 309. Mich. 1675. B. R. in caſe of Bell v. Thatcher.

18. *He is a knave in his practice*, is actionable without any colloquium, becauſe they neceſſarily relate to his employment. Freem. Rep. 277. pl. 309. Mich. 1675. B. R. per cur. in the caſe of Bell v. Thatcher. Calling an attorney *knave*, adjudged actionable in C. B. and that judgment affirmed in B. R. cited Sty. 17. as Trin. 12 Car. Nicholas v. Webb. ——*He is a knave, and would have cheated me of 4 l.* is not actionable by *general averment that thereby he loſt his client, without ſpecial colloquium of his profeſſion*, or ſaying, he is a *knaviſh attorney*, or ſuch words as touch his profeſſion; and judgment was ſtayed. 2 Keb. 84. Trin. 13 Car. 2. B. R. Rod. v. Binks.

(S. a. 3) Words ſpoke of Clergymen.

1. IF a clergyman is to be preſented to a benefice, and one to defeat him thereof, ſays to the patron, *he is a heretic*, or a *baſtard*, or he is *excommunicated*, by means whereof the patron refuſes to preſent him, and he *loſes his preferment*, he ſhall have action for ſuch ſcandal, tending to ſuch an end. Per cur. 4 Rep. 17. a. pl. 11. Trin. 15 Eliz. in caſe of Davis v. Gardiner.

2. *Thou haſt made a ſeditious ſermon, and moved the people to ſedition this day*, being ſpoken of a clergyman, adjudged actionable. 4 Rep. 19. a. Per cur. cites Paſch. 24 Eliz. B. R. Phillips v. Badby.

3. *He hath had two wives*, being ſpoke of a clergyman, was adjudged againſt the plaintiff. Cro. E. 94. pl. 4. Paſch. 30 Eliz. B. R. Nicholſon v. Lyne.

4. *He is a lewd adulterer, and hath had two children by the wife of J. J. S. and I will cauſe him to be deprived for it*, being ſpoken of a clergyman, is puniſhable in the ſpiritual court, but not actionable. Adjudged. Noy 64. Parret v. Carpenter. Cro. E. 602. pl. 23. Mich. 38 & 39 Eliz. B. R. S. C. adjudged accordingly.

5. *He is an adulterer, whoremaſter, drunkard, ſwearer, and a preacher of falſe doctrine*, were ſpoken of a clergyman. It was objected that it does not appear that the plaintiff is a beneficed man, and ſo cannot be puniſhed for preaching falſe doctrine. Judgment was ſtayed till the plaintiff ſhould move. Sty. 49. Mich. 23 Car. B. R. Anon.

6. *He has a baſtard on the other ſide the river, and it is ſo indubitable, that I fear not to divulge it; and if I am troubled for it I can juſtify it*, being ſpoken of a clergyman who was agreed to be retained chaplain to the * duke of Ormond, by which he loſt his chaplainſhip. Adjudged for the plaintiff. Lev. 248. Mich. 20 Car. 2. B. R. Payne v. Beaumorris. Sid. 376. pl. 3. Dumewick v. Pain, S. C. mentions only the firſt words, and held actionable in reſpect of the ſpecial declaration. ——2 Keb. 400. Humoriſt v. Pain, S. C. accordingly.

See pl. 14. 16, 17. 22. 25. 37.

(S. a. 4) Words ſpoke of Counſellors.

Mo. 695. pl. 964. Gidoye v. Heale. Trin. 33 Eliz. S. C. adjudged in B. R. and affirmed in the exchequer chamber by all the juſtices.—And. 269. S. C. cited per cur. that judgment was given for the plaintiff, and by the opinion of other judges.——S. C. cited by Serjeant Richardſon 2 Roll. Rep. 145, 146. as adjudged actionable in B. R. but ſaid that the judgment was reverſed in the exchequer-chamber, becauſe the word (warrant) was * uncertain.——S. C. cited Palm. 64. 95. as adjudged in B. R. but reverſed in the exchequer-chamber, becauſe it might be intended warrants made by him as juſtice of peace.——S. C. cited Win. 39. Arg. as adjudged and reverſed accordingly, becauſe the word (warrants) is general, and may be applied to other things; but Winch interrupted him and ſaid, it was not reverſed for error.

* The original is (certain) but miſprinted.

1. AT a court of ſurvey held by H. a *counſellor*, ſteward of a manor lately purchaſed of the queen, he produced the letters patents, and thereupon ſaid, I aſſure you the fee-ſimple of the manor is in the patentees; and then deſired the tenants to ſhew their copies and leaſes, &c. Whereupon G. ſaid the tenants ought to be better informed. Upon which ſome of the tenants ſaid, they hoped that H. was ſufficient warrant, he having affirmed that the fee-ſimple was in the patentees; G. replied, *no, friends, I know well a great number of people in this country, truſting to his warrants, have been thereby undone.* Adjudged for the plaintiff, and affirmed in error in the exchequer chamber. 2 And. 40. pl. 26. Hole v. Gyddy.

Freem. Rep. 14. pl. 14. S. C. but there the words are, *he adviſes you to a vexatious ſuit, and he will make you pay double and treble fees, is a griping lawyer, and he will milk, &c.* adjudged accordingly.

To ſay that he is a griping lawyer, and will milk your purſe, is actionable; per Tyrrel J. Ibid. 15.

2. *He will give vexatious and ill counſel, and ſtir up a ſuit, and then he will milk your purſe, and fill his own large pockets.* Theſe words were wrote in a letter of a counſellor to his client (a counteſs;) and the count ſet forth that he loſt the ſaid counteſs, and other clients. Adjudged by 3 juſtices againſt Vaughan, that the action lay. 2 Vent. 28. Mich. 23 Car. 2. C. B. King v. Lake.

3. *He gives bad counſel*, being ſpoke of a counſellor, is actionable; per cur. Arg. Freem. Rep. 15. in caſe of King v. Lake.

4. *He will ſpin out your cauſe, do not go to him*, being ſpoke of a counſellor, is actionable; per Wild J. Freem. Rep. 15. Arg. in caſe of King v. Lake.

5. *He never gives his advice, but he conſults with others*, being ſpoke of a lawyer, is actionable; per North. Freem. Rep. 279. Trin. 1680. in pl. 314.

[462]

(S. a. 5) Words ſpoke of a Midwife.

1. *MANY have periſhed for want of her ſkill*, being ſpoken of a midwife, is actionable; and judgment for the plaintiff; for ſhe has a profitable gain by that function, and ſo thoſe words

may be prejudicial. Cro. C. 211. pl. 2. Paſch. 7 Car. B. R. Flower's caſe.

2. *She is an ignorant woman, and of ſmall practice, and very unfortunate in her way; there are few that ſhe goes to, but lie deſperately ill, or die under her hands,* being ſpoke of a midwife, the action was held maintainable. Vent. 21. Paſch. 21 Car. B. R. Wharton v. Brook. 2 Keb. 489. pl. 36. WHARTON v. GLOVER, S. C. adjudged for the plaintiff.

3. *Thou art no midwife, but a nurſe, and if I had not pulled thee from Mrs. J. S. thou hadſt killed her and her child;* actionable, becauſe they diſparage her in her profeſſion. Freem. Rep. 277. pl. 310. Paſch. 1676. B. R. Whitehead v. Founes.

4. *She layeth no woman, but Dr. Chamberlain or his lady does her work,* and declared that by reaſon thereof ſhe loſt her employment, and particularly of ſuch a perſon. Adjudged actionable. Freem. Rep. 278. pl. 314. Trin. 1680. Gyles v. Biſhop.

(S. a. 6) Words ſpoke of School-Maſters, &c.

1. IF one ſays of a ſchool-maſter, that *he has no knowledge in grammar, or in the Latin tongue, nor knows how to educate his ſcholars in the Latin tongue,* and he thereby loſes his ſcholars, an action lies; per Crooke J. 2 Roll. Rep. 72. Hill. 16 Jac. B. R.

2. *Put not your ſon to him; for he will come away as very a dunce as he went,* being ſpoke of a ſchool-maſter, is actionable; per Yelverton J. Arg. Het. 71. Mich. 3 Car. C. B.

3. *She is a whore, and J. S. kept her as his whore,* being ſpoken of a ſchool-miſtreſs who taught children to write and read, by which ſhe got her livelyhood, was cited by Twiſden J. Vent. 21. Paſch. 21 Car. 2. B. R. to have been adjudged not actionable, without laying ſpecial damage.

4. Words ſpoke of a *dancing-miſtreſs*, viz. *ſhe is as much a man as I am, ſhe is an hermaphrodite,* by which ſhe loſt divers ſcholars, but did not mention any in particular. After a verdict for the plaintiff, judgment was ſtayed, that the words are not actionable; for it is no ſcandal to her profeſſion to ſay ſhe is an hermaphrodite; for young women are more commonly taught by men to dance than by women, and here is no ſpecial damages laid, and the words are not actionable in themſelves. 2 Lev. 233. Mich. 30 Car. 2. B. R. Wetherhead v. Armitage. 2 Show. 18. pl. 11. Wetherhead v. Brookborne, S. C. adjornatur. —Freem. Rep. 277. pl. 312. Witherley v. Hermitage, S. C. The words are, *ſhe is as much a man as I am, and got J. S. with child,* and that by reaſon thereof ſhe loſt her ſcholars; but becauſe ſhe did *not lay in particular what ſcholars* ſhe had loſt, the court would adviſe.

(T. a) For Words in *Diſgrace of an Office.* [463]

[1. IF a man ſays of a church-warden, having communication of his ſaid office, and [the plaintiff] averring in his declaration that he was church-warden, and had received ſeveral Sty. 338. S. C. and judgment for the plain-

tiff, niſi, and ſaid that officers who have no benefit by their offices have more need to be repaired if they be ſcandalized in the execution of them.

ſums of money to the uſe of the pariſh, by force of his ſaid office, *thou art a cheating knave, and haſt cheated the pariſh of* 40 *l.* action lies; for this is a great ſlander of him, this being an office of truſt, though he be not ſworn, yet he is a temporal officer as well as a ſpiritual; for he is named in ſeveral ſtatutes, as in the ſtatute of the poor. Trin. 1652. between STRODE AND HOLMES, adjudged, this being moved in arreſt of judgment. Intratur Hill. 1651. Rot. 999.]

——The plaintiff counted that he was conſtable and church-warden of A. and as ſuch had expended divers ſums of money for the uſe of the inhabitants, &c. and the defendant ſaid, *thou haſt beguiled and deceived that town* (innuendo the inhabitants of A.) *upon thy accounts* 4 *l. and it is no marvel thou groweſt rich, when thou deceiveſt the town*; adjudged for the defendant, the words being too general. Cro. J. 339. pl. 4. Paſch. 12 Jac. B. R. Hutton v. Beach.——S. P. and ſeems to be S. C. adjudged accordingly, 2 Bulſt. 218. Paſch. 12 Jac. Hopton v. Baker.

In action for words, the plaintiff counted that he was ſteward of the courts of the Ld. A. and a pariſhioner of G. and had been church-warden there, and had received 100 l. by reaſon of his office, and rendered thereof a true account; but the defendant, to diſgrace him, having diſcourſe with K. of the offices which the plaintiff had born in the ſaid pariſh, and of the money received, ſaid, *thy brother-in-law Charles Willis, is a notorious lyar, and a cozener, and hath deceived and cozened the pariſh of G. of* 500 *l. and he will teach thee to cozen me of my houſe.* The court thought the words too general, and gave judgment quod querens nihil capiat per breve. Cro. J. 619. (bis) pl. 9. Mich. 18 Jac. B. R. Willis v. Shepherd.——Words ſpoke of a church-warden were, *W. is a knave, and has cheated the pariſh of* 20 *l.* a colloquium was laid of the office of church-warden. Bridgman Ch. J. ſaid that to ſay, he hath cheated me, are words of paſſion; but if applied to a man in his office (and church-wardenſhip is a temporal office) the action will lie; and ſo it was adjudged. Cart. 1. Mich. 16 Car. 2. C. B. Woodruff v. Wooley.

Thou doſt make lowns, (viz. taxes or aſſeſſments) thy ſelf, and makeſt 5 *quarters in the year, and doſt cheat and cozen the pariſh.* The words muſt be intended to be ſpoken of him in relation to his office; for that is implied by his making of lowns, and his cozening the pariſh. Sty. 394. Mich. 1653. B. R. Townſend v. Barker.

Sty. 363. S. C. The court inclined the words were actionable, and judgment, niſi, &c.

[2. If a man ſays of a miniſter, who is inſtituted and inducted into a benefice, *he preacheth lies in the pulpit*, an action lies; for a lie is a falſe thing againſt his own knowledge, and this is good cauſe of deprivation, by which he may have a temporal damage. Hill. 1652. between DRAKE AND DRAKE; judgment upon a demurrer upon the declaration.]

But if one calls another, be he who he will, *extortioner*, it is actionable, becauſe extortion is puniſhable in any man, but ſo is not bribery, unleſs he be an officer of record; per Dyer. Dal. 43. pl. 26. 4 Eliz. Anon.

3. If one calls an *eſcheator*, *coroner*, *ſheriff*, *attorney*, or ſuch as are *officers of record*, *extortioner*, action lies; but if one calls a *bailiff*, or *ſteward of a baſe court*, who are not officers of record, extortioner, no action lies; becauſe extortion cannot be but in ſuch as are officers of record. Dal. 45. pl. 35. 4 Eliz. Anon.

Action does not lie for calling one extortioner, without averment that the plaintiff was an officer. Mo. 182. pl. 324. Trin. 26 Eliz. per Wray Ch. J. in Lynſey's caſe.

He hath taken 40 *s. for a bribe*; adjudged actionable, being ſpoken of a *town clerk*.

4. *He has taken bribes or rewards*, being ſpoke of an officer of a court of record, is actionable; but if of a ſervant or officer to another common perſon, it is otherwiſe. Dal. 43. pl. 26. per Dyer, 4 Eliz. Anon.

Godb. 157. pl. 211. Mich. 6 Jac. B. R. Lee v. Swan.——Yelv. 142. Nile v. Swanſon S. C. * adjudged accordingly; for the plaintiff has ſhewn himſelf to be an officer of truſt, both as town-clerk and keeper of the courts, at the time of ſpeaking of the words, ſo that they cannot be conſtrued but in ſlandering him in his office; for he cannot take a bribe by any other colour. So if they had been ſpoke of a juſtice of peace or a *clerk of aſſiſe*.

5. As an officer of the court was receiving his fee, the defendant called him *cut-throat*. Arg. Mo. 142. in pl. 283. cites it to have been adjudged actionable, 6 Eliz.

6. *Thou doſt ſerve falſe warrants, and deceiveſt the people*, being ſpoken of a *bailiff* [* of a franchiſe] were adjudged not actionable; for it is not averred that he made falſe warrants, or knew they were falſe. Cro. E. 192. in pl. 5. Arg. cites it as adjudged in Kimſey's caſe. And this caſe was agreed by the counſel of the other ſide, who was of counſel in that caſe. * Le. 336. in pl. 449. cites it as adjudged not actionable in Kinſey's caſe, S. C.

7. *Thou art a cozening knave, coroner; for thou haſt cozened me of my land.* The plaintiff could not have judgment; for he was not particularly charged in reſpect of his office. 3 Le. 171. in pl. 222. Mich. 29 Eliz. B. R. cites it as Egerton's caſe. Godb. 88. pl. 99. Mich. 28 & 29 Eliz. B. R. Eglinton v. Aunſell, S. C. but the word *(for)* is there *(and)* and ſays, the better opinion of the court was, that the words were not actionable; but Clench, Gawdy, and Shute J. were of opinion that if the words had been *cozening coroner*, they had been actionable. —— S. C. cited with the word (for) and that it was held not actionable. —— Cro. J. 427. in pl. 1. S. P. cited as adjudged for the plaintiff; and that a precedent was ſhewn of one Holberk's caſe coroner of Warwick.

8. The defendant ſaid of the *maſter of the mint, he hath not made the money as good and fine as the ſtandard by an halfpenny in the ounce, and ſo he hath ſaved* 4000 *l.* It was argued that theſe words were not actionable. Sed adjornatur. Le. 88. pl. 111. Mich. 29 & 30 Eliz. Martin v. Stedd.

9. Saying of a *deputy of clarencieux king of arms*, whom he had appointed to ſit in the counties of Devon and Somerſet, that *he came and ſat by force of a forged cemmiſſion, and he is a ſcrivener and no herald.* Adjudged actionable; for they touch him in his profeſſion, in ſaying that he is a ſcrivener, and no herald. Cro. E. 328, 329. pl. 2. Trin. 36 Eliz. B. R. Brooke v. Clarke.

10. *Before the plaintiff came to ſervice of the merchant taylors he dwelt in Shrewſbury, and ſet the town together by the ears; and as long as he was there they were never in quiet, but afterwards they lived quietly; and he being clerk of the merchant taylors, was of conſent and counſel with W. G. to deliver the books of the corporation which he had in his keeping, to the intent that thereby ſome of the lands of the ſame corporation might be found concealed.* Adjudged actionable; for theſe words touch him in his office and credit; and his office is an office of truſt. Cro. E. 358. pl. 18. Mich. 36 & 37 Eliz. C. B. Wright v. Moorhouſe.

11. *Thou art as cozening a fellow as any is in the country; the laſt time thou waſt under-ſheriff, as now thou art, thou didſt ſerve an execution for a neighbour of mine, and didſt keep the money in thy hands.* Adjudged not actionable; for as to the laſt words, it is not expreſſed how long he kept the money, and it might be only till the return of the writ, or by the plaintiff's aſſent. Cro. E. 854. pl. 14. Trin. 43 & 44 Eliz. B. R. Geeve v. Copſhill.

12. Words, viz. the plaintiff *is not worthy the office of a conſtable; for he and his company, the laſt time he was conſtable, ſtole five of my ſwine, and eat them.* Adjudged actionable. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. B. R. Taylor v. How.

Noy 133. S. C. but S. P. does not appear.

13. *Thou art a healer of felony, and haſt ſhewn ſuch favour to a horſe-ſtealer in the time of thy conſtableſhip, that thereby both the horſe and thief were conveyed away; and it lies in my power to hang thee.* Adjudged for the plaintiff; and though it be not laid expreſsly that the plaintiff was * conſtable at the time of ſpeaking the words, it is not material; for though he be out of his office, he ought not to be ſlandered with any thing in his office. Yelv. 153. Paſch. 7 Jac. B. R. Pridham v. Tucker.

14. *He* (innuendo the plaintiff) *hath cozened the earl of H. of as much as he* (innuendo the plaintiff) *was worth*, being ſpoken of one who was *high-ſheriff of the county, and juſtice of peace;* but held clearly by Yelverton, Crooke, Fenner, and Williams J. that the words are not actionable. And judgment againſt the plaintiff. Bulſt. 172. Trin. 9 Jac. Tut v. Kerton.

15. Saying to a *conſtable, thou art a bribing knave, and haſt cozened the pariſh of W. in rates to* 30*l.* Het. 36. Mich. 3 Car. C. B. THOMAS'S CASE; but it is not ſaid whether actionable or not.

16. *The mayor of Tiverton has cozened the town and county*, is not actionable. Jo. 308. pl. 22. Mich. 8 Car. B. R. Tiverton (Mayor's) caſe.

You make falſe records, and juſtify them for true, being ſpoke of a *clerk of the peace* of the county of Glouceſter, was held not actionable; for they might be falſe for miſwriting, or otherwiſe; cited Cro. E. 192. in pl. 5. Arg. and the counſel of the other ſide agreed this caſe (in which he was of counſel;) for they ſhall be intended in a good ſenſe, and could not be intended that they counterfeited warrants or records.

17. One ſaid to a *town-clerk* of Southampton, *thou haſt made many falſe certificates to the mayor and burgeſſes in that court, and the more thou ſtirreſt in it the more it will ſtink.* Adjudged not actionable, becauſe no colloquium is alleged of his office of town-clerk, nor does he count that the making certificates belongs to his office, but only that he had the cuſtody of them. And the caſe being moved again the next term the judgment was affirmed. Hutt. 123. Paſch. 9 Car. Smith v. Cornelius.

18. *He is a baſe cozening knave; he is a cheater, and has cozened his maſter*, was ſpoke of a deputy-clerk to an arch-deacon's regiſter, who received the fees and profits of the office to render account. All the court (abſente Bramſton) held that it ſhall not be intended but the words were ſpoke concerning the execution of the office, where the communication was concerning the office. And adjudged for the plaintiff. Cro. C. 563. pl. 8. Mich. 15 Car. B. R. Reignald's caſe.

19. *Thou haſt received money of the king to buy new ſaddles, and haſt cozened the king and bought old ſaddles for the troopers.* Bramſton Ch. J. and Heath J. held the words actionable; for it is not material what imployment he hath under the king, if he may loſe his imployment or truſt thereby. And it is not material whether the imployment be for life or years, &c. Mar. 82. pl. 135. Paſch. 17 Car. B. R. Sir Richard Greenfield's caſe.

20. An *aſſignee of one who is deputy only at will of the bailiwick of Middleſex to the lord treaſurer*, is not ſuch an officer as may have

have an action againſt one for ſaying of him, *thou art a cozener.* Noy. 74. Dobſon v. Dugdale.

21. *You have cozened the ſtate of* 25,000*l. and I will prove it, for you have received* 25,000*l. of the office, and not compounded for it, and have foiſted in words in the order for your compoſition,* are actionable, being ſpoke of an officer. Style 436. Trin. 1654. B. R. Henley v. Sir Edward Baynton.

22. *He hath broken up letters, and taken out bills of exchange,* being ſpoke of one retained by the under poſt-maſter to carry about poſt letters, of which he made a profit; and whereby he loſt the imployment; adjudged not actionable, and ſo a judgment given in C. B. reverſed. Vent. 275. Mich. 27 Car. 2. B. R. Bell v. Thatcher.

Freem. Rep. 276. pl. 309. S. C. and the words held not actionable, becauſe no colloquium was laid to be of his imployment at the time of ſpeaking the words. —— Vent. 276. S. C. ſays that what Hale Ch. J. principally went upon in reverſing the judgment, was the *quality of the employment*; * for by maintaining ſuch actions, one muſt not ſpeak diſparagingly of a man's cook or groom, but an action would be brought.

* [466]

23. Words ſpoken of a doctor of the civil law, who was alſo a juſtice of peace, and chancellor of the biſhopric of Norwich, were, viz. *he is not fit to be a chancellor or a juſtice of peace; he is a knave, a raſcal, and a villain, he is not fit to practice, he ought to have his gown pulled over his ears*; adjudged actionable. 2 Lutw. 1288. Trin. 5 W. 3. Pepper v. Gay.

Caſe, &c. in which the plaintiff declared that he was chancellor to the biſhop, and ſtood for parliament man, and that the defendant ſaid, *there goes your rare chancellor to ſuborn witneſſes to ſwear againſt the parſon*; Powis and Gould J. held the words actionable; but Holt Ch. J. and Powell e contra, not actionable; for the firſt words are only a deſcription of his perſon, and thoſe which follow do not relate to his office; to ſay a man is forſworn, is not actionable, and ſuborning is not a crime in itſelf, but as it relates to perjury; for there can be no ſubornation but where there is perjury. 2 Salk. 696. pl. 8. Trin. 3 Annæ B. R. Walmeſley v. Ruſſel. ——6 Mod. 200. S. C. argued by the court, ſeriatim.

(T. a. 2) For Words ſpoke of Judges.

1. A Judge of the admiralty-court brought action againſt the defendant, againſt whom ſentence was given in that court, and counted that the defendant ſaid, that *the ſaid ſentence given by the plaintiff* (innuendo ſententiam prædictam) *was corruptly given.* Adjudged actionable, and that the words muſt be intended of the judge that gave the ſentence, and ſo it was preciſely alleged in the declaration. Cro. E. 305. pl. 3. Mich. 35 & 36 Eliz. B. R. Cæſar and Curſeney.

Poph. 35. S. C. and S. P. but moved in arreſt of judgment upon award of the tales, the defendant being alien.

2. *My lord chief baron cannot hear of one ear;* there having been a colloquium of his adminiſtration of juſtice, it was adjudged actionable. Otherwiſe if there had been no diſcourſe of his juſtice. Cited Het. 167. in caſe of Alleſton v. Moor.

3. *Your maſter's witneſſes* (in ſuch a cauſe) *were perjured, and your maſter is the maintainer and upholder of them.* Rainsford and Turner held the words not actionable, they not relating to his office; and it was not ſaid that he upheld their perjury but only their perſons; but Hale Ch. B. e contra; for if true they are a ſcandal

ſcandal to his office, and (upholding) here can have no other meaning than abetting them in their perjury; but judgment was arreſted. Hard. 501. Mich. 20 Car. 2. in the exchequer, Pugh v. Owen.

(T. a. 3.) For Words ſpoke of Juſtices of Peace.

See (S. a) 27, 28, 29. 31, 32, 33. 38, 39.

S. C. cited Yelv. 21. by Yelverton J. ſays it was not alleged expreſsly that Butler was a juſtice of the peace at the time of the ſpeaking the words. —— Palm. 69. cites S. C. as adjudged that the action lies. —— Palm. 566. S. C. cited by Crooke J. who ſaid he was of counſel in that caſe, and it was reſolved it ought to be averred that he was a juſtice at the time of the ſpeaking; but if it appears that the words were ſpoke after he was a juſtice, as if he alleges that he was a juſtice of peace, and that afterwards the words were ſpoke, it is good without ſaying that the plaintiff was a * juſtice of peace at the time of ſpeaking; for though it might be that the commiſſion was determined, being only at the king's will, yet it ſhall not be intended after a verdict.

1. *YOU do openly maintain and countenance the worſt people againſt God's laws and the queen's;* held not actionable, though ſpoke of a juſtice of peace, the words being too general. Cro. E. 297. pl. 7. Paſch. 35 Eliz. B. R. Butler v. Paynter.

*[467]

2. One indicted of felony, to which he pleaded not guilty, ſaid of the plaintiff a juſtice of peace, *he did ſeek my life, and offered 10 s. to the under-ſheriff to impanel a ſpecial jury that might find me guilty of the felony;* adjudged actionable. Cro. E. 313. pl. 3. Hill. 36 Eliz. B. R. Bleverhaſſet v. Baſpoole.

2 And. 47. pl. 35. Stafford's caſe S. C. adjudged and affirmed; for the words are in effect no other than he is acceſſory to the felony, and the words (ſtealing of his own goods) does not alter the caſe; for a man may be acceſſory to the ſtealing his own goods. —— Cro. E. 536. pl. 71. Mich. 38 & 39 Eliz. in the exchequer-chamber S. C. and judgment affirmed by all the juſtices and barons beſides Walmſley.

3. *One W. being arreſted as acceſſory of felony for ſtealing his own goods, Mr. Stafford* (the plaintiff) *knowing of this, diſcharged the ſaid W. by an agreement of 3 l. to which Mr. S. was party, whereof 30 s. was to be paid to Mr. S. and was paid to his man by his appointment.* Adjudged actionable, the words being ſpoken of a juſtice of peace, and the judgment affirmed in the exchequer-chamber. Mo. 704. pl. 981. Trin. 36 Eliz. Stafford v. Powler.

Thou doſt not adminiſter true juſtice, is actionable, being ſpoke to a juſtice of peace; per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B.

4. *Thou art a falſe juſtice,* is actionable; per Anderſon. Cro. E. 358. Mich. 36 & 37 Eliz. in pl. 18.

Sir W. M. is an half-eared juſtice, he will hear but of one ſide; adjudged actionable. Cro. C. 223. pl. 10. Trin. 7 Car. B. R. Sir William Marſham v. Bridges.

5. *Thou art a lewd juſtice,* is actionable; per Anderſon. Cro. E. 358. in pl. 18. Mich. 36 & 37 Eliz. C. B.

Goldſb. 132. pl. 28. S. C. ſays Clench and Gawdy ſeemed to think the action main-

6. The father being a juſtice of peace, brought an action againſt his ſon for ſaying to him, *my brother has ſtole a black mare, and you was privy to it, and ſent her away to the fens to my brother's houſe;* it was moved that privity does not make one acceſſory to a felony; but the plaintiff being a juſtice of peace, the words were ſlanderous, charging him with ſmothering felony, he being

privy

privy to it; and judgment for him. Mo. 401. pl. 528. Paſch. 37 Eliz. Laſſels v. Laſſels.

tainable; Fenner e contra.

7. Words ſpoke in open ſeſſions were, viz. *you have perverted juſtice, and to your ſhame and diſhonour I will prove it*, were adjudged actionable. Mo. 409. pl. 554. Trin. 37 Eliz. Ld. Delaware v. Pawlet.

8. *Mr. S. covereth and hideth felonies, and is not worthy to be a juſtice of peace*, adjudged actionable; for it is againſt his oath and office, and good cauſe to put him out of the commiſſion, and he may be indicted and fined for it. 4 Rep. 16. a. pl. 7. Mich. 44 & 45 Eliz. C. B. Stutley v. Bulhead.

He is a maintainer of felons, are actionable, though not alleged that he knew them to be felons, or that he was a juſtice of peace. Cro. J. 268. cited by Tanfield Ch. B. as adjudged in Sir Henry Lea's caſe to be actionable; and ſays, a multo fortiori, when one ſays *he is a ſmotherer and maintainer of felonies*, which cannot be without conuſance of them; and adjudged actionable. Cro. J. 267. pl. 30. Mich. 8 Jac. Rich v. Holt.

9. Words ſpoken of a juſtice of peace, who had been ſheriff of the county, and for 7 years before was deputy-lieutenant there, viz. *your maſter* (innuendo the plaintiff) *is a baſe raſcally villain, and is neither nobleman, knight, nor gentleman, but a moſt villainous raſcal, and by unjuſt means doth moſt villainouſly take other men's rights from them, and keeps a company of thieves and traytors to do miſchief, and giveth them nothing for their labour but baſe blue liveries, and this all the country reports, and other good he doth not any.* Adjudged not actionable. Cro. J. 58. pl. 4. Hill. 2 Jac. B. R. Hollis v. Briſcow.

Yelv. 64. S. C. adjudged accordingly; but mentions nothing of the plaintiff's qualifications.

10. *Mr. K. is a baſket-juſtice, and a partial juſtice; I will give him 5 l. a year for his gifts for juſtice-matters.* Fenner and Williams only in court, held the words (partial juſtice) actionable, but none of the other words; and that (partial) touches him in his office, and is quaſi a corruption. Cro. J. 90. pl. 17. Mich. 3 Jac. B. R. Kemp v. Houſegood.

[468] Het. 173. Arg. cites S. C. as adjudged.

11. *You are a ſweet juſtice; you ſent your warrant for J. S. to be brought before you for ſuſpicion of felony, and afterwards ſent J. D. to him to give him warning thereof, that he might abſent himſelf.* All the court held the words actionable; for it touches him in his office to give ſuch ſecret warning; and adjudged for the plaintiff. Cro. J. 143. pl. 1. Hill. 4 Jac. B. R. Burton v. Tokin.

Het. 173. Arg. in caſe of Hitcham v. Caſon, cites Denſon's caſe, that it is actionable; for it is a miſbehaviour in a juſtice of peace to do ſo.

12. *When thou waſt a juſtice, thou waſt a bribing juſtice*, being ſpoke of one who had been a juſtice of peace, but was put out of commiſſion, is actionable; for though it refers to a thing paſt, yet it defames him for ever in other people's opinions, and makes him accounted unworthy to bear office afterwards; per cur. Yelv. 153, 154. Paſch. 7 Jac. B. R. obiter.

S. P. Arg. Noy 33. that he ought to allege he was a juſtice at the time the words were ſpoken.

13. *He* (præfatum querentem innuendo) *for malice and ſpleen did many times wreſt the law, and pervert juſtice, to ſerve his own turn*, being ſpoken of a juſtice of peace, is actionable. Theſe words ſhall be intended ſpoken of him in the worſt part, and in ſcandal of him in his office; and adjudged for the plaintiff, and

Bulſt. 36. Haſtings v. Beamount, S. C. adjudged accordingly, by the clear

opinion of the court. —— Jenk. 317. pl. 9. S. C. accordingly.

that judgment affirmed in error. Cro. J. 240. pl. 6. Paſch. 8 Jac. B. R. Sir T. Beamond v. Haſtings.

Poph. 180. S. C. accordingly; but no judgment in either book.

15. *He had 2 ſervants proſecuted about 5 or 6 years ſince for ſtealing ſheep, and he deſired me not to proſecute them.* Theſe words were ſpoke of a juſtice of peace. It ſeems that the words are actionable, but not in this caſe, becauſe it is *not averred that he was a juſtice of* peace *of the ſame county where the words were ſpoke*, it not being againſt his office to endeavour to ſtay proceedings againſt the parties, if it be in another county where he has nothing to do. Lat. 49. Trin. 2 Car. Button's caſe.

Sid. 432. pl. 24. Kirle v. Oſgood, S. C. adjudged for the plaintiff. —Mod. 22. pl. 60. S. C. adjudged accordingly. ——Vent. 50. S. C. adjudged accordingly; for the calling him (forſworn juſtice) ſhews he intended perjury relating to his office, to which an oath is annexed. ——2 Keb. 548. pl. 21. S. C. adjornatur. ——But ibid. 579. pl. 108. adjudged for the plaintiff.

16. *He is a forſworn juſtice, and not fit to ſit upon a bench.* It was moved that there was no colloquium of his office; but per cur. there need not; for it appears by the words themſelves that they were ſpoke of him in reſpect of his office. Lev. 280. Mich. 21 Car. 2. B. R. Carn v. Oſgood.

17. *He is not worth a groat, and he is gone to the dogs.* It was inſiſted that the ſtatute of H. 6. requires that a juſtice of peace ſhall have 40l. a year; but ſuch words were held not actionable, unleſs the perſon of whom ſpoken lives by buying and ſelling. Vent. 258. Paſch. 26 Car. 2. B. R. Anon.

18. Plaintiff declared that he was a juſtice of peace, and that there was a rebellion in the weſt by the duke of Monmouth, &c. [469] that ſearch was made for the defendant, being ſuſpected to be in that rebellion; and that thereupon the defendant ſaid of the plaintiff, *John Prowſe is a knave, and a buſy knave, for ſearching after me and other honeſt men of my ſort, and I will make him give me ſatisfaction for plundering me.* It was moved in arreſt of judgment, that here was no colloquium laid of his office, or that the words were ſpoken relating to his office, therefore an action would not lie, though an information might. The court was divided, and ſo the plaintiff had his judgment. 3 Mod. 163. Hill. 3 Jac. 2. B. R. Prowſe v. Wilcox.

2 Ld. Raym. Rep. 1369. Mich. 11 Geo. S. C. where the words are, *he is a raſcally villain, and is neither nobleman, knight, nor gentleman, but a moſt villainous raſcal*; *and by unjuſt means doth moſt villainouſly take other men's rights from them, and keeps a company of thieves and traytors to do miſchief*; and the court held it all one as if he had ſaid he was a villain in the execution of his office, a raſcal in the execution of his office, and ſo of liar, and gave judgment for the plaintiff.

19. *He is a raſcal, a villain, and a liar.* Per cur. the words raſcal and villain being ſpoke of a juſtice of peace, where *a colloquium was laid of his office*, import a ſcandal; for though thoſe are words of an incertain ſignification, yet they import a mean and baſe behaviour in the man; that the word liar is as much as to ſay the juſtice of peace acts unfairly in his office, ſo taken altogether they are ſcandalous words; and the plaintiff had judgment. 8 Mod. 271. Trin. 10 Geo. 1725. Aſhton v. Blagrave.

20. *You robbed the poor, and are worſe than a highwayman.* 2dly, *You villain, you have robbed the poor, and are worſe than a highwayman.* 3dly, *You villain, you have robbed the poor.* 4thly, *You are worſe than a highwayman.* The court thought there was not much difficulty in this caſe, and obſerved that though the plaintiff was ſaid to be a juſtice of peace, yet *no ſpecial damage was laid;* and ſaid that the office of a juſtice of peace is not ſo conſiderable, but that many people chuſe to decline it; that *(villain)* alone has never been held actionable, though indeed in ſcandalum magnatum the rules are very different; that *(robbing)* is a word of an incertain ſignification, and is here rendered more ſo by the words annexed, viz. *(the poor;)* what poor? and when? ſo that the verdict being general, if one ſet are bad, judgment muſt be arreſted for the whole; and the words *(worſe than a highwayman)* are very uncertain, and judgment muſt be arreſted. Rep. of Caſes of Pract. in C. B. 160. Mich. 13 Geo. 2. Palmer v. Edwards.

(U. a) For what Words *in Diſgrace of a Trade*, [&c.]

[1. IN an action upon the caſe, if the plaintiff declares that he was for ſeveral years before a brewer, and got his living by brewing of beer, and ſelling it to his cuſtomers, and he brewed wholeſome beer, and that the defendant having a diſcourſe with his cuſtomers about his trade, and of his beer brewed by him, to the intent to diſcredit him and his beer as well to his cuſtomers as to his neighbours, with whom he had before traded, ſaid theſe words of the plaintiff and his beer, *I will give my mare a peck of malt, and lead her to the water, and let her drink, and ſhe ſhall piſs as good beer as any Tom Fenn* (who was the plaintiff) *brews;* by the ſpeaking of which words he was eſteemed among his cuſtomers and neighbours to brew and ſell unwholſome beer, and they afterwards refuſed to buy beer of him, and to have any dealing with him in * his ſaid trade; no action lies for theſe words, *without ſhewing* ſome particular damage thereby, as *that ſome particular perſons abſtained from buying of beer of him, or ſuch like particular loſs;* for theſe words ſhall be taken to have been ſpoken in merriment and jeſt; for it is impoſſible to be true in the underſtanding of any man, and it may be underſtood that he intended that he brewed ſmall beer, and not unwholſome beer. Mich. 15 Car. B. R. between FENN AND DIXE, adjudged † per totam curiam, in arreſt of judgment after a verdict for the plaintiff. Intratur Hill. 15 Car. Rot. 838.]

* [470] Jo. 444. pl. 5. S. C. and judgment ſtayed; for the words in themſelves cannot be any ſcandal. ——Mar. 59. pl. 93. Dickes v. Fenne, S. C. adjornatur. But it being ſaid Arg. that if one ſays of a brewer, that *he brews naughty beer*, without ſaying more; the words are actionable without any ſpecial damage alleged; the whole court (abſente Crooke) e contra, held that the words of themſelves were not actionable, without alleging ſpecial damage, as the loſs of his cuſtom, &c. which is not here; and therefore not actionable.

† Fol. 59.

[2. If

Thou didſt open my pack, and put in wet wool, being ſpoken *of a ſhifter and dreſſer of wool*, is actionable, it being in deceipt of trade; per Doderidge & Whitlock J. Lat. 188. Trin. 2 Car. Dean v. Steel.—— S. C. cited D. 72. b. marg. pl. 6. ——Godb. 435. pl. 498. S. C. but S. P. does not appear.

[2. If A. brings an action againſt B. and declares that he was a merchant, &c. and the defendant, to diſgrace him in his trade, ſaid theſe words of the plaintiff, *thou art a deaf dog, a dumb dog, a beggarly raſcal, and thou art a cheating merchant*, though the laſt words only, ſcilicet, thou art a cheating merchant, are actionable, if any are, and theſe found but as familiar words of heat; yet if the defendant juſtifies, that whereas he had *bought a pipe of Canary wine of the plaintiff, and left it in the poſſeſſion of the plaintiff*, the *plaintiff ſecretly took out a certain quantity thereof, and put in a like quantity of that which was not ſo good*, and therefore he ſpoke the words, and therefore this is found againſt him, this ſhews that he really intended a cheat in his trade, and therefore the action lies; for it appears by all the words themſelves that he ſpoke them in anger, and to ſcandalize him. Trin. 17 Car. B. R. between LAMBELL AND HANCOCK, adjudged, this being moved in arreſt of judgment.

Words ſpoke of a *fuller* were, that he *ſtopt holes made in fulling with ſtocks*. Lat. 188. cited by Doderidge J. as adjudged not actionable.

* Hob. 140. pl. 191. Hill. 14 Jac. S. C. but no judgment or any thing ſaid per cur. as to this point.——

[3. If a man ſays of a * common carrier, (who is of good reputation) that he *is a common barretor*, no action lies; for this diſgrace does not any way reflect upon him in his trade. Hob. Rep. 189. between THORNTON AND JOBSON. But if a man ſays of a juſtice of peace, or public officer, or of an † attorney, that he is a common barretor, action lies. Hob. Rep. 189.]

Brownl. 11. Thornton v. Jepſon, S. C. the words being ſpoke of a currier [carrier]; but ſays the words [action] would not lie for a man of that profeſſion.——See (S. a) pl. 30. S. C.——Hob. 140. pl. 191. S. P. per cur. accordingly, obiter in S. C.

He has made falſe letters, he has cozened my huſband of 11 *l. and gave me a falſe and forged acquittance*, being ſpoken of a *carrier* to his wife, but without any colloquium of his being a carrier, adjudged not actionable. Lev. 112. Mich. 15 Car. 2. B. R. Mills v. Monday.

† See (S. a) pl. 15. S. P.

[4. If a man ſays of a weaver that uſed to weave for divers cuſtomers, *he is a rogue and a villain, and he taketh the goods of his cuſtomers, and pawneth them, and he is not a man to be truſted*, action lies; for this diſgraces him in his trade. Hill. 1650. between DELAPORTE AND COOK adjudged, this being moved in arreſt, where the words were ſpoken in French, but this was the interpretation in Engliſh. Intratur Hill. 1649. Rot. 1459.]

‡ [471] Jo. 395. pl. 1. S. C. adjudged accordingly upon the firſt words, no mention being there of the barley.——

[5. In action upon the caſe, if the plaintiff declares that he was retained as the ſervant and bailiff to J. S. and lived in the houſe with him, and that the defendant ſpoke theſe words of him, *you are a cozening knave, and you did cozen your maſter of a buſhel of barley* ‡ (innuendo the barley of J. S. in the charge and truſt of the plaintiff before put and committed) an action lies for theſe words. Mich. 13 Car. B. R. between SAM AND BIGG adjudged, this being moved in arreſt of judgment.]

All the court (abſente Brampſton) held, that true it is generally an action will not lie for calling one cozening knave, yet where they are ſpoken of one who is a ſervant and accountant, and whoſe credit and

and maintenance depends upon his faithful dealing, and he by diſgraceful words is deprived of his livelihood and means of maintenance, there is good reaſon it ſhould bear an action, that he might have recompence for his loſs of credit, and means, &c. Cro. C. 480, 481. pl. 3. Mich. 13 Car. B. R. S. C.

If a bailiff is intruſted with buying and ſelling corn, and has greater wages in reſpect thereof, and another ſays of him, *he hath deceived his maſter, by buying and ſelling by falſe meaſure to his loſs and damage*, this is actionable; for it diſcredits him in his means of living, and may occaſion his loſing his preſent ſervice, and to be refuſed by others; per Hobart Ch. J. Hob. 76. in pl. 95.——But Win. 40. Hobart Ch. J. cites the caſe of Brad v. Hay, in B. R. that the plaintiff declared he was bailiff to J. S. and had the buying and ſelling his corn; and that defendant ſaid of him, that he *ſold by falſe meaſures*. And adjudged that no action lies; for it is not a ſcandal to him in his public profeſſion.

The plaintiff declares, that he was *bailiff or ſervant* to Mr. Gawdy; and the defendant ſaid, *Mr. Farrer deſired Mr. Gawdy to ſee farther how Raynolds did get his means; and that he was become a broker, and did not know but that he now and then threw in a load of corn; and that his wife was as chargeable as a lady, and if he kept him he would never let a foot of land*. Reſolved per curiam, that they are not actionable; but if he had declared that he had been his bailiff certainly, and had alleged a ſpecial damage, it had been good; and the ſaying Mr. Farrer ſaid the words, whereas he ſaid them not (which was averred by the plaintiff) would not excuſe him any more than if he had ſpoke them himſelf. Judgment arreſted. Freem. Rep. 275. pl. 304. Paſch. 1674. Raynold v. Blanchett.

[6. In an action upon the caſe, if the plaintiff declares that he uſed the art of a ſcrivener for 8 years before, and received the money of the king's ſubjects, and that the defendant ſpoke theſe words of him, *he is a broken runaway, and dares not ſhew his face*, action lies for theſe words; for though it was objected that before 21 Jac. of bankrupts, a ſcrivener was not within the ſtatute of bankrupts; and here it does not appear by his declaration that he ſo received money as to make him a bankrupt within the ſtatute. But per curiam adjudged that the action lies; for though it is not within the ſtatute, yet the action lies at the common law, becauſe theſe words diſgrace him in the trade of a ſcrivener. Mich. 13 Car. B. R. between Best and Lott, per curiam, Trin. 13 Car. 690.]

Words ſpoke of a *carpenter* were, that *he is broken and run away*. He declared that he was a carpenter, and freeman of London, and got much money by buying timber and materials, and building houſes; and that defendant, in diſcourſe of him and his trade, ſpoke thoſe words. The plaintiff had a verdict. The court were divided in opinion whether action lies or not, and ſo the plaintiff had his judgment upon his general rule for judgment, there being no rule made to ſtay it; but otherwiſe had it been on demurrer or ſpecial verdict, then it would be adjourned to the exchequer chamber. 3 Mod. 155. Hill. 3 Jac. 2. B. R. Chapman v. Lamphire.——Comb. 74. S. C. accordingly.

[7. If A. keeps a ſtable in London, and uſes to receive horſes at livery, and J. S. ſays to him, *thou buyeſt nothing but ſtinking rotten hay to poiſon men's horſes*, no action lies by A. for theſe words, becauſe he is not any inn-keeper, and ſo it is not any trade allowed in law. * Paſch. 14 Car. between Jones and Joice per curiam, in arreſt of judgment, ſtaid.]

Words ſaid of an inn-keeper were, *go not to ſuch an inn; for he is ſo poor that you can have no good entertainment*. Action lies. Hutt. 125. Paſch. 10 Car. Per cur. obiter.

* Fol. 60.

Caſe, &c. in which the plaintiff declared that he is keeper of a livery-ſtable, and of the Bell-Savage Inn, and that the defendant had other livery-ſtables in the ſame yard; and that a ſtranger coming with a waggon into the yard, and inquiring of the defendant which was Bell-Savage Inn, the defendant replied, *this is Bell-Savage Inn; deal not with Southam* (the plaintiff) *for he is broke, and there is neither entertainment for man nor horſe*. After a verdict for the plaintiff, and great damages, the judgment was affirmed after much debate. Raym. 231. Mich. 25 Car. 2. B. R. Southam v. Allen.

[8. If a man ſays of A. to his maſter, who is a ſhoemaker (A. being his journeyman, and the foreman of his ſhop, and uſed to cut leather to make ſhoes, and to ſell goods for his maſter) *it is no matter*

[472]

See (L. b) pl. 4. S. C. ——Mar.

1, 2. pl. 3. Anon. S. C. the court was clear of opinion that an action lies, and that the averment ought to be, that in this (and ſo ſhew it ſpecially)

matter who hath him; for I warrant whoſoever hath him he will cut him out of doors, with an averment that in London (where the words were ſpoken) theſe words tantamount, as if he had ſaid, *that he would undo his maſter*, action lies; for it is a ſcandal to him in his trade. Paſch. 15 Car. B. R. between ELLIS AND HUNT adjudged per curiam, it being moved in arreſt that the action did not lie. There were other words to which the court gave no regard. Intratur Hill. 14 Car. Rot. 1218.] the plaintiff was damnified.

[9. In an action upon the caſe, if the plaintiff declares that whereas he was a ſervant to J. S. and as a journeyman to him ſold ſeveral goods for his maſter truly, and that he got his living by his ſaid ſervice; and that the defendant having communication of his ſelling, ſaid to the plaintiff, *thou haſt cozened me of 5l. in a piece of ſtuff, and haſt cozened me of 600l. or 700l. more; thou haſt maintained thyſelf and others with my money; and thou didſt take 4l. or 5l. out of the box.* Action lies upon this declaration; for theſe words tend to diſgrace him in his profeſſion. Mich. 15 Car. B. R. between PHILLIPS AND ELLAKER, per curiam adjudged, after a motion in arreſt of judgment. But quære how this diſgraces him in his trade, inaſmuch as this is no prejudice to the maſter, if his ſervant cozens another in a piece of ſtuff, and it does not appear what box he intended.]

S. P adjudged niſi, &c. Sty. 388. Mich. 1653. B. R. Townſend v. Barker.— *He is a baſe cheating knave, and had cheated his father by returning 20l. for wares*, was held by Berkley and Crooke (cæteris abſentibus) to be actionable, being ſpoke of a *merchant*.

[10. In an action upon the caſe, if the plaintiff declares that he was a merchant, &c. and the defendant to the intent to defame him in his trade, having a diſcourſe of his trade, and of a partownerſhip between the plaintiff and J. S. before had in a certain ſhip called B. ſpoke theſe ſcandalous words of the plaintiff, *he is a baſe cheating knave, and he hath cheated J. S. (the ſaid J. S.* innuendo) *and I will prove it; for he received of C. in partnerſhip 20l. and gave an account unto J. S.* (præd. J. S. innuendo) *but of 5l. received* of the ſaid C. ubi revera, he gave a true account of all things between the plaintiff and the ſaid J. S. touching the ſaid partnerſhip. The action well lies upon this declaration, for this diſgraces him in his trade; for it diſgraces him in his partnerſhip, which is one part of his trade, as a merchant. Trin. 15 Car. B. R. between ARUNDEL AND MASY adjudged per curiam, this matter being moved in arreſt of judgment.] And judgment for the plaintiff. Cro. C. 552. pl. 6. Trin. 15 Car. B. R. Arundel v. Mare.

Hill is a broken raſcal, and hath broken twice already, and I will make him break the 3d time; but becauſe the plaintiff only ſaid that

[11. In an action upon the caſe for ſcandalous words, if the plaintiff declares that whereas for divers years before fuit verus & fidelis emptor & venditor merchandizarum & mercimoniorum & diverſa mercimonia, merchandizas & res per viam barganizationis & venditionis emerit & vendiderit & hujuſmodi emptione & venditione per totum tempus prædictum uſus fuit, and thereby hath maintained himſelf and his family; the defendant ſaid theſe words of him, *he is a broken bankrupt, and a declined man, not able to pay his debts, and therefore is run the country.*

Though

Though he does not allege that he uſed any certain trade, viz. of a merchant, or other certain trade, yet the action lies; for ſuch a man who uſes to buy and ſell, and live thereby, is within the ſtatute of bankrupts, though he is not of any * certain trade. Paſch. 16 Car. B. R. between BOYER AND SHALE adjudged per curiam, though I moved this in arreſt of judgment. Intratur Hill. 15 Car. Rot. 109.]

he was a lawful ſubject, and that he got his living by buying and ſelling, but did not ſay that he was a tradeſman,

judgment was arreſted per tot. cur. And Doderidge ſaid it might be intended of burſtneſs of belly, and that (I will make him break) will not bear an action; nor to ſay (he hath broken twice), becauſe many that have been bankrupts may now be ſufficient; to which Jones agreed; but Doderidge and Jones ſaid, that to ſay *he will break ſhortly*, will bear an action, but not to ſay *I will make him break*. Crew inclined to the whole, and day was given to ſhew cauſe why judgment ſhould not be arreſted. Lat. 114. Paſch. 2 Car. Hill's caſe. ——— S. C. cited D. 72. b. pl. 6. marg. ——— Noy 77. Marſhall v. Allen, the very ſame words, and ſeems to be S. C. adjornatur. ——D. 72. b. marg. pl. 6. cites S. C. and ſays judgment was arreſted, becauſe he did not count that he was a tradeſman. ——— S. C. cited Arg. Sty. 429. but Roll Ch. J. ſaid he did not agree that caſe. ——— S. C. cited 2 Ld. Raym. Rep. 1480.

Thou art a cozener and a bankrupt, and haſt an occupation to deceive men by, was ſpoke of *a gentleman* who had 100 l. a year land to live upon; and therefore, though he *uſed to buy and ſell iron*, yet becauſe he was *not a merchant, nor did live by his trade*, the better opinion of the court was, that the words were not actionable. And ſo adjudged. Godb. 40. pl. 45. Hill. 28 Eliz. B. R. Anon. ——— S. C. cited Arg. 3 Mod. 112.

Caſe, &c. in which the plaintiff declared, that he for 7 years laſt paſt had lawfully *uſed the art of buying and ſelling*, and had gained great profit thereby for the ſupport of himſelf and family; and that the defendant falſo & malitioſe ſaid of him (the plaintiff) *he is a runagate, and worſe than a rogue; and if he had his deſerts he had been hanged*, whereby he loſt his cuſtom; but he did not allege any ſpecial damage. After a verdict for the plaintiff the judgment was ſtayed, becauſe runagate had not the ſame ſenſe as bankrupt, and here the plaintiff did not ſet forth what trade he uſed, it might be of a tinker or pedlar who are rogues by the ſtatute Eliz. ſo the words not actionable. But the reporter makes a quære, by reaſon of the words, thou deſerveſt to be hanged. 2 Lev. 214. Mich. 29 Car. 2. in the exchequer, Cockaine v. Hopkins.

In caſe, &c. the plaintiff declared, that by buying and ſelling wares uberrimam ſibi & familæ acquiſivit vivendi ſuſtentationem (without mentioning any certain trade) and that the defendant ſaid to him, and of him, *thou art a pitiful, beggarly, broken fellow*. After a verdict for the plaintiff, it was objected that the plaintiff did not allege that he was of any trade. Sed non allocatur; and the plaintiff had judgment. 2 Jo. 140. Hill. 32 & 33 Car. 2. B. R. Peacock v. Leech. ——— 2 Show. 153. pl. 136. Hill. 32 & 33 Car. 2. B. R. Anon. ſame objection made and over-ruled as here, and ſeems to be S. C. only the words there are, viz. *he is a bankrupt, and has been ſo theſe ſeveral months*. And adjudged for the plaintiff.

[12. If a man ſays of a tradeſman, *thou art a baſe beggarly fellow*, † *and had it not been for my help he had not had a bit of bread to put in his head; and I have exactly caſt up his eſtate; he is not able to pay above 2s. 6d. in the pound to his creditors of their debts*, an action lies; for this diſcredits him in his trade, without averring any particular damage. Paſch. 1651. adjudged between SMITH AND ROOKES, this being moved in arreſt of judgment. Intratur Paſch. 1651. Rot. 311.]

† Fol. 61. Sty. 273. Rooke v. Smith, S. C, but there the words are, *thou art a poor fellow, and art not*

able to pay 2s. in the pound, and art not able to pay thy debts. And Roll Ch. J. ſaid that it was not neceſſary for the plaintiff to aver that he was able to pay his debts. And judgment for the plaintiff niſi.

[13. If a man ſays of a *grocer*, or other tradeſman, *you are a baſe, beggarly knave, and you are not able to pay your debts*; and avers, that according to the phraſe and underſtanding of the place where the words were ſpoken, theſe words were underſtood that he was a bankrupt, action lies for theſe words, it being found for the plaintiff, by which the averment is found true.

Cro. C. 472. pl. 5. Paſch. 13 Car. B. R. Anon. but ſeems to be S. C. adjudged ac-

cordingly.— Sty. 217. S. C. cited by Roll Ch. J. as the case of Jackson v. Hewes, the words being spoken of a *grasier*. Pasch. 11 Car. B. R. between Jackson and Lewes adjudged, this being moved in arrest.]

He is a beggarly fellow, and not worth a groat, and not able to pay his debts; and he goes abroad with his men double-armed for fear of the bailiffs. The court thought the words actionable, being spoke of a merchant. Sid. 424. pl. 7. Mich. 21 Car. 2. B. R. Drake v. Hill.——Lev. 276. S. C. but the words there are, *he is fled and gone, and I shall lose my money*; and at another day, *he is a beggarly fellow, and not worth a groat, and not able to pay his debts.* The court held the last words as actionable as the first, but upon the importunity of serjeant Maynard, who moved it, they stayed the judgment for a fortnight.——Raym. 184. S. C. but the words there are, *he is broke, and gone for Virginia. I have ill fortune; for he is failed, and I have lost my monies. He is a beggarly fellow, and not able, &c.* [as in Sid.] And judgment was given for the plaintiff.——2 Keb. 549. pl. 25. S. C. judgment for the plaintiff nisi, the words altogether amounting to as much as calling him bankrupt.——To say of a merchant, *he is not worth a groat*, is not actionable, because he may be an honest man notwithstanding: per Keeling Ch. J. Raym. 184. in the case of Drake v. Hill.

He is a pitiful fellow, and not able to pay his debts being spoke of a *merchant*, was adjudged actionable, without any special signification or special damage. And per Holt Ch. J. it is not material whether the words import a bankruptcy, but the true reason is because it imports a scandal to a trading man, and there *needs no averment that he was no pitiful fellow, and was able to pay his debts.* Comb. 292. Mich. 6 W. & M. in B. R. Hooker v. Tucker.——Carth. 330. Cook v. Tucker, S. C. and the plaintiff setting forth that the defendant having communication of him, and his trade and family, said the words. And the court held the words actionable.

Saying to a milliner, *thou art a beggarly fellow, and not worth a farthing.* Plaintiff alleged, that by reason of these words A. his former customer, left him. Held that the averment signifies nothing; for it alters not the nature of the words. And judgment for the plaintiff per tot. cur. 12 Mod. 591. Mich. 13 W. 3. Simpson v. Barlow.

(H. a) pl. 8. S. C.— Noy 117. Thorne v. Durham, seems to be

[14. If a man says to an *alehouse-keeper, thou art a bawd, and dost keep a bawdy-house*, action lies for these words; for by this report he will lose his custom, and forfeit his recognizance. Hill. 4 Jac. B. R. between Turnam and Thorne adjudged.]

S. C. and held accordingly; but says it was spoke of one that kept a *victualling-house*.——So of one that keeps an *inn or a tabling-house*; for by this her house is slandered. Cro. E. 582. in pl. 8. Per cur. Mich. 39 & 40 Eliz. B. R.——S. P. accordingly, Goldib. 172. pl. 104.

See (Y. a) pl. 18. 22. S. C.—— S. C. cited Cro. J. 430. pl. 9. in

[15. If a man says to an *inn-keeper, thou art rotted with the pox*, action upon the case lies; for this cannot be intended of the natural pox, for no rottenness comes of that. Hill. 41 Eliz. B. R. between Davis and Taylor.]

Miller's case, where the words are, he is *laid of the pox*.——Ibid. cites 33 Eliz. Backster's case, S. P.——Cro. J. 144. pl. 3. Hill. 4 Jac. B. R. in case of Taylor v. Perkins, S. P. admitted.——Cro. E. 648. pl. 2. S. C. adjudged accordingly, by Fenner J. only in court.——*E. had the French pox, and hath set it in the house* (meaning the plaintiff's house, who was an inn-keeper) *and W. S. and his wife* (meaning the plaintiff and his wife) *have it, and all you.* Adjudged actionable.

Words spoken of an *inn-keeper*, viz. *Colonel E. had the French pox, and hath set it in the house, and Smith and his wife have it.* It was objected that the words (hath set the French pox in the house) is insensible. But adjudged actionable. Sty. 112. Smith v. Hobson.

S. C. cited, and the plaintiff alleged quod per multos annos jam retroactos artem merchandizandi exercuit & usus fuit.

[16. If a man has been a merchant, and *used the trade of a merchant* for several years past, *though he does not use it now*, and *another calls him bankrupt*, an action upon the case lies; for though he does not use it at the time of the speaking of the words, yet he remains a merchant, and may use the trade at his pleasure. Trin. 39 Eliz. B. R. between Gardner and Harwood adjudged, upon such a declaration.]

And judgment given for the plaintiff. Yelv. 159.—— Win. 17. Arg. cites 5 Jac. C. B. Atkinson's case, where the declaration was the same, and that it was adjudged ill, because he did

did not allege that he exercised merchandize at the time of the speaking; and he said the cause of the judgment was entered on the roll, and he could shew the same to the court; and Hobart desired to see it, for he doubted much of the law of it; to which Winch and Hutton agreed.

[17. J. S. being a merchant, if J. D. demands of D. whether J. S. owes him any thing; to which D. answers yes; upon which J. D. says, *you were best to call for it in, and to take heed how you trust him*, no action lies for J. S. for these words; for he only gives the other good and found counsel. Trin. 39 Eliz. B. R. between VANSPICKE AND CLAYTON adjudged.]

Cro. E. 541. pl. 5. S. C. adjudged accordingly.—*I believe all is not well with V. there are many merchants that have lately failed, and I expect no otherwise of V.* being spoke of a *merchant*, was adjudged actionable. Raym. 207. Mich. 22 Car. 2. B. R. Vivian v. Willet.——2 Keb. 718. pl. 110. Vinian v. Willet, S. C. adjudged accordingly.

* Words spoken of a citizen and pewterer were, *he is gone, and hides himself for debt, and for aught I know he is a bankrupt. Have a care, and do not trust him; for he will run away, and pay you nothing.* It was moved that the latter words were not actionable; and therefore damages being given for both, no judgment should be given. But the court held that both the words taken together are actionable; and judgment nisi, &c. Sty. 142. Mich. 24 Car. B. R. Jones v. Jacob.

* [475]

[18. If a man says of a merchant, *that he is a bankrupt*, action lies. Mich. 7 Jac. B. between LONG AND LONG adjudged.]

To call one *bankrupt* generally, no action will lie upon it, but *to call a merchant so* is actionable; per Wray Ch. J. Le. 336. Trin. 31 Eliz. B. R. in pl. 469.

He is a bankrupt-knave is actionable, being spoke of a common *baker*. Hutt. 49. Trin. 20 Jac. Hawkins v. Cutts.

Thou art a bankrupt, being spoke of one that *sold wool*, adjudged actionable. Noy 158. Courtney v. Thompson.——Het. 171. Waters v. Thompson, Trin. 7 Car. C. B. S. P. and seems to be S. C.

He is gone, and hides himself for debt, and for aught I know is a bankrupt. Judgment for the plaintiff, nisi. Sty. 142. Mich. 24 Car. B. R. Jones v. Jacob. Vent. 60. Twisden J. said he knew these words held actionable.

[19. If a man was a merchant, and after *leaves off merchandizing* for 2 or 3 years, and another calls him *bankrupt*, an action lies; for he may exercise his trade again when he will. Mich. 7 Jac. B. between LONG AND LONG. Pasch. 44 Eliz. B. R. between GRAY AND WESTON. Trin. 39 Eliz. B. R. between † GARDINER AND HOPWOOD, adjudged.]

† See pl. 16. S. C. and the notes there.

[20. If a man says to J. S. of a merchant of the staple, who used to buy and sell wool, *buy no more wool for him, for he will never pay for it, he is not worth a penny*; an action lies for these words. Pasch. 11 Car. in the exchequer-chamber, in a writ of error upon a judgment in B. R. adjudged, and the first judgment affirmed. Intratur Pasch. 12 Car. B. R. Rot. 424.]

Trust him not, for he is not worth one groat, is actionable, being spoke of a merchant. Hutt. 125. Pasch. 10 Car. per curiam obiter.——*So* trust him not, *for he owes me* 100*l.* and is not worth one groat. Adjudged actionable, being spoke of *a fuller*. Hutt. 124. Pasch. 10 Car. Dawe v. Palmer.

[21. If a man says to a *mercer, thou art a cuckold, and a cuckoldly rascal; thou dost owe more than thou art worth, and thou art not able to pay all thy debts*; action lies for these words; alleging that he used before to buy several commodities upon trust, without ready money, but that after, by reason of these words, he could not buy without ready money. Pasch. 1650, between VICARY AND BARONS, adjudged, this being moved in arrest of judgment.]

Sty. 213. S. C. adjornatur.—— Ibid. 217. S. C. held actionable by 3 justices, contra Ask. J. who doubted, and Roll Ch. J. ordered that the plaintiff have his judgment, nisi, &c.——*He is not worth a groat, he is* 100*l.* worse

worſe than nought, being ſpoke of a merchant, is tantamount to the calling him bankrupt, and therefore adjudged for the plaintiff. Cro. C. 265. pl. 14. Trin. 8 Car. B. R. Goodyear v. Biſhop.

You are a beggar and a bankruptly fellow, and if every one had his own, your are not worth a groat, being ſpoke of a *farmer*, and it appearing that by reaſon thereof his landlord had given him warning to quit his farm, though the words generally conſidered are not actionable, yet Roll Ch. J. ordered cauſe to be ſhewn why the plaintiff ſhould not have his judgment. Sty. 426. Mich. 1654. Roungs v. Woodward.

Thou art a pitiful idle raſcal, and not worth a groat, actionable being ſpoke of *a weaver*, and alleged that he got his living by buying and ſelling, for it amounts to calling him bankrupt; and judgment for the plaintiff. 2 Show. 295. pl. 293. Paſch. 35 Car. 2. B. R. Garrat v. Shelſon.——S. C. cited per cur. as held actionable. Carth. 330. Mich. 6 W. & M. in B. R.

The defendant diſcourſing with a creditor of a *ſugar baker*, &c. to whom he owed 10 l. ſaid, *I will not give you 2 s. in the pound for your debt, he* (innuendo the plaintiff) *is a pitiful fellow, and owes 40 l. more than he is worth*, held actionable. Freem. Rep. 318. pl. 18. Mich. 1671. Brown v. Robinſon.

† [476]

Godb 241. pl. 336.

* Fol. 62.

Brook's caſe S. C. Hobart Ch. J. and Nichols J. held the words not actionable, but Warburton juſtice doubted; and afterwards adjudged not actionable, to which Warburton at length ſeemed to agree.——Brownl. 4. S. C. Hobart and Nichols held the words not actionable; but Warburton e contra.——Mo. 409. pl. 553. S. C. but the words there are, *he is a falſe man, and I will prove it*; *and he keepeth a falſe debt book*; *for he hath charged me with a piece of three piled velvet which I never had*: adjudged not actionable, without ſaying it by way of diſſuading his cuſtomers or others that they ſhould not deal with or truſt him.——Cro. E. 403. pl. 12. Brook v. Watson S. C. and the words were much the ſame as in Mo. and Popham ſaid the defendant ſpake only of a grievance to himſelf by that falſe entry, and not in general words to diſcredit the plaintiff; but if he had ſaid, *take heed how you deal with him, for he keepeth a falſe book*, peradventure an action would lie, becauſe he drew other cuſtomers from him; therefore it was adjudged for the defendant.——Palm. 65. cites S. C. accordingly.——S. C. cited by Hobart Ch. J. Win. 40.

[22. If a man ſays of a *mercer*, *he hath deceived me in a reckoning, and his debt-book which he keepeth in his ſhop is a falſe debt-book*, * *and I will make him aſhamed of his calling*, no action lies for theſe words; for the words ſhall be taken in mitiori ſenſu, and then the debt-book may be kept by the ſervant (as for the moſt † part it is) and the maſter perhaps does not know of the falſity. Mich. 11 Jac. B. between Brooks and Clark, adjudged.]

You are a cheating fellow, and keep a falſe book, and I will prove it, not actionable, it not being averred that at the time of the ſpeaking the words there was any communication of the plaintiff's trade, or of his dealing by buying or ſelling, and ſo cannot touch him in his trade; and the keeping a *falſe book* does not imply that he kept a *falſe debt-book*. 2 Saund. 307. Paſch. 23 Car. 2. Todd v. Haſtings.——Vent. 117. S. C. and the want of a colloquium of the plaintiff's trade was objected, ſed non allocatur; for the words muſt be intended of a debt-book which ſhopkeepers keep; and to ſay ſuch a one keeps a falſe book, is a great ſlander to him in his trade.

There being diſcourſe of the plaintiff's trade, the defendant ſaid, *he was a cheating knave, and kept a falſe debt-book, with which he cheated the country*; the court reſolved that the words laid together are actionable; for tradeſmen's books are of much regard, and ſometimes given in evidence. Vent. 263. Mich. 26 Car. 2. B. R. Crawfoot v. Dale.

Hob. 76. pl. 95. S. C. adds, *and I will prove it, and thou haſt changed my barley*. Adjudged not actionable. But if plaintiff had been a *common badger*, and charged with ſelling by falſe meaſure, it would have born an action. And Hobart Ch. J. held, that if a gentleman's bailiff be charged with buying and ſelling by falſe meaſure, in deceit of his office, to the loſs or damage of his maſter, this is actionable; for it diſcredits him in his means of living. But in the preſent caſe it appears not that the words were ſpoke of any ſale while he was bailliff, nor of his maſter's corn, nor to his maſter's damage.——Brownl. 4. S. C. adjudged actionable.

[23. If A. is *bailiff* to 2 men, and for 3 years before the action brought had uſed *to ſell* their barley, and another ſays to A. *thou art a cozening knave, for thou haſt cozened me in falſe meaſure in my barley* (innuendo *certain barley, &c.*) *the country is bound to curſe thee for ſelling falſe meaſure in my barley*, no action lies for theſe words, becauſe it does not appear that he lived by the ſelling of barley, whereby this ſhould impair his livelihood. Mich. 13 Jac. B. between Bray and Hayns, per curiam adjudged.]

[24. If

[24. If a man ſays of a *ſmith, thou art a rogue, and a cozening rogue, and in one tire of wheels ſent* George Bell, *thou didſt cozen him of a noble, and that I will prove*, no action lies for theſe words, becauſe it may be intended that he cozened him in the price, which is not any ſlander to his trade, for he does not ſay that he made falſe ware, &c. Paſch. 16 Jac. B. between Digner and Snelling.]

[25. If one ſays of another who is a tradeſman, ſcilicet, that uſes the trade of buying and ſelling of crewel in a ſhop that he keeps, *thou art a cheating cozening fellow, and thou haſt cozened my huſband of* 500*l.* there not being any communication of his trade before, no action lies; for this of itſelf is not actionable, without an averment of a diſcourſe of his trade, to which it may be referred. Mich. 11 Jac. B. R. between NEEDLER AND SYMNEL, per curiam adjudged in arreſt of judgment after a verdict for the plaintiff.]

Jo. 366. pl. 4. S. C. accordingly; for it does not appear by the words that the cheating was in any thing relating to his trade. ——Cro. C. 417. pl. 5. S. C. adjudged accordingly per tot. cur. who delivered their opinions ſeriatim. ——S. C. cited, and judgment accordingly, where the words were, *you are a cheating old rogue, and have cheated the fatherleſs and widow.* Not actionable, being ſpoke of a tradeſman, there being no colloquium laid of his trade; and therefore judgment arreſted. 2 Ld. Raym. Rep. 1417. Paſch. 12 Geo. B. R. Ludwell v. Hole. ——But where there was a colloquium of a timber merchant in his way of trade, and the defendant ſaid of him, *he is a rogue and a villain; he has cheated me of* 14*l.* the words were held actionable, and judgment for the plaintiff. 2 Barnard. Rep. in B. R. Trin. 5 Geo. 2. Smith v. Jones.

[477]

[26. If a man ſays of the *wife of a butcher* of London, that uſed to ſell in the ſhop of her huſband, *ſhe is a cozening woman, ſhe did cozen one of her neighbours* (innuendo quendam D. D.) *of* 40*l.* no action lies for theſe words, becauſe this does not diſgrace her in her trade, inaſmuch as there was not any precedent ſpeech of her trade, ſo that it may be intended that he ſpoke thereof. Mich. 13 Jac. B. between SAMMON AND BALL, adjudged.]

Hutt. 14. Anon. S. P. accordingly, and ſeems to be S. C.—*A cheating knave and rogue.* Theſe words were ſpoken of a *mercer*, but there being *no colloquium laid*, but only of the man, and not *of his trade*, judgment was ſtayed. Lev. 250. Mich. 20 Car. 2. B. R. Smedley v. Heath. ——Raym. 169. Smedley v. Heap. S. C. accordingly. ——2 Keb. 404. pl. 15. S. C. accordingly.

Words ſpoken of a *merchant* were, *thou art a cheating rogue, and haſt cheated me of* 20*l.* After verdict judgment was ſtayed; for per cur. the words are not actionable *without averment or colloquium of his trade.* 2 Keb. 91. pl. 10. Mich. 18 Car. 2. B. R. Combe v. Peters.

[27. If a man ſays to a *goldſmith, thou art a cozening knave, and ſoldeſt me a chain of copper for gold;* action lies for theſe words. Hill. 32 Eliz. B. R. PECK's caſe, adjudged, cites Mich. 13 Jac. B.]

For thou ſoldeſt, &c. and he is a cozening knave upon record.

Wray and Gawdy conceived the words not actionable, unleſs it had been alleged that he is a goldſmith, and got his living by buying and ſelling of chains, and ſuch wares, and then peradventure the action would lie; but not here. Cro. E. 171. pl. 12. Hill. 32 Eliz. B. R. RYLE's caſe ſeems to be S. C.

[28. In an action upon the caſe for words, if the plaintiff declares that he had uſed the trade of a *brewer* for ſeveral years, and had brewed wholſome beer and ſold to his cuſtomers, by which he had obtained great profit to himſelf, and that the defendant to the intent to diſcredit him with his cuſtomers, upon a col-

See ſupra pl. 1. and the notes there the like point. ——*N. puts lime in his ale,*

and killed E. C. and the poor man loſt his life and his eyes by drinking N.'s ale. It was objected that the words are not actionable, becauſe a victualler ought not to ſell ale, neither has he alleged any *ſpecial damage.* The court inclined that the words were actionable. Freem. Rep. 25. pl. 33. Hill. 1671. Nuton's caſe.

a colloquium of and concerning the ſaid occupation and art of the plaintiff, maliciouſly ſpoke theſe falſe words of him, *Lee's beer is unwholſome*, (innuendo the beer of the plaintiff made for his cuſtomers in his ſaid trade) by which he is diſcredited, and has received damage in the ſelling of his beer in his trade, as he ought before any action lies for theſe words, and upon this declaration, though he does not charge him with any deceit, for beer may be unwholſome for want of good brewing, or for other neglect of his ſervants; and though it does not appear that the defendant ſpoke theſe words of beer that he ſold to his cuſtomers, yet upon this declaration (though the innuendo will not help it) it ſhall be intended ſuch beer as he ſold to his cuſtomers, having a diſcourſe of his trade; and brewers are puniſhable for ſelling of unwholſome beer by the ſtatute; and it is alleged that he had damage by ſpeaking of theſe words, and therefore this action lies. Mich. 9 Car. B. R. between LEE AND STRADWICH, adjudged, it * being moved in arreſt of judgment by myſelf. Intratur Trin. 9 Car. Rot. 1097.]

* Fol. 63.

†[478] If one ſays of a merchant, *put not your ſon to him, for he will ſtarve him to death*, the words are actionable; for it comes within the compaſs of the diſgrace of his profeſſion. Per Yelverton J. Het. 71.

[29. If A. had *uſed to keep at board ſeveral children*, by which means he got his living, and another ſays to him, *you have ſtarved hoſpital children, and you kept a kinſman of your wife's and ſtarved him to death* (innuendo A. B. that he kept at board;) *you kept one of J. S.'s children, and ſtarved it to death;* (innuendo W. S. whom he kept at board) by reaſon of which words people forbore to put their children to him to board, ſo that he loſt his livelihood, an action lies for theſe words upon the declaration, becauſe he diſgraces him in his trade of living. Trin. 13 Car. B. R. between HARRISON † AND ELDRINGTON, adjudged per curiam, this being moved in arreſt of judgment.]

[30. In an action upon the caſe, if the plaintiff declares that whereas he was a *leather-ſeller*, and uſed to ſell ſhamoys-ſkins to J. S. his cuſtomer, and avers that ſhamoys-ſkins were of a greater price than lamb-ſkins, and that the defendant having parlance of the plaintiff, ſaid to J. S. of the plaintiff, *he hath cozened you, and hath ſold you lamb-ſkins inſtead of ſhamoys-ſkins, do not go to him for he will cozen you*, the action lies upon this declaration, becauſe he ſlanders him in his trade, and to his cuſtomer. Mich. 10 Car. B. R. between FAIREBANK AND MALSON, adjudged per curiam upon a demurrer. Intratur 10 Car. Rot. 1339.]

To ſay of a *ſilk-dyer*, that he *puts in duſt in his* [* *fat* or] *ſilk*, is actionable, becauſe it makes it

[31. In an action upon the caſe, if the plaintiff declares that whereas he, at ſeveral times for 25 years laſt paſt, had *ſowed woadſeed*, and had uſed to weed it, *and after to grind it*, and per totum idem tempus had uſed to ſell the woad to his cuſtomers, and the cuſtomers had uſed to take a ſay of the woad before they bought it; and farther ſhews that if any man puts black mould among the woad, this makes the woad of leſs value; and that

that the defendant was formerly his ſervant for 8 years, and that the defendant to the intent to diſgrace him in his trade, ſaid of the plaintiff, *he did uſe to make me, when I dwelt with him, to take black mould out of hillocks, and to mix it among the woad, and afterwards ſold it for woad.* The action well lies for theſe words upon this declaration, with an averment, that by reaſon of thoſe words he loſt his cuſtomers, and great benefit thereby, though he does not ſhew in his declaration that he had any cuſtomers in particular by name; for this is not neceſſary, inaſmuch as they may be many; and it is not like an action for loſs of marriage, but like an action brought by a counſellor for words, by which he loſt his clients in general. Old Entries 22. Paſch. 11 Car. B. R. between † JESSON AND HAYES adjudged, this being moved in arreſt of judgment. Intratur Hill. 10 Car.]

more ponderous, &c. cited by Doderidge J. Lat. 188. Trin. 2 Car. in caſe of Dean v. Steel. * S. C. cited D. 72. b. marg. pl. 6. —† 1 Salk. 16. pl. 7. Trin. 11 W. 3. B. R. it was ſaid by Holt Ch. J. and Rokeby J. that this caſe had often been denied, and is not law; for the damage muſt be ſpecially ſhewn, where the words in themſelves are not actionable.

[32. If one man ſays of another, *he did treaſon in the Low-Countries, and did run away from his captain*, an action upon the caſe lies for the firſt words, ſcilicet, he did treaſon in the Low-Countries, becauſe he is triable here by the ſtatute of 35 H. 8. of a treaſon committed beyond ſea, and his life is drawn in queſtion. Paſch. 15 Jac. B. R. adjudged, this matter being ſpoke to in arreſt of judgment.]

S. P. and ſeems to be S. C. Cro. J. 424. pl. 6. Lewis v. Coke adjudged actionable; for there is a violent intendment that he committed treaſon to the ſtate here and not to a foreign ſtate, and the treaſon is triable here; and the addition, that (thou haſt run away from thy captain) does not detract from the firſt words, nor are they material to the action.

[33. If one man ſays to another, *thou haſt deſerved to be hanged as well as any man in* Worceſterſhire; *for when thou waſt retained to ſerve thy prince thou didſt run away from thy captain*, no action lies for theſe words, becauſe it does not appear that he had ſaid that he was preſt to ſerve, and had received preſt money; for otherwiſe it is not felony. Hill. 38 Eliz. B. R. adjudged.]

34. *He is a caterpillar, for he lives by robbing his gueſts*, being ſpoken of an *inn-keeper*, was adjudged not actionable clearly by all the juſtices; for it is as if he had ſaid that *he lives by powling and pilling*, which is incident to this trade. Mo. 179. pl. 319. Paſch. 26 Eliz. B. R. Anon.

[479] *But* if he had ſaid of an inn-keeper that *he is a caterpillar, and lives by robbing in the highway*, action would lie. Mo. 179. pl. 319.

Words ſpoken of an *inn-keeper*, viz. *your maſter Thomas Clarke did harbour and lodge cut purſes and rogues, and did receive ſtolen goods, and there are yet ſome in his houſe*; and declared that by reaſon of ſpeaking thoſe words he loſt his gueſts. Adjudged not actionable; for an inn-keeper's houſe being common to all his gueſts, he may lodge cut-purſes and receive ſtolen goods, without knowing them to be ſuch. But Mountague Ch. J. ſaid if the words had been, *he doth uſe to harbour cut-purſes*, it would be actionable, becauſe this implies notice. 2 Roll. Rep. 136. Mich. 17 Jac. B. R. Clarke's caſe.

35. Action for theſe words, *he was a bankrupt*; and alleged he was a *ſhoemaker, and uſed buying and ſelling of leather*; and it was adjudged that the action did lie, although the plaintiff was not a merchant, but he got his living by buying and ſelling. Cro. E. 268. pl. 6. Hill. 34 Eliz. B. R. Stanly v. Oſbaſton.

36. *He is broke, and run away*, was adjudged actionable, being ſpoken of a *carpenter*. 3 Mod. 312. cited per cur. as Mich. 3 Jac.

Words ſpoken of a *diſtiller*, in which the plaintiff declared that the defendant, diſcourſing with one Iles, aſked him *of whom do you buy your aqua vitæ*, who *replied of Mr. Godfrey* (the plaintiff;) thereupon the defendant ſaid, *he is a varlet, he hath ſuppreſſed his brother's will, to cozen and deceive men of their legacies; we will make him cry peccavi on his knees; he maketh ſhew of religion, but is an hypocrite.* Adjudged not actionable, becauſe the words do not relate to his trade. Palm. 21. Mich. 17 Jac. Godfrey v. Owen.

37. *He is a very varlet, and a knave*, being ſpoken of a *cooper*, adjudged actionable; but the judgment was reverſed for that reaſon. Cro. J. 204. pl. 8. Hill. 5 Jac. B. R. Coles v. Kettle.

38. The plaintiff declared that he exerciſed himſelf in facultate emendi & vendendi, and that defendant ſaid of him, *thou art a bankrupt, and I have many witneſſes for it.* It was moved that he ought to have ſaid he was a merchant, and that he ought to have averred what goods he had ſold, and that it might be intended that he uſed this faculty as a ſervant. Sed non allocatur; and judgment for the plaintiff. 2 Bulſt. 267. Mich. 12 Jac. Nichols v. Catſey.

Godb. 278. pl. 371. Anon. ſeems to be S. C. The plaintiff counted that he was brought up in the ſtudy of the mathematics, &c. and the opinion of the court was that the words are actionable; and Montague ſaid it was ruled accordingly in 36 Eliz. Rot. 242. between Kirby and Walter; and he ſaid the words are actionable in regard it is a faculty to meaſure land. But Doderidge took a diverſity between a meaſurer of land by the pole, and one who does it by geometry or mathematics; that in the firſt caſe it is no ſcandal, it not impeaching his credit; but in caſe of a geometrician or mathematician, it is an art or faculty which every one does not attain to. —— 2 Roll. Rep. 72. London v. Eaſtgate, S. C. accordingly, and adjudged for the plaintiff; but the judges agreed that ſuch words ſpoke of a ſhoemaker, butcher, or baker, are not actionable; for the goodneſs or deceit of their ware is ſubject to the view, and may be diſcerned by the eye, which in this caſe can be diſcovered only by perſons ſkilled in the ſaid art, and he is a perſon mentioned in the ſtatute de terris menſurandis, and puniſhable by that ſtatute if he falſifie his trade.

39. In diſcourſe with a *ſurveyor and meaſurer of land*, about meaſuring of land, one ſays to him, *thou art a cozening and a ſhifting knave, and a cheating knave.* Montague Ch. J. ſaid theſe words touched the plaintiff in his way of living, and ſo the action lies; but the other juſtices doubted. But afterwards all the court agreed, that a ſurveyor being an officer of ſkill, and ſuch officer for the king is mentioned in ſtatutes by that name, and the words take away his means of gaining his living, it was adjudged for the plaintiff. Cro. J. 504. Mich. 16 Jac. B. R. Blunden v. Euſtace.

*[480] Palm. 63. S. C. Montague Ch. J. thought the words actionable; but Haughton contra; but Haughton ſaid thoſe words might be ſo laid in the declaration as to make them actionable, by averring that in common unſterſtanding they ſignify a bankrupt. —— 2 Roll. Rep. 144. S. C. Haughton J. held the word (broken) of an uncertain ſignification, and was applicable to infirmity of body as well as of eſtate, and therefore to make them actionable

40. A trial being appointed at Guildhall between A. and J. a vintner, and there being diſcourſe thereof between B. and L. B. aſked L. * *will you be at the trial to-morrow between B. and J.* to which L. anſwered, *J. is broke, and I warrant you he dares not be there.* The court inclined that the words were actionable; but becauſe the damages given were great, viz. 200l. they would adviſe; and both parties referred themſelves to the Ld. Ch. J. who awarded 66l. 13s. 4d. to be paid the plaintiff, and he to releaſe. Cro. J. 562. pl. 10. Hill. 17 Jac. B. R. Johnſon v. Leman.

actionable an averment was neceſſary; but Montague Ch. J. held that the court ought to take notice what words are actionable in London; and becauſe they differed in opinion, the matter was referred to the arbitrement of the Ch. J.

41. Words of a *dyer*, who uſed to get his living by buying and ſelling, *Thomas Johns of Hertford*, (meaning the plaintiff) *is a bankrupt-knave, and is not worth* 3 *half-pence*. After judgment, error was aſſigned that the words were ſpoken adjectively, and that a dyer is ſuch trade that for ſuch words he ſhall not have an action; but reſolved e contra, and that the words are actionable, it being alleged that he got his living by buying and ſelling, and the judgment was affirmed. Cro. E. 585. pl. 6. Mich. 18 Jac. B. R. Squire v. Johns.

Palm. 151. S. C. and judgment affirmed, becauſe dyers have a dependency on merchants, and uſe their credit for woad, and other commodities neceſſary to their trade.

42. *He is a bankrupt, and not able to pay his debts, but will run the country*. Plaintiff declared that he bargained and ſold, viz. *merchandized for lead* in the county of Derby, *and thereby acquired money towards his livelihood*. It was objected that he is intitled *gentleman*; but the court held that the action well lay. Hutt. 46. Mich. 19 Jac. Allen v. Swift.

And it was ſaid per cur. that it had been adjudged 14 Eliz. that a *tanner* ſhall have an action for ſuch words. Ibid.

43. *He is a bankrupt-rogue*, being ſpoken *of a wool-winder*, is not actionable. Poph. 184. Mich. 2 Car. B. R. Barker v. Ringroſe.

44. *Thou art a rogue, and a beggarly fellow, and I ſhall prove thee a bankrupt before the next term;* and afterwards the ſame day he ſaid to a 3d perſon of the plaintiff, *truſt him not; for he will be thy undoing*. The words being ſpoke of a merchant, it was held that thoſe ſpoke at the 2d time are as well actionable as thoſe ſpoke at the firſt time, and aggravates the firſt words; and judgment for the plaintiff. Cro. C. 236. pl. 19. Mich. 7 Car. B. R. Jaxon v. Tanner.

45. *Thou art a bankrupt*, is actionable, being ſpoke of a *drover*; but becauſe he did *not aver that he was a drover at the time of ſpeaking* the words, judgment was quod querens nil capiat, &c. Jo. 304. pl. 12. Mich. 8 Car. B. R. Collis v. Malins.

Cro. C. 282. pl. 23. S. C. and though he declared that per magnum tempus uſus fuit the trade of buying and ſelling cattle, yet that might be diverſe years before; and adjudged for the defendant.

In an action for calling him bankrupt, the plaintiff *declared that he was, and had been for many years laſt paſt, a merchant*; but becauſe it did *not appear expreſsly that he was a merchant at the time of ſpeaking the words*, but only argumentatively, it was adjudged againſt the plaintiff. Cited by Yelverton J. Yelv. 21. as Trin. 2 Jac. B. R. Grey v. Medcalfe.

46. *Go not to buy of J. S.* (a merchant;) *for he will deceive you*, is actionable. Hutt. 125. Paſch. 10 Car. per curiam, obiter.

47. *Thou art in a breaking and decayed condition, and I will prove it, and if you queſtion me I will prove it to your diſgrace*, being ſpoke of a *milliner* in London. It was objected that theſe are adjective words, and of * an uncertain ſignification; but judgment was given for the plaintiff. Sty. 425. Mich. 1654. Walkenden v. Haycock.

S. C. cited per cur. 12 Mod. 592. Mich. 13 W. 3.

* [481]

48. *Thou*

48. *Thou art a broken fellow, and haſt cheated me of* 200 *l.* was ſpoke of a *tradeſman*, and it was averred that the words were meant to ſignify that the plaintiff was a bankrupt, and a verdict was found for him. And Roll Ch. J. ſaid that all the words together, as they are laid, imply that he is broken in his trade, and that the word (cheated) inforces this ſenſe, and the averment and verdict make it more ſtrong; and judgment for the plaintiff, niſi, &c. Sty. 429. Hill. 1654. Wiſe v. Jefferies.

S. C. cited Arg. 3 Mod. 112.

49. *Thou art a whore-ſon bankrupt rogue*, being ſpoke of a *farmer*, was adjudged actionable. But it was aſſigned for error, that it did not appear by the declaration that the plaintiff got his living by buying and ſelling, nor that it was ſpoken with relation to his profeſſion. And thereupon the judgment was reverſed. Sty. 420. Trin. 1654. Phillips v. Phillips.

Raym. 86. S. C. accordingly; but there the words are, *he is a runaway, and he is a baſe cheating rogue, and he ſhall never think to bring W. where he is himſelf; and rather than ſo I will ſpend* 20*l.*——Keb. 602. pl. 75. S. C. and the words according to Raym. and adjornatur.——Ibid. 644. pl. 15. S. C. adjornatur.——S. C. in a copy of a M. S. Rep. of Lord Ch. J. Keeling, ſays, that though the plaintiff counted that he was a tradeſman, and ſuppoſed the words ſpoke of him and his trade, yet that will not make them bear an action; for the plaintiff ſhall not by any flouriſhes or affirmations of his own make thoſe words actionable which at firſt ſpeaking were not ſo; ſo that in this caſe there being no colloquium of the plaintiff's trade at the time of ſpeaking, adjudged the action would not lie, and judgment was arreſted; but agreed that if the defendant had ſaid, that *the plaintiff that limeburner was a cheating knave*, this would be actionable; for the words are of him and his trade.

50. *He is a cheating knave*, being ſpoke of a *limeburner*, is not actionable, unleſs ſpoke in reference to his trade; and being found by the jury to be ſpoke of him and his trade, was held by Windham and Twiſden to be actionable; but Hyde Ch. J. and Keeling e contra, and judgment was ſtaid, the court being divided. Lev. 115. Mich. 15 Car. 2. B. R. Terry v. Hooper.

61. *Thou art a rogue, and a baſe knave, and a cheating knave, and I will poſt thee for it*, was alleged to be ſpoken of the plaintiff, *a clothier, & de geſto ſuo in exercitio officii ſui*, per cur. is actionable. *And* where the plaintiff alſo *counted that the ſame words were ſpoke at another time the ſame day*, in malice to him and his trade, *ſimiliter injurioſe & falſo, without other colloquium*, Windham held it ſufficient, and that it muſt be proved on the evidence; and it being moved that the laſt words being *ſimiliter ex ulteriori invidia towards his trade*, can relate to nothing elſe; and the court gave judgment for the plaintiff, niſi, &c. 2 Keb. 380. pl. 23. and 383. pl. 51. Trin. 20 Car. 2. B. R. Farmer v. Jenkins.

2 Keb. 568. pl. 74. S. C. accordingly. ——But it was admitted by Saunders, of counſel with the defendant, that if he had ſaid, *he could not make a good watch*, it would have been known what he had meant. Mod. 19. and Keb. 568.

62. *He is a bungler, and knows not how to make a good piece of work*,, being ſpoke of a *watch-maker*, but there was no colloquium of his trade. And judgment was ſtaid. Mod. 19. pl. 50. Mich. 21 Car. 2. B. R. Redman v. Pyne.

63. A *ſhoemaker* brought an action for ſaying, *he is a cobler*. And per Twiſden J. it was held in Glyn's time that action lay, though a cobler is a trade of itſelf. Mod. 19. in pl. 50.

64. Upon colloquium with a dyer's ſervant of his maſter and his trade, the defendant ſaid, *where is the rogue thy maſter? I will prove him a rogue.* Theſe words ſeemed too general to be actionable; but where at another time, having the ſame colloquium with the wife, he ſaid, *where is that cheating knave thy huſband? I will prove him a cheating knave, for he cheated me,* are actionable, per 3 juſtices, though he did * not ſay in what particular he had cheated him. Freem. Rep. 276. pl. 307. Hill. 25 Car. 2. Preſton's caſe.

65. *He is a cheating, cozening knave, and hath cheated Sir J. F.* (his maſter) and being aſked wherein, he anſwered, *in many things.* The court inclined that the words are not actionable, becauſe he does not charge him with cheating in his employment, neither has he laid any ſpecial damage. Freem. Rep. 279. pl. 316. Paſch. 1681. Harris v. Tucker.

66. A *ſtage-coachman* declared, that he got his livelihood by carrying paſſengers; and *that the defendant ſpoke ſuch ſcandalous words of his wife, which reflected upon him, and rendered him ſo ridiculous, that nobody would ride in his coach; and he thereby loſt his cuſtomers.* The plaintiff had a verdict, but judgment againſt him; and the court ſaid that the plaintiff ſhould at leaſt have declared what cuſtomers he had loſt in particular. Vent. 348. Trin. 32 Car. 2. B. R. Anon.

67. The plaintiff declared, that he was a *renter of lands, &c. and made great profit by buying and ſelling wheat, barley, &c.* and that the defendant ſaid of him, *he hath cheated in corn,* is not actionable; for per cur. the deſcription is no more than of a common farmer. But per Pemberton Ch. J. if no mention had been made of renting lands, or if he had *alleged that he was a badger,* &c. the action perhaps would lie. 2 Jo. 156. Trin. 33 Car. 2. B. R. Fox v. Lapthorne.

68. *He owes more money than he is worth; he is run away and is broke,* being ſpoke of a *huſbandman* or farmer, was held actionable. 3 Mod. 112. Trin. 2 Jac. 2. B. R. Dobſon v. Thorniſtone.

69. Saying of a tradeſman, *he is a cheat,* and ſaying at another time, with a colloquium of him and his trade, *he hath nothing but rotten goods in his ſhop;* the firſt words are not actionable, but the laſt words were held clearly actionable. But it was agreed that if the words had only been, that *he has rotten goods,* the action would not lie; for the ſlander is in ſaying, that he *has nothing but rotten goods.* Judgment for the plaintiff. 12 Mod. 420. Mich. 12 W. 3. Burnet v. Wells.

70. *You are a raſcal, you are a pitiful ſorry raſcal, you are next door to breaking,* being ſpoke of a *laceman,* are actionable. Ld. Raym. Rep. 610. Mich. 12 W. 3. Read v. Hudſon.

71. *You are a ſoldier, I ſaw you in your red coat doing your duty, your word is not to be taken,* is actionable, being ſpoke of an upholſterer, it being known to be a common *practice for tradeſmen to protect themſelves againſt their creditors by a counterfeit liſting;* for

for a ſoldier has the privilege of not being held to ſpecial bail. 10 Mod. 111. Mich. 11 Ann. B. R. Arne v. Johnſon.

Barnard. Rep. in B. R. 13. Stanton v. Squibb, S.C. and the whole court held the words actionable.

72. *He is a ſorry pitiful fellow, and a rogue, and compounded his debts at 5s. in the pound.* Exception was taken that the words were not actionable, becauſe no colloquium was laid of his trade. But per tot. cur. ſuch words ſpoke of a tradeſman muſt leſſen his credit much, and be very prejudicial; and therefore actionable. And judgment for the plaintiff. 2 Ld. Raym. Rep. 1480. Paſch. 13 Geo. Stanton v. Smith.

[483] Fol. 64.

(X. a) For Words. In what Caſe it lies. [In reſpect of the *Manner of Speaking, and by Way of Report.*]

Cro. J. 406, 407. pl. 2. Mich. * 14 Jac. B. R. in the caſe of Lewis v. Walter, cites Hill. 4 Jac. Moriſon v. Carr, where the caſe was, that the defendant had ſaid that A. had reported that he had the uſe of her body, and the precedent thereof was ſhewn that it was adjudged for the plaintiff; whereupon the court was ſatisfied in the principal caſe, that the report of the ſpeech of another, who never uſed ſuch words, is actionable. —— Jenk. 316. pl. 7. S. C. ——— S. C. cited Roll. Rep. 444. ——— S. C. cited 3 Bulſt. 325. as adjudged and affirmed in error.

[1. IF a man ſays, *that Pierce ſaid that Lewis did a certain ſcandalous thing, &c. Lewis* ſhall have an action for this againſt him, with an *averment that Pierce never ſaid ſo*; for then he himſelf is the author of the falſe news, and ſhall be charged for it; for this is according to the law of news. Hill. * 44. [14] Jac. My Rep. between † LEWIS AND WALTER adjudged, between DAME ‡ MORRISON AND CADE. Paſch. 5 Jac. B. R. adjudged.]

† (Y. a) pl. 35. S. C. not exactly S. P.

‡ See (D. a) pl. 4. S. C.—Infra, pl. 3. S. C.——(Z. a) pl. 7. S. C.

[2. If I ſay to J. N. that J. S. *ſaid* to me, *that the ſaid J. N. did ſuch a ſcandalous matter as witchery*, as the caſe was, which matter is ſufficient to maintain an action, J. N. may have an action againſt me for the words aforeſaid, with an *averment that he never ſpoke the words, nor that J. S. ever ſpoke the words of him*; for this is conformable with the law for telling of falſe news. Paſch. 15 Jac. B. R. between LOCK AND LOCK, adjudged, by admittance; but this matter was not moved.]

Cro. J. 162. pl. 17. Paſch * 5 Jac. B. R. S. C. but S. P. does not appear.

[3. *But* if a man ſays that J. S. ſaid, *that J. D. ſaid a certain ſcandalous thing that will bear an action of itſelf*, though this be falſe, yet if J. S. ſaid that J. D. ſaid the words, no action lies againſt him; for he has *named his author*, ſcilicet, J. S. and therefore he muſt bring his action againſt J. S. if he will have remedy. Paſch. * 15 Jac. B. R. in DAME MORRISON AND CADE'S CASE, per Tanfield.]

J. S. told me that J. N. ſtole a horſe, but I do not believe him. This, with an averment that J. S. did not ſay any ſuch thing, will bear an action. Cited Mar. 8. in pl. 18. by Jones J. as a caſe which he ſaid he remembered.

Goldſb. 139. pl. 47. Hill. 43 Eliz. S. C. ad-

[4. If a man ſays, *a woman told me that ſhe heard one ſay, that Meggs his wife had poiſoned Griffin her firſt huſband in a meſs of milk, Meggs* and his wife may have an action for this againſt him; for otherwiſe

otherwiſe a man might raiſe a ſcandal of his own head without any puniſhment. Mich. 37, 38 Eliz. B. R. between MEGGS AND GRIFFIN, adjudged.] judged for the plaintiff. ——— Mo. 408. pl. 552. S. C.

The plaintiff averred that the woman never told the defendant ſo; but the court held that neither the words nor the averment were ſufficient. But the reporter ſays quære. ——— Cro. E. 400. pl. 7. S. C. The plaintiff averred that no body ſaid ſo. Adjudged for the plaintiff; for it is a great defamation, and a cauſe of drawing her name and life into examination. ——— S. C. cited Arg. Cro. E. 645. in pl. 51. as adjudged actionable.

If J. publiſhes that *he heard J. N. ſay that J. G. was a traitor or thief*, and an action is brought againſt J. S. for theſe words, and the truth be ſuch, he may juſtify. *But* if J. S. publiſhes *generally, without a certain author*, that J. G. was a traitor or thief, action lies againſt J. S. becauſe he has not given the party aggrieved any cauſe of action againſt any beſides himſelf who publiſhed the words, though in truth he might hear them; or otherwiſe an innocent perſon might be greatly ſlandered; for ſhould it be lawful for a man of credit to report generally words ſpoke by one of no credit, as that he heard ſuch ſcandalous words, without mentioning his author, this would give greater probability of the truth of the words, in reſpect of the credit of the reporter, than if the author had been mentioned. 12 Rep. 134. reſolved Mich. 10 Jac. in the ſtar-chamber, in the earl of Northampton's caſe.

[484]

[5. If one man ſays of another, *he was arraigned at Warwick aſſizes for ſtealing a dozen of hogs, and had he not made good friends it had gone hard with him*, an action lies for theſe words, with an *averment that he never ſtole any* hogs, *nor was ever arraigned for the ſtealing of any* hogs; for this is a great ſlander, the arraignment implies an indictment, and the making of friends implies that he was greatly ſuſpected at leaſt. Mich. 8 Car. B. R. between * HAWLEY AND STANTON, adjudged, this matter being moved in arreſt of judgment. But in this caſe juſtice Croke cited a caſe to have been adjudged, Paſch. 34 Eliz. between † BAILIE AND CALENTON, that no action lies for theſe words, *thou was arraigned for 2 bullocks*, but did not ſay that he was arraigned for the ſtealing of them; and it was not *averred* that he was not arraigned, or that he did not ſteal any bullocks.] * Jo. 299. pl. 1. Haley v. Stanton, S. C. adjudged for the plaintiff. ——— Cro. C. 268. pl. 2. Halley v. Stanton, S. C. adjudged actionable, eſpecially as in this caſe it is alleged that he falſely and maliciouſly ſpoke theſe words, adding (if he had not made good friends, it would have gone hard with him,) which ſhews that he conceived he was guilty of ſuch offence.

† Cro. C. 268. in the caſe of Halley v. Stanton, cites S. C. as adjudged Paſch. 34 Eliz. C. B. Bayly v. Charrington. ——— Co. E. 279. pl. 6. Bayly v. Churington, S. C. adjudged not actionable; and if the words had been, *he was arraigned for ſtealing 2 bullocks*, yet the words had not been actionable; for one may be arraigned for felony, and yet be no felon.

[6. If one ſays of another, *he was taken for ſtealing of 2 horſes, and I have ſuſpected him this 4 years*, no action lies for theſe words, though he ſays that he never was ſuſpected of any felony; for a true man may be taken for the ſtealing of horſes. Paſch. 10 Car. B. R. between CURSON AND WOOD, adjudged no action lay after a verdict for the plaintiff. But quære, if he had averred that he was never taken for the ſtealing of horſes.] See (P. a. 3) S. C.

7. Words ſpoken of a juſtice of peace were, *I heard it ſpoken that Mr. Read was one that was at Burrel's robbery, and that 4 of them went to his houſe the next morning;* the plaintiff averred that the defendant never heard any ſuch words, &c. In arguing for the plaintiff was cited the caſe of MEGGS v. GRIFFIN; but the juſtices doubted thereof; for words of ſlander ought not to be taken by implication, and willed the parties to agree; and the plaintiff took 15l. for all. And judgment was entered by conſent. *I heard a bird ſing that you have committed felony, or I dreamed ſo.* Lev. 277. ſays ſuch words have been adjudged actionable

ſent. Cro. E. 644. pl. 51. Mich. 40 & 41 Eliz. B. R. Read's caſe.

8. The defendant ſaid, that *as he was carrying one W. to gaol for felony, he met one on the road, who ſaid to him, What? are you carrying W. to gaol? I ſhall follow you ſhortly, and bring with me H. C.* (the plaintiff) *for ſtealing a mare.* All the court, beſides Mallet, held the words actionable. But 3 juſtices held the declaration ill for want of an averment, ubi revera, no one met him on the road and ſaid ſo to him; for this had been traverſable, and the defendant might have pleaded to it, that another did ſay ſo to him, and ſo put the plaintiff to bring his action againſt ſuch other; but Twiſden held that the declaration being falſo & malitioſe, and ſo found, is a proof that none ſaid ſo to him. But it was ruled, quod querens nil capiat per billam. Lev. 82. Mich. 14 Car. 2. B. R. Crawford v. Middleton.

[485] (Y. a) For what Words it lies, in reſpect of *Uncertainty.*

Fol. 65.

[1. IF A. ſays of B. *I have found out B. I have found records which he hath forged, and he ſhall dearly pay for it; I have catched the forgerer*, an action lies for theſe words, though it does not appear whether he intends records of a copyhold manor, or what other record; for it ſhall be intended to be a true record of a court of record, and if it be a true record, the forgery of which is not within the ſtatute of 5 Eliz. or 1 Hen. 5. yet it is a great ſlander. Mich. 13 Car. B. R. between GARBUTT AND BELL, adjudged per cur. this being moved in arreſt of judgment.]

See (D. b) pl. 3. S. C.

You have made a falſe record, and that I will make you anſwer where you dare not ſhew your head, and you have ſought my death. And. 121. in pl. 168. cites it as adjudged for the plaintiff, Trin. 25 Eliz. Rot. 477. Adams v. Chriſtian. ——— 4 Le. 54. pl. 139. Mich. 27 Eliz. B. R. Chriſtian v. Adams, S. C. but there are only the laſt words, viz. *he did conſpire my death.* Adjudged for the plaintiff.

[2. If a man ſays, *there can be no writ againſt me; we have ſought for the writ, but can find none; but if there be any it is forged by the under-ſheriff, Mr. Ed. Hole, as he hath forged 2 writs;* in this caſe *Ed. Hole* ſhall have an action upon the caſe for theſe words, without an *averment* that he was under-ſheriff at the time, becauſe he is charged with the forgery of a writ; for though the forgery of a writ be not within the 5 Eliz. nor 1 Hen. 5. yet this is a great ſlander and defamation. Paſch. 16 Jac. B. R. between HOLE AND adjudged, this matter being moved in arreſt of judgment.]

Thou haſt cauſed the defendant to be arreſted with forged writs. It was urged that it might be that the writs were forged by ſtrangers, without the privity of the plaintiff, and that the plaintiff, not knowing them to be forged, procured the arreſt. But the opinion of the court was, that the words were actionable; for the word (cauſed) extends as well to the forgery as to the arreſt, and ſo amounts to the ſlander of forgery. 4 Le. 181. pl. 279. Mich. 26 Eliz. C. B. Hungerford v. Watts.

Thou haſt uſed juggling with me, but thy juggling ſhall not ſerve thy turn, and haſt forged a writ of quare impedit. The court held the firſt words not actionable, but that the laſt are; and judgment for the plaintiff. Cro. E. 178. pl. 8. Paſch. 32 Eliz. B. R. Sale v. Marſh.

[3. If

[3. If one man ſays to another, *thou haſt forged an obligation, and I will prove it*, though he does not ſhew between what perſons this was, nor that the obligation was ſealed and delivered, yet an action lies for theſe words; for it cannot be intended but that it was ſealed and delivered, for otherwiſe it could not be an obligation, but a writing only. Paſch. 40 Eliz. B. R. between WADE AND BUSSARD, adjudged.]

Cro. E. 607. pl. 7. S. C. adjudged accordingly.

Thou haſt forged a deed, was adjudged actionable; cited by Twiſden J. Sid. 16. in pl. 9. as 4 Car. Delahey's caſe.——S. P. per cur. as to forging a deed or releaſe, &c. but as to forging *a writing*, it is not actionable. Keb. 273. pl. 60. Paſch. 14 Car. 2. B. R. in caſe of Motley v. Slany, where the words were, *he has forged a bond, and that is not the firſt by a hundred*, adjudged for the plaintiff.

It was agreed clearly between Thorn and C. that where an *obligation is made, and the obliger and the obligee conferred about it*, and the *obliger ſaid to the obligee that he had forged it*, this is actionable; for here it refers to a certainty; but if he had ſaid to the other thus, he was a forger, and had forged falſe writings, no action will lie; for the words are too general in that caſe. Win. 76. Paſch. 22 Jac. C. B. Thorne's caſe.

Thou haſt made a forged bond, and I will prove it; adjudged for the plaintiff. Cro. E. 554. pl. 8. Paſch. 39 Eliz. B. R. Auſtie v. Maſon.

[4. If one ſays to another, *he hath forged the queen's evidence, and I would not be in his coat for* 1000*l.* no action lies for theſe words, * for the generality of them. Mich. 40, 41 Eliz. B. R. between WRIGHT AND GAYNER, dubitatur.]

Thou were ſuitor to a woman in Southwark, and didſt cozen her of her goods, and procured certain falſe witneſſes to be forged. It was objected, that as to cozening it had been lately adjudged not actionable; and that as to the witneſſes it appears not what their teſtimony concerns, nor that the forgery of it is to any purpoſe. Judgment was ſtayed. Cro. E. 99. pl. 2. Trin. 30 Eliz. B. R. Enghurſt v. Browne.

* [486]

[5. If A. exhibits an information in the exchequer againſt two men for the cutting of wood, and after one of the barons give's to him licence by writing to compound with them, whereupon C. ſays of B. *the licences which* † *I* [*A.*] *had in the exchequer were counterfeited, and B. did forge them*, an action lies for B. for theſe words, upon ſuch declaration, though he ſpoke of the licences indefinitely, and though no licence can be given by the 18 Eliz. before the anſwer of the defendant, which is not alleged; for to ſay that he forged ſuch licences before anſwer, is a great ſlander. Mich. 11 Jac. B. R. between GREGORY AND WILKS, adjudged.]

3 Bulſt. 137. S. C. adjudged accordingly.

† The original is (I) but it ſeems miſprinted, and that it ſhould be (A).

T. hath forged and counterfeited a certificate to a commiſſion out of the exchequer, and hath forged and counterfeited B.'s and S.'s the commiſſioners, hands, and had put their hands to it, by reaſon whereof he got a verdict in the exchequer, whereas otherwiſe he muſt needs have had the foil. It was objected, that it was not ſhewn what commiſſion it was, nor in what ſuit, ſo as the defendant might give anſwer to it; but judgment was given for the plaintiff. Cro. E. 72. pl. 27. Mich. 29 & 30 Eliz. B. R. Topliffe v. Wilſon.

[6. In a ſuit between A. and B. in chancery, if A. ſhews a deed indented, whereby he claims certain lands, and after B. ſays to A. *that deed is a forged deed, and you made it under a hedge.* A. ſhall have action for theſe words, though he might make the indenture, and another write and ſeal it, and ſo forge it; for if he made the deed that was forged, he forged it. Mich. 11 Jac. B. R. between SIR GEO. REYNELL AND SACKFIELD, adjudged.]

2 Bulſt. 132. S. C. adjudged accordingly.

[7. If one man ſays of another, *Mr. Carr hath put a preſentment into the jury's verdict againſt me of* 3*s.* 4*d. for ſuing of P. W.*

See (S.a) pl. 28. S. C.

[out]

[*out*] *of the court, contrary to a pain, without the conſent of the jury*, no action lies for theſe words, the ſaid *Carr* not being any officer of the court, though this was a deceit in him ſo to do; for every deceit will not * maintain an action. Mich. 4 Jac. B. R. between CARR AND READ, adjudged.]

* Fol. 66.

Roll. Rep. 431. pl. 25. S. C. The court being divided, adjornatur; and the reporter adds a nota, that the court ſeemed to incline that if the plaintiff had been an *attorney*, the words would be actionable, becauſe they ſhould be taken according to his profeſſion; but in this caſe he alleged that he was ſteward of courts of divers lords, which Crooke thought ſufficient to make the words actionable; but the reſidue of the court took no regard; & adjornatur.——3 Bulſt. 265. Froſt v. Ayer, S. C. The court divided 2 againſt 2; & adjornatur, and after was ended by agreement.

[8. If one man ſays to another, *thou haſt made forged writings, and thou ſhouldſt have loſt thy ears for it*, no action lies for theſe words, becauſe it is altogether uncertain what writings he intends by the firſt words; for perhaps he intends ſome writings, the forgery whereof will not deſerve the loſs of his ears, and then the laſt words will not explain his intention, inaſmuch as it may be that this was but an ill concluſion upon the premiſſes. Mich. 14 Jac. B. R. between AIER AND FROST.]

Thou haſt forged a writing, not actionable, becauſe the words are uncertain; per Gawdy, which Wray conceſſit; but if the declaration had been more certain, as innuendo *ſuch a deed*, it had been well enough. 3 Le. 231. pl. 313. Anon.——S. P. by Twiſden J. Sid. 16. in pl. 9.

Popham and Gawdy held that action lies for ſaying, *thou art a forger of writings*; for the word ſhall be intended of ſuch writings whereof forgery may be. But Fenner e contra; for it may be of a church-book, &c. and forgery ſhall not be intended, unleſs preciſely alleged; and Clench abſente, adjornatur. Cro. E. 554. Paſch. 39 Eliz. B. R. Goodale v. Caſtle.

† *Thou haſt made falſe writings, thereby to get my land from me.* It was objected that falſe writings may be miniments without ſeals, for which one is not puniſhable as a forgerer; and Gawdy and Clench were of that opinion; but Fenner e contra, becauſe he cannot get land by them, unleſs they be forged writings. Et adjornatur. Cro. E. 853. pl. 11. Mich. 43 & 44 Eliz. B. R. Perkinſon v. Bowman.

The making forged writings is not puniſhable, but the publication of them; per Haughton J. 3 Bulſt. 266.

† [487]

Thou haſt forged falſe letters, and haſt given me a falſe and forged acquittance. The plaintiff declared that he was a common carrier. But judgment was ſtayed. Sid. 155. pl. 6. Mich. 15 Car. 2. B. R. Monday v. Mills.——*Thou haſt forged an acquittance.* Twiſden J. held that action lay, though not ſaid whoſe; but this was denied by the other juſtices, unleſs he had ſaid, *an acquittance of J. N.'s.* Sid. 451. pl. 16. Paſch. 22 Car. 2. B. R. Anon.

You have falſely forged your father's hand, and thereby falſely have procured your father's tenants to pay their rents to you [which are] *due to your ſiſter.* It was objected that perhaps he counterfeited his father's hand to a letter, which is not puniſhable. And judgment for the defendant. Cro. E. 166. pl. 1. Hill. 32 Eliz. B. R. Venard v. Wooton.——Yelv. 146. S. C. cited by Crooke J. as adjudged not actionable, becauſe it relates only to a private matter, and is rather an aſperſion than a ſlander.——S. C. cited 3 Bulſt. 265. by the name of Vender's caſe.

[9. If a man ſays to J. S. *thou didſt forge an acquittance, and I will prove it*, an action lies for theſe words; for it is not material for what thing the acquittance was made; for ſuch forgery is within the ſtatute. Mich. 13 Car. B. R. between ONGE AND SPARK per curiam adjudged in a writ of error, and the firſt judgment affirmed accordingly. Intratur Trin. 13 Car. Rot. 722.]

Thou haſt forged a deed to cheat J. S. of his land. Adjudged actionable. Sid. 16. pl. 9. Mich. 12 Car. 2. B. R.

[10. If a man ſays to J. S. *thou haſt cauſed a deed to be forged, and a dead man's hand to be put to it, and cheated and cozened my huſband of his land*, an action lies for theſe words, though he expreſſes not what manner of deed it was, ſcilicet, whether it was ſuch a deed the forgery whereof is within the ſtatute of forgery; for forgery is an offence at the common law, though not within the ſtatute, for which the party may be indicted. Mich. 15 Car. B. R.

B. R. between PUDSY AND PUDSY and his wife adjudged, this being moved in arreſt of judgment. Intratur Hill. 14 Car. Rot. 902.] Caſſabilly v. Brit. ——— Adjudged that action lies for the

firſt words, though it be not ſpecially alleged what manner of deed was forged. Ow. 47. Trin. 30 Eliz. Moſſe v. Read. ——— Same words, with this addition, viz. *and he gave A. B. 40s. for ingroſſing of it.* Reſolved the words are actionable, and ſo a judgment in C. B. was affirmed in error. Raym. 4. Hill. 12 Car. 2. B. R. Reynolds v. Burton.

B. ſaid, that *A. procured the deed* (a deed produced at a trial at the aſſiſes) *to be forged.* Crooke J. held the words actionable, becauſe the ſtatute puniſhes forgery and the procurers of it; and the word (falſely) ſhall be implied. But if it had been ſaid, *the deed given in evidence was forged,* that was not actionable. Het. 31. Mich. 3 Car. C. B. Andrews v. Bird.

[11. If A. ſays, *this is B. his writing, and he hath forged this warrant,* innuendo, &c. B. ſhall not have any action for theſe words, becauſe the word warrant is of an uncertain ſenſe, and the innuendo ſhall not aid it. Hob. 3. between THOMAS AND AXWORTH.] Hob. 2. pl. 4. Paſch. 12 Jac. C. B. and Hobart ſaid that this was and is his opinion,

but that the cauſe was not adjudged; but that it was cited by Nichols and Winch J. afterwards, as adjudged according to his opinion, which (he ſays) ſhews their opinions concurring with his. ——— *Brownl.* 4. S. C. but is only an account of the words. ——— S. C. cited Sid. 16. in pl. 9. as not actionable; per Twiſden J. but he ſaid that to ſay, *thou haſt forged a warrant in ſuch a one's ſuit,* was adjudged actionable 9 Car. —— A ſheriff having made a warrant on a writ to arreſt another, the defendant ſaid, *this is a counterfeit warrant made by Mr. Stone* (a lawyer of whom they were diſcourſing) is actionable; for the law takes notice of this word counterfeit. As the ſtatute of 39 E. 3. 17. if a ſoldier counterfeits the warrant of his captain, it is felony. 2 Roll. Rep. 266. Mich. 20 Jac. B. R. Stone's caſe. —— Cro. J. 648. pl. 17. S. C. the words (counterfeit warrant made by him) are to be intended to be counterfeited by him. Adjudged for the plaintiff. Stone v. Smalcombe.

[12. *Where circumſtances ſhew an apparent intention of doubtful words in themſelves, that they are ſlanderous,* the action lies for them. My Reports, 14 Jac. Roote v. Molyn.] [488]

[13. *As* if a man ſays of a woman, *that ſhe did lie with a weaver* of Colcheſter *in a ditch, and the weaver's breeches were down, and they were at it,* an action lies; for though ſhe might lie with him in a ditch without any harm, yet the laſt words ſhew that he intended that he had carnal knowledge of her. My Reports, 14 Jac. ROOTE AND MOLYN. Adjudged.] Roll. Rep. 420. pl. 7. S. C. She alleged loſs of marriage by reaſon of the words. And

adjudged per tot. cur. for the plaintiff.

[14. If a man ſays of a woman, *that ſhe is a lewd or common woman of her body, and has the pox,* an action lies; for the laſt words ſhew that he intended the *French pox.* My Reports, 14 Jac. per Croke.] S. P. by Crooke J. Roll. Rep. 420. in caſe of Roote v. Molling.

Thou art burnt, and haſt the pox. This ſhall be intended the French pox, which uſually cometh of burning. Cro. E. 2. pl. 3. Hill. 24 Eliz. B. R. Box's caſe.

Thou art a whore, and a baſe burnt-arſe whore, is actionable; and ſo a judgment was affirmed. 2 Sid. 5. Mich. 1675. Commings's caſe. ——— But Glin doubted if the words, *thou art a burnt whore,* be actionable or not. Ibid. ——— *Thou art a whore, and a pocky-arſed whore,* actionable; and ſo a judgment in C. B. affirmed. Sid. 50. pl. 14. Mich. 13 Car. 2. B. R. Marſhall v. Chickhall. ——— S. C. cited Cart. 55. as adjudged 12 Car. 2. ——— Maſkalt v. Chirkall, S. C. Keb. 128. pl. 47. Mich. 13 Car. 2. B. R. Judgment in C. B. affirmed in error.

[15. *So* if he ſays, *that ſuch a one is eaten out with the pox,* an action lies. My Reports, 14 Jac. B. per Dod.] Roll. Rep. 420. in caſe of Roote v. Molling.

[16. *So* if one ſay of another, *Mrs. Milner is a whore, and hath the pox, and had holes in her face that ſhe might turn her finger in them;* Cro. J. 430. pl. 9. Miller's caſe

S. C. and all the court held the words actionable.—Roll. Rep. 145. Arg. cites 15 Jac. Palmer v. Read S. P. accordingly, and ſeems to be S. C.—Godb. 340. in pl. 434. Arg. cites it as adjudged accordingly 17 Jac. B. R. in the caſe of Palmer v. Read.—Palm. 65. Arg. cites S. C. accordingly by the name of Read v. Palmer, otherwiſe if he had ſaid only, *ſhe had the pox*.

them; J. King (who was a common ſurgeon) *gave her a diet-drink; I wiſh you to take heed how you drink in a cup with her.* Action lies; for all the words being joined together, it plainly appears that he intends the great pox, inaſmuch as he ſays that ſhe is a whore, which is the cauſe thereof; and ſays that ſhe had taken a diet-drink of a ſurgeon, which is the remedy, and that ſhe had holes in her face; and adviſed others not to drink with her, which is the effect thereof. Trin. 15 Jac. B. R. between MILNER AND HIS WIFE v. REEVE adjudged.]

[17. If a man ſays to another, *thou art a rogue, and a pocky rogue, and the pox haunts thee twice a year*, action lies; for hereby it is apparent * that he intends the great pox, becauſe they uſe to trouble thoſe that have them twice per annum, ſcilicet, in ſpring and autumn. Paſch. 8 Jac. B. PREKINGTON's caſe. Adjudged.]

* Fol. 67.

† S. C. cited by Fenner to have been adjudged actionable; for that it cannot be intended but of the French pox.

[18. *So* if one man ſays to another, *thou waſt laid of the pox*, action upon the caſe lies; for this is a proper phraſe for the curing of the great pox. Paſch. 8 Jac. B. PREKINGTON's caſe, agreed per curiam; and there it was ſaid that it had been ſo adjudged Paſch. 40 Eliz. B. R. between † DAWES AND TAYLOR adjudged in point. 43 Eliz. B. R. ‡ BACKSTER's caſe adjudged in point. Hill. 41 Eliz. B. R. agreed in DAVIE's caſe.]

Cro. E. 214. pl. 7. Hill. 33 Eliz. B. R. in caſe of Auſtin v. White, where the action was brought for theſe words, *thou was laid of the French pox*. And adjudged actionable.—S. P. per cur. Cro. J. 144. Hill. 4 Jac. B. R. in pl. 3. Arg.

‡ See (U. a) pl. 15. and the notes there.

[489]

Cro. E. 289. pl. 8. Mich. 34 & 35 Eliz. B. R. S. C. but there the words are, *thy houſe is infected with the pox, and this, &c.* And adjudged accordingly; and if it were the *ſmall pox*, yet they are actionable, they being ſpoke of an *inn-keeper*; for gueſts would not reſort thither.

[19. If one ſays of another, *thou art infected of the pox, and thy wife was laid of them*, action upon the caſe lies; for it appears that he intends the great pox. This was cited by G. Crooke, Paſch. 15 Jac. to have been one LEVET's caſe. Adjudged.]

Thou art a pocky knave; get thee home to thy pocky wife, her noſe is eaten with the pox. The words purport that he hath the French diſeaſe, by ſaying that his wife's noſe was eaten with the pox. And adjudged for the plaintiff. Cro. E. 878. pl. 7. Paſch. 41 Eliz. B. R. Brooke v. Wife.—S. C. cited 2 Brownl. 276. Mich. 7 Jac. by Doderidge ſerjeant, as adjudged accordingly.—S. P. cited accordingly, by Doderidge the king's ſerjeant. 2 Brownl. 272. Mich. 7. Jac. C. B.

Thou art an arrant whore, and an old worm eaten jade, and one of thy ſides hath been eaten with the pox. Held actionable. Cro. E. 857. pl. 24. Mich. 43 and 44 Eliz. C. B. Garford v. Clark.

Thou art a pocky whore, and carrieſt the pox along with you. Per Holt Ch. J. to ſay a woman is a pocky whore muſt be that ſhe is pocky, quatenus ſhe is a whore; and the other words make it ſtronger. Judgment for the plaintiff. 12 Mod. 633. Hill. 13 Will. 3. Clifton v. Wells.—Ld. Raym.

[20. If a man ſays to a woman, *thou art a pocky whore, and the pox have eaten the bottom of thy belly, that thy guts are ready to fall out*, action lies; for the following words ſhew that he intended the great pox. Mich. 7 Jac. B. between MILES AND BLAND adjudged per curiam.]

Raym. Rep. 710. S. C. with an innuendo (the French pox.) And judgment for the plaintiff per tot. cur.

[21. But if one says of another, *hang him, hang him, he is full of the pox*; *I marvel you will eat or drink with him*, no action lies, becauſe it is uncertain what pox he intends. Co. 4. 17. * JAMES AND RUTLECH. Trin. 41 Eliz. B. R. BONNER's caſe adjudged.]

* 4 Rep. 17. pl. 12. Mich. 41 & 42 Eliz. B. R. S. C. has theſe further words, viz. *I will prove that he is full of the pox* (innuendo the French pox.) And the court held that this innuendo does not do his proper office; for it endeavours to extend the general words (the pox) to the French pox, and by imagining an intent which is not apparent by any precedent words to which the innuendo ſhould refer; and the words themſelves ſhould be taken in mitiori ſenſu. —— Mo. 573. pl. 786. S. C. adjudged not actionable, becauſe it may be intended the ſmall pox; and it is not ſpoke of a perſon certain, with intent to defame him, but for advice to his friend.

[22. If one man ſays of another, *he is rotten with the pox*, an action upon the caſe lies; for this muſt be intended the great pox, becauſe rottenneſs comes from them only. Hill. 41 Eliz. B. R. between DAVIES AND TAYLOR.]

Cro. E. 648. pl. 2. S. C. adjudged actionable per Fenner J. he only being in court. —— See (U. a) pl. 15. and the notes there.

[23. If a man ſays to another, [a woman] *thou art a pocky whore, go to John Hawkins the* leech *for the pox*, no action lies for theſe words. Mich. 17 Jac. B. R. between AND FARIN, per curiam, in arreſt of judgment, the poſtea ſtaid.]

Thou art M.'s hackney, thou art a thieving whore and a pocky whore, and I will prove thee a pocky whore. Adjudged for the defendant; for the words cannot be intended of the French pox, it not being ſhewn by any other circumſtances, as to ſay ſhe was laid of them, &c. Cro. J. 514. pl. 26. Mich. 16 Jac. B. R. Califord v. Knight. —— Godb. 278. pl. 393. Culliford's caſe, S. C. And judgment was ſtayed.

[24. If one ſays to another, *thou art a baſe fellow, and hadſt the French pox*, no action lies; for perhaps he had the pox, but is now cured thereof, and no body will now avoid his company for that. Paſch. 6 Jac. B. between ALLEN AND SMITH, adjudged.]

Away, you pick-pocket, thou art a ſcurvy pocky whore. It was argued that theſe words do not ſhew any intention that he ſpake of the French pox, which ought to appear † by ſome particular circumſtances from the words; and ſo held all the court; and a judgment given in Briſtol was reverſed. Cro. J. 499. pl. 7. Mich. 16 Jac. B. R. Hunt v. Jones.

Thou art a whore, and haſt had the French pox. Per Glin, thoſe words are actionable. 2 Sid. 5. Mich. 1657. — S. P. without the word (French) cited per cur. as actionable; becauſe when (whore) is accoupled with (pox) it is apparent that he intended the French pox. Sid. 50. pl. 14.

† [490]

[25. If one man ſays to another, *thou art a baſtard-getting rogue, and hadſt a baſtard at* Oxford, *and a pocky rogue; and for aught I do know, thou haſt filled my bed full of the French pox, and no ſuch pocky rogue ſhall lie in my bed*, action lies; for all being laid together, it appears that he intended the French pox. Trin. 1650. between BLAGE AND ELLIOT, adjudged, this being moved in arreſt of judgment. Intratur Hill. 1650. Rot. 613.]

Sty. 283. Ellyot v. Blague S.C. adjudged accordingly, niſi,

[26. If a man ſays, *M. hath ſtolen ſheep, and Reynold Nichols, by compact and agreement, hath taken a meadow to help him to cloak and eſcape from the felony*, R. Nichols ſhall have action for theſe words, though he does not ſay that he had notice of the felony, for the taking the meadow to cloak the felony, implies as much. Hill. 38 Eliz. B. R. between NICHOLS AND BADGET, adjudged.]

Mo. 428. pl. 597. S. C. adjudged accordingly.

Cro. E. 486. pl. 3. Hall v. Hemmerſley S. C. adjudged for the defendant.—— Gouldſb. 119. pl. 3. Hall's caſe S. C. adjudged not actionable.——Noy. 57. S. C.

[27. If a man ſays, *J. S. was robbed by perſons unknown, and he hath received again 3 pieces of his cloth of the thief, and beareth with the thief, and if I receive any hurt I will charge him with it*, no action lies for J. S. for theſe words; for a man may receive his goods taken from him by a thief without being in any danger; as if a man makes freſh purſuit after a thief; and for ſaying that a man bears * with a thief, no action lies. Mich. 38 & 39 Eliz. between HAW AND HEMNESLEY, Trin. 39 Eliz. B. R. adjudged.]

* Fol. 68.

[28. If one man ſays to another, *J. S. did rob me of a cloak and a groat, and J. D. was there preſent, and did carry home my cloak, and did compound the robbery*, no action lies for J. D. for theſe words, for the uncertainty. Mich. 41 & 42 Eliz. B. R. between MARSH AND DIKES, dubitatur.]

Cro. E. 888. pl. 1. Dawes v. Bolton S. C. not actionable; for perhaps he received them as bailiff, or lord of a manor, who had waifs and felons goods.——Yelv. 4. Dawſon's caſe. S. C. but the words there are, thou haſt bought, &c. And adjudged againſt the plaintiff.

[29. If one ſays to another, *thou art a knave, thou haſt received ſtolen goods, and thou didſt know them to be ſtolen*, no action lies for theſe words; for he is not acceſſory by ſuch receit without an aiding and comforting of the felon. Trin. 44 Eliz. B. between DAWES AND BOUGHTON, adjudged.]

His boy hath cut my purſe, and he knowing it hath received it. Adjudged actionable. Cro. E. 877. pl. 4. Paſch. 44 Eliz. B. R. Cox v. Humphries.——Cro. E. 889. pl. 4. Trin. 44 Eliz. B. R. this caſe was moved again, when the words were alleged to be, viz. *thy boy hath cut my purſe, and thou haſt received it, knowing it, and haſt the rings and money that were there in thy hands, therefore I charge thee with felony.* Adjudged not actionable; for it appears not that the purſe was cut feloniouſly, and then the receiving of the boy, and things which were in the purſe, is not felony.——S. C. cited Poph. 210. and ſays that for the words (cutting my purſe) no action lies; for it is not felony unleſs taken from the perſon, and that to receive it is not felony; but it was reſolved that the laſt words were actionable.

You have bought a roan ſtolen horſe, knowing him to be ſtolen. Adjudged actionable. Godb. 157. pl. 212. Mich. 6 Jac. B. R. Brigg's caſe.

She cauſed L.'s ſervant to ſteal and purloin 30 . . . *and received them, and ſold them, which was the cauſe why his maſter broke.* Upon a verdict, judgment was given in C. B. and affirmed in error; becauſe ſhe is charged with procuring felony, and receiving ſtolen goods. All. 5 Mich. 22 Car. Hinacre v. Lemon.

Thou art a knave, and a ſitting knave, and haſt received ſtolen goods. Winnington moved in arreſt of judgment, becauſe it is *not averred that the defendant knew them to be ſtolen* goods, and per cur. it was ſtayed. And Twiſden ſaid, albeit they had averred he did know them to be ſtolen, the action would not lie. Adjornatur. 2 Keb. 338. pl. 4. Paſch. 20 Car. 2. B. R. Steventon v. Higgins.

* *Thou haſt received ſtolen goods, and knew they were ſtolen. A. S. ſtole them, and thou waſt partner with her.* Per cur. the firſt words are not actionable; for they might admit of a juſtifiable conſtruction, as if the *goods were waived*; but the laſt were held ſufficient; for *partner with her*, muſt intend partner in the felony. Vent. 18. Paſch. 21 Car. 2. B. R. Anon.

* [491]

Cro. C. 329. pl. 13. Penſon v. Gooday S. C. it was agreed that for ſaying, *ſhe is a bawd and keeps a bawdy houſe*, action lies; but not for

[30. If one ſays to another, being a feme-covert, *hang thee, bawd, thou art worſe than a bawd, and thou keepeſt a houſe worſe than a bawdy-houſe, and keepeſt a whore in thy houſe to cut my throat*, action lies for theſe words; for it is a great ſlander. Mich. 9 Car. B. R. between BENSON AND GOODACH, adjudged, this being moved in arreſt of judgment where the baron and feme brought the action, and alleged that the baron kept an alehouſe, being thereto legally licenſed by divers juſtices; but the court had no regard thereto, inaſmuch as the baron and feme cannot join in

an

an action for ſuch loſs, but the baron only ought to have the action.] calling one bawd, without ſaying

any thing more. And for ſaying, *he keeps a houſe worſe than a bawdy-houſe*, no action lies; for it is uncertain what is meant thereby. Adjudged for the plaintiff.

[31. If one ſays to another, *thou art a cozening and cony-catching rogue, and haſt cozened me of* 30*l.* no action lies; for it may be that he juggled with him. Mich. 9 Jac. B. per curiam.] See (U. a) pl. 23. &c.

[32. If a man ſays of J. S. who is a tradeſman, not having any diſcourſe of his trade, *thou art a cheating cozening knave, and thou haſt cozened my huſband of* 500*l.* no action lies; for this ſhall not be intended to be ſpoken of him in his trade. Mich. 11 Car. B. R. between NEEDLER AND SYMNEL, adjudged in arreſt of judgment, after a verdict for the plaintiff.] See (U. a) pl. 25. S. C. and the notes there.

[33. If a man ſays to J. S. *thou haſt forged a privy-ſeal and a commiſſion, and why doſt thou not break up this commiſſion and ſerve it?* (innuendo *the commiſſion of the plaintiff*) an action lies for theſe words upon ſuch a declaration; for it ſhall be intended the privy-ſeal of the king per excellentiam, and not the fabric of the ſeal only, but alſo the putting thereof to ſome writing, and alſo a commiſſion of the king, which was in ſome matters relating to the plaintiff, as the words import in common diſcourſe. Mich. 9 Car. B. R. between BALL AND BADGARLY, dubitatur, and the poſtea ſtayed in arreſt of judgment; but after judgment was given for the plaintiff per curiam.] Jo. 325. pl. 4. S. C. adjudged actionable per tot. cur. præter Barkley. ——— Cro.C. 326. pl. 9. S. C. and judgment for the plaintiff, and Berkley agreed with the others.

He hath forged the late queen's writ; adjudged actionable, and affirmed in error. Yelv. 146. Mich. 6 Jac. B. R. Wilſhire's caſe.

[34. If a man ſays maliciouſly of J. D. *he hath picked my pocket of ſilver and gold*, et de ulteriori malitia ſua (as the declaration was) at another day ſays of him, *I had* 100*l. about me, and he picked my pocket of* 40*l. and I will indict thee at the ſeſſions, and make thee hold up thy hand at the bar*, and an action lies for the firſt words clearly, and alſo for the ſecond words, they being averred to have been ſpoken *de ſua ulteriori malitia*, and ſo explanatory only of the firſt words. Mich. 9 Car. B. R. between PENSON AND GOODACH, adjudged per curiam, this being moved in arreſt of judgment, damages being given intire for all the words, being ſpoke at ſeveral days.] Cro.C. 327. pl. 11. S. C. adjudged actionable without queſtion; for he directly charges him with a felonious taking, and the words have reference the one to the other.

You and G. (the plaintiff) *made J. S. drunk, and picked his pocket*, is actionable. Keb. 691. pl. 6. Paſch. 16 Car. 2. B. R. Gerrard v. Lyon.

You are a pick-pocket, you picked my pocket, and took away my money, and I will juſtify it. Not actionable. 2 Lev. 51. Paſch. 24 Car. 2. B. R. Watts v. Rymes. ——— Vent. 213. S. C. accordingly; for the words * might mean only treſpaſs, and do not neceſſarily imply felony.—3 Keb. 34. pl. 4. Watts v. Grimes S. C. accordingly.

To ſay a man is a pick-pocket, and has picked my pocket, in common acceptation is actionable. Per Holt Ch. J. 11 Mod. 256. Mich. 8 Ann. B. R. in caſe of Stebbing v. Warner.

* [492]

Fol. 69.

[35. If one ſaid to another, 10 Jac. *that he ſaid there is no prince in England*, an action upon the caſe lies; for the words have not ſuch an intendment as if he had ſaid, the prince is not in *England*, but that the ſuppoſed prince which is in *England* is no See (C. b) pl. 2. S. C. Cro. J. 406.

pl. 2. S. C. adjornatur. —Ibid. 413.

no prince. My Reports, 14 Jac. between LEWIS AND WALTER, adjudged.]

pl. 1. S. C. and all the juſtices beſides Haughton held clearly that the action lies; for it being alleged that he ſpoke them on purpoſe to draw his life in queſtion, it ſhall be taken in the worſt ſenſe, he having pleaded not guilty, and found guilty; and if he had other intention he would have ſhewn it by way of excuſe; and that not ſhewing when he ſpake them, is not material; for the plaintiff alleged that he never ſpake them, and that the other never reported them, and ſo cannot ſhew any time of ſpeaking what never was ſpoke; and adjudged for the plaintiff.——Roll. Rep. 444. pl. 8. S. C. per tot. cur. the words are actionable.——3 Bulſt. 225. S. C. adjudged for the plaintiff.

See (C. b) pl. 2. S. C. and S. P.— Roll. Rep. 445. pl. 8. S. C. and S. P. per Doderidge, quod fuit conceſſum per Crooke and Mountague.——3 Bulſt. 227. S. C. and S. P. accordingly.——Cro. J. 406. 413. S. C. but S. P. does not appear.

[36. So an action lies in this caſe, *though there are ſeveral princes in* England, *as every earl is a prince, and ſo is a duke and marquis, for when there is a diſcourſe ſimply, it ſhall be intended the king's eldeſt ſon* per excellentiam. My Reports, 14 Jac. between LEWIS AND WALTER, adjudged.]

S.P. exactly held accordingly, C. 10 E. 878. pl. 6. Paſch. 44 Eliz. B. R. Fountain v. Rogers.— S. C. cites Roll. Rep. 427.—S. C. cited 3 Bulſt. 260.—* Cro. E. 621. pl. 12. Wells v. Hemmerſon S. C. the words were, *thou art a rebel, and no true ſubject.* The whole court held theſe words not actionable; for he may be ſaid to be a rebel upon a proclamation of rebellion againſt him in an Engliſh court; and adjudged accordingly.——S. C. cites Sid. 132. pl. 5. in caſe of Glanvill v. Gully. Paſch. 15 Car. 2. B. R. where the words were, *thou art a rebel againſt the king*, and held that judgment be arreſted.

† See pl. 38. S. C.

[37. If one man ſays to another, *that he is a rebel*, no action upon the caſe lies for this; for it might be that a proclamation of rebellion was granted againſt him out of the chancery or ſtar-chamber. Mich. 40, 41 Eliz. B. R. * EMERSON'S CASE, per curiam adjudged. Mich. 40, 41 Eliz. B. R. † REDSTON'S CASE, per curiam.]

Cro E. 638. pl. 38. Redſton v. Eliot S.C. Fenner and Clench held the words actionable.

[38. But if one man ſays to another, *thou art a rebel, and all that keep thee company, and thou art not the queen's friend*, an action upon the caſe lies for theſe words; for he explains his intention by the laſt words. Mich. 40 & 41 Eliz. B. R. REDSTON'S caſe.]

And though it was ſaid to have been adjudged 16 Eliz. C. B. in caſe of Buſtard v. Petts, that for ſaying, *thou art not the queen's friend*, no action lay; yet they ſaid that being conjoined with the other words, *all that keep thee company*, they are thereby aggravated, and ſhew his intent. But the other juſtices being abſent, adjornatur.

See (G. a) pl. 6. S. C. and the notes there.

[39. If T. the parſon of the pariſh of D. warns the pariſhioners to come to church to give God thanks for the deliverance from the gunpowder treaſon, and S. ſays to him, that he will not come to church; upon which T. ſays to him, *thou art no true ſubject to the king*, no action lies for theſe words; for the word (true) is uncertain, inaſmuch as no man is ſo true as he ought to be. Mich. 5 Jac. B. between SMITH AND TURNER, per curiam.]

‡ [493] *Palm. 410. S. C. and the plaintiff had judgment.—— Jo. 68. pl. 4. S. C. ad-

[40. If one ſays to another, *thou didſt keep* Faulkener *the jeſuit in thy houſe, knowing him to be a jeſuit*, an action lies for theſe ‡ words, though it does not appear whether *Faulkner* was born within the dominions of the king, as the ſtatute 27 Eliz. limits, not that he received him after the making of the ſtatute;

for

for they ſhall be ſo intended, the words having a violent preſumption of ſlander. Paſch. 1 Car. B. R. between Sir Simon * Clarke and Loggin adjudged, this being moved in arreſt of judgment; and Hill. 9 Jac. B. R. Rot. 1439. between † Flint and Smith adjudged in point, where it was ſaid, that *he received ſuch a one who was a ſeminary prieſt, knowing him to be a ſeminary prieſt.* Mich. 16 Jac. B. R. between Sir John Lenthall and Andrews adjudged. *He did entertain and often harbour in his houſe one St. John, and others, knowing them to be Romiſh prieſts; and* Sir John Lenthall *ſhall be indicted for it.* And after the defendant maliciouſly procured a bill of indictment to be drawn and ingroſſed, and to be preferred to the juſtices of gaol-delivery, containing this matter, and publiſhed that he would prefer it to them, though it was laid in the declaration that the plaintiff was marſhal of the marſhalſea of the king's bench, and thereby might have the cuſtody of ſuch prieſts; yet inaſmuch as he ſaid he ſhould be indicted for it, he ſhewed that he did not intend a lawful harbouring of them. And judgment was given for the plaintiff. Intratur Trin. 16 Car. Rot. 350.]

judged accordingly.—Lat. 1. S. C. adjudged accordingly.—Lat. 83. S. C. ſays this caſe was adjourned; but that another report ſays it is actionable; for though it be not felony to lodge a jeſuit, that is an alien, as Suarez or Gregory de Valentia, yet it is a ſcandal to lodge them. † Cro. J. 300. pl. 3. Paſch. 10 Jac. B. R.

S. C. adjudged actionable.——S. C. cited Jo. 68. in the caſe of Clarke v. Loggin; and ſays, that upon producing the roll in court, judgment in the principal caſe was given for the plaintiff.——Lat. 2. cites S. C. accordingly.

[41. If one ſays to another, *thou art a perjured fellow, for thou waſt forſworn before the lord biſhop of Norwich,* no action lies for theſe words, becauſe he does not ſay this was in the court of the biſhop, and ſo uncertain whether it was perjury; and it ſhall not be intended to have been in his court. Mich. 15 Jac. B. R. between Keble and Page adjudged, in arreſt of judgment.]

See (F. a) pl. 9. S. P.—Br. Action ſur le Caſe, pl. 104. cites 30 H. 8. contra, that action upon the caſe lies for calling the plaintiff *falſe perjured man.*——Cro. J. 436. pl. 5. Page v. Keble, S. C. but there the laſt words are, *forſworn in the biſhop of N.'s court*; and yet adjudged that the action did not lie.——But Cro. E. 297. pl. 5. Paſch. 35 Eliz. B. R. Lee v. Secombe, it was held actionable for ſaying, *he was falſely forſworn in the court of the biſhop of Exon at Exon*, though it was objected that (court) might mean the biſhop's yard. It was ſaid that the court knows that every biſhop has his conſiſtory court.

[42. If one ſays to another, *thou waſt forſworn in the court of* ‡ *requeſts*, an action upon the caſe lies, between Brooke and Doughty, cites Hill. 40, 41 Eliz. B. R.]

‡ Fol. 70.

See (F. a) pl. 17. S. C. and the notes there.

[43. If one ſays of another, *thou art a forſworn fellow, and I will prove thee one; for thou ſetteſt thy hand to a bond of mine, and ſwore nay*, no action lies for the uncertainty. Mich. 15 Jac. B. R. between Serjeant and Clarke adjudged.]

[44. If one ſays to another, *thou waſt forſworn and perjured in 2 or 3 articles in a ſuit between me and thy daughter in law, and thou ſhouldſt loſe thy ears for it, and ſhouldſt come from* London *like a pollard*, an action upon the caſe lies for theſe words; for it appears that he intends a perjury in a court of record, for which

he ought to loſe his ears. Mich. 15 Jac. B. R. GODDARD AND HAMPTON adjudged, as to the words.]

Cro. E. 374. pl. 25. Hill. 37 Eliz. Brawn v. Michael, S. C. and the words held not actionable. ——Cro. E. 500. pl. 20. Brown v. Michel, S. C. and all the court (abſente Gawdy) agreed the words not actionable; and reverſed the judgment. ——Noy 36. S. C. and the words held in B. R. not actionable, becauſe he did *not ſay he delivered untruths in matter of ſubſtance*; and ſo reverſed the judgment. —— —— Palm. 65. Mich. 17 Jac. Arg. cites Brown's caſe, 38 Eliz. where the words, *he delivered an untruth in the chancery in a material cauſe*, were adjudged actionable.——2 Roll. Rep. 145. Arg. Hill. 17 Jac. cites S. C. that the words, he delivered *untruths in a material thing in his anſwer in chancery*, were adjudged actionable.

* [45. If one ſays to another, *that he hath delivered falſe evidence and untruths in his anſwer to a bill of J. S. in the chancery*, no action lies for the uncertainty; for many things in a bill are not material to the matter in variance; and therefore if the party does not anſwer truly as to them, he is not puniſhable for perjury; and perhaps he intends ſuch matter. Mich. 38, 39 Eliz. B. R. between MICHEL AND BROWN adjudged in a writ of error, and the judgment given in bank to the contrary reverſed accordingly.]

(F. a) pl. 11. S. C.

[46. If one ſays to another, *thou art a forſworn man*; *I will teach thee the price of an oath, and will ſet thee on the pillory*, an action upon the caſe lies for thoſe words; for this ſhall be intended ſuch a forſwearing for which he ſhall ſtand in the pillory, and not any voluntary oath. Hil. 41 Eliz. C. B.]

2 Bulſt. 81. Liſard v. Stamp, S. C. the point of the words was not agreed whether actionable or not; but becauſe the declaration was uncertain, the judgment was given againſt the plaintiff.

[47. If one ſays to another, *thou haſt ſtolen my wood, and I will have an action of felony againſt thee*, an action lies. Trin. 11 Jac. B. R. between LIFORD AND STAMP, per curiam.]

Caſe, &c. for theſe words, *you ſtole my box-wood, and I will prove it*. Actionable, becauſe they tend to diſgrace the plaintiff by an imputation of felony. 2 Salk. 695. pl. 6. Mich. 2 Ann. B. R. Baker v. Pierce.——6 Mod. 23. S. C. adjudged per tot. cur. for the plaintiff.——2 Lord Raym. Rep. 959. S. C. adjudged for the plaintiff, notwithſtanding the opinion in Cro. J. 166. Low v. Saunders, to the contrary.

Thou ſtoleſt my wood was ſaid by Hutton J. 2 Roll. Rep. 381. to have been adjudged by them to be actionable in Coggins's caſe; but that the words, thou ſtoleſt my wood *out of my field*, were not actionable; and Winch J. ſaid, that in Coggins's caſe, he was of opinion that the words were not actionable; but the court were againſt him. ——*Thou haſt feloniouſly taken my wood*, is actionable; for unleſs it was wood cut down, he could not have ſaid feloniouſly taken. And adjudged for the plaintiff by Anderſon and Beaumont contradicente Walmſley, and Owen abſente. Cro. E. 471. (bis.) pl. 31. Paſch. 38 Eliz. B. R. Anon.

Thou haſt ſtolen a load of hop-poles, was ruled actionable; for it ſhall be intended that they were cut down before, otherwiſe they could not be called hop-poles, or that he could otherwiſe ſteal them. Cro. E. 225. pl. 9. Paſch. 33 Eliz. B. R. Guildeſlew v. Ward.

† Cro. J. 166. pl. 5. Lo t. Sanders, S. C. adjudged without argument for the plaintiff; for t ſhall be taken in the worſt part. And wood is to be intended of that which is cut down, according to the ancient rule of arbor dum creſcit, lignum dum creſcere neſcit.——S. C. cited Cro. J. 674. in pl. 7. by the name of Child v. Sanders.——*Thou art a thieviſh rogue, and haſt ſtolen my wood*, Brampſton Ch. J. conceived the words actionable for the reaſon above; & adjornatur. Mar. 211. pl. 248. Trin. 18 Car. B. R. Paulin v. Forde. ——— Godb. 340. in pl. 434. Arg. cites Hill. 3 Jac. B. R. Roberts v. Hill, where it was adjudged that thoſe words, *thou haſt ſtolen my wood*, were not actionable, becauſe it might be wood ſtanding, and then the cutting and taking it away is not felony but treſpaſs.——S. C. cited 2 Roll. Rep. 143.

The

The caſe of Low v. Sanders, Cro. J. 166. was cited by ſerjeant Darnell. 2 Ld. Raym. Rep. 960. but Powell J. ſaid the later books are contrary, and that he would ſtick to the later authorities, being grounded on ſo much reaſon. And Gould J. ſaid that Mich. 10 Car. 2. it was adjudged that theſe words, thou haſt ſtole my wood, were actionable. —— So *thou haſt ſtolen my timber* is actionable; for it ſhall not be intended of trees growing, becauſe they are then timber-trees. Noy 114. Short's caſe. ——*Thou haſt ſtolen as much wood and timber as is worth* 20*s.* Verdict found the words with this addition, (*off my landlord's grounds.*) Adjudged for the plaintiff, for the additional words do not qualify the firſt words, for timber implies its being ſevered from the ſoil; per tot. cur. Yelv. 152. Paſch. 7 Jac. B. R. Higges v. Auſten. —— S. C. cited Arg. 2 Bulſt. 82.

* *A. in the night time did ſteal my wood and oaks, and built his houſe with them.* The court agreed that this intended wood felled, eſpecially the defendant being found not guilty as to the oaks. And judgment for the plaintiff, albeit the word thief was not in it. 2 Keb. 261. pl. 11. Mich. 19 Car. 2. B. R. Alſop v. Taylor.

[49. If one ſays to another, *thou art a thief, for thou haſt ſtolen a load of turves*, an action lies, for they are not called turves till they are cut from the earth, and dried. Mich. 9 Car. B. R. between DOLMAN AND YOUNG adjudged, this being moved in arreſt of judgment.]

[50. If one ſays to another, *thou art a corn-ſtealer, and haſt ſtolen my corn off my land*, no action lies; for it might be that he intended corn growing. Hill. 5 Jac. B. per curiam.] *Thou haſt ſtolen as much corn out of my fields as is worth 9 or 10s.* It was moved that this might be intended ſtanding corn, and then the taking is not felony, and ſo not actionable. The court doubted, and would adviſe. Cro. J. 457. pl. 2. Hill. 15 Jac. B. R. Ellis v. Fitch.

[51. If one ſays to another, *thou art a thief, for thou haſt ſtolen half an acre of my corn*, no action lies for theſe words; for it may be that he intended corn growing. Mich. 37, 38 Eliz. B. R. adjudged.] Cro. E. 428. pl. 30. Caſtleman v. Hobbs, S. P. and ſeems to be S. C. adjudged for the defendant, for no one will intend it corn ſevered. ——Mo. 396. pl. 516. S. C. adjudged not actionable. ——Ow. 57. S. C. adjudged accordingly. ——S. C. cited by the name of Hobb's caſe, 2 Bulſt. 82. Arg.

[52. If one ſays to another, *thou haſt* † *feloniouſly ſtolen my corn*, an action upon the caſe lies, though he does not ſay that he ſtole it out of his barn. Mich. 8 Jac. B. per 2 juſtices.] But ſaying *he hath ſtolen my corn*, being ſpoken generally, is not actionable; for it might have been growing, and then it had been only a treſpaſs. Poph. 129. per cur. obiter. Mich. 15 Jac. —— Lat. 176. S. P. accordingly, per Jones J. Arg.

Thou haſt ſtolen my corn, and carried it to market, is actionable; for it ſhall be intended according to the common ſenſe, viz. corn in the barn, nor in ſheaves, whereof a quantity cannot be taken, and carried to market. Cro. J. 442. pl. 16. Mich. 15 Jac. B. R. Turner v. Champion.

† See pl. 48. in the notes there.

[53. If one ſays of another, *he ſtole corn from maſter Kays*, an action lies for theſe words. Mich. 21 Jac. B. R. between SMITH AND WARD adjudged, this being moved in arreſt of judgment.] Cro. J. 673. pl. 7. S. C. but adds the words, *he is a thief, for he hath ſtolen*, &c. Adjudged for the plaintiff, and affirmed in error.

[54. If one ſays to another, *thou haſt ſtolen my furſe*, no action lies; for it may be well intended that he means furſe growing. Mich. 9 Car. B. R. ſaid to be adjudged in one GILBERT'S CASE, in the common pleas.] See (R. a) pl. 6. S. C. and the notes there.

[55. If one ſays of another, *he is a thief, and ſtole a pye out of John Barham's houſe*, no action lies for theſe words, becauſe it is

is uncertain what manner of pye he intended; for perhaps he intended a bird ſo called. Mich. 15 Jac. B. R. between STABBACK AND WESTON, per curiam, in arreſt of judgment, and the poſtea ſtayed accordingly.]

2 Brownl. 272. S. C. agreed that action lies not. And Foſter J. held that if he had ſaid *for felony*, yet it would not be actionable; for many honeſt men are arraigned.

[56. If one ſays to another, *thou art drunk, and I ſhall never hold up my hand at the bar as thou haſt done*, no action lies; for it may be that he held up his hand for drink, and not for felony. Mich. 7 Jac. B. between SIMPSON AND WARTERS, adjudged.]

[496]

[57. If one ſays to another, *thou art a knave, and didſt conſent to the taking of a 20s. piece out of J. S.'s pocket*, no action lies for theſe words, becauſe it does not appear that he intended a felonious taking thereof. Paſch. 11 Car. B. R. between DEEKS AND BAGLY, per curiam, in arreſt of judgment.]

Cro. E. 620. pl. 9. S. C. adjudged not actionable, per Popham & Fenner; but Clench e contra, and Gawdy was abſent; but Popham and Fenner held that if the words had been, that *he ſcienter & voluntarie, adminiſtered phyſic to J. S. to kill him*, the words had been actionable, becauſe that touches him in his profeſſion.

[58. If a man ſays of a phyſician, *he hath killed J. S. in the* Old Jewry *with phyſic, which phyſic was a pill, and Dr.* Atkins *and Dr.* Pady *found the vomit in his mouth*, no action lies for theſe words; for if a phyſician gives medicines or drugs to his patient, to the intent to recover him from his ſickneſs, yet though the patient dies after the taking thereof, the phyſician is not puniſhable, inaſmuch as it does not appear that he knew the medicines to be contrary to the nature of the diſeaſe, and ſo he did it not maliciouſly. Mich. 40, 41 Eliz. B. R. between POE AND MUMFORD, adjudged.]

[But it had been otherwiſe if he had ſaid, *that he adminiſtered medicines that he knew to be contrary to the diſeaſe, &c.* For an action lies for theſe words. Mich. 40, 41 Eliz. B. R. between POE AND MUMFORD, per cur.]

Saying to a *ſurgeon*, who had had one M. under his care, and who is ſince dead, and of whom there was then a diſcourſe, *thou didſt kill Mr. M. thou didſt kill him*, was held actionable by 3 judges, and that without alleging that he was a ſurgeon at the time the words were ſpoken. Het. 69. Mich. 3 Car. C. B. Watſon v. Vanderlaſh.

Cro. E. 889. pl. 3. S. C. and adjudged not actionable; and the breaking the houſe may be a treſpaſs, and not felony. —— S. C. cited Comb. 247. Paſch. 6 W. & M. in B. R. Arg. but the court thought it was a ſtrange reſolution.

[59. If one ſays to another, *thou haſt committed burglary in breaking his houſe, and ſtealing his goods*, no action lies; for it is not known whoſe houſe or goods he intends, there being no diſcourſe of any. Trin. 44 Eliz. B. R. between BROWN AND ST. JOHN, adjudged.]

A. hath ſtolen away ſuch and ſuch *goods*, (naming them) *and B.* (the plaintiff) *was privy and conſenting thereto*; adjudged actionable; for B. is accuſed of being acceſſory. Cro. C. 236. pl. 18. Mich. 7 Car. B. R. Mot v. Butler.

60. *That thief A. has ſtolen away my goods, and delivered them to B.* Action lies not for B. For the words do not charge him as acceſſory, it not appearing by what is ſaid that he had any notice of the ſtealing. Dal. 42. pl. 2. 4 Eliz. Anon.

S. C. cited Cro. E. 166. Hill. 32

61. *He hath counterfeited my lord of Leiceſter's hand to a letter againſt the biſhop of London, for which he was committed to the marſhalſea.*

marſhalſea. 3 Le. 231. in pl. 313. cites it as held not actionable in the caſe of Brook v. Doughty. Eliz. B. R. in pl. 1. and the court there were of the ſame opinion.

62. *Thou art a forger, and art ſued in the ſtar-chamber for going by one Sedge.* Adjudged for the plaintiff; for forger is intended of ſuch thing of which forgery might be, and to be ſpoken in the worſt part; and by ſaying he is ſued in the ſtar-chamber, this aggravates it that he did ſuch forgery, for which he is ſuable there. Cro. E. 296. pl. 1. Paſch. 35 Eliz. B. R. Munday v. Cordal.

63. *There never was a purſe cut within 2 miles of Wellingborough, but thou hadſt thy part in it.* Adjudged actionable; for they ſhall be taken to be ſpoken in the worſt ſenſe. Cro. E. 342. pl. 11. Mich. 36 & 37 Eliz. B. R. Boll v. Roane. [497] S. C. cited Arg. Bulſt. 147.

64. *He was one of them that broke P.'s houſe, and did take and carry away part of the money that was ſtole,* not actionable; for it may be intended that he broke the houſe upon juſt cauſe, and brought the money to another place upon juſt cauſe. Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon.

65. *M. was robbed of* 40*l. and* 100 *marks worth of plate, and A. and B. had it, and for that they will be hanged.* The court at firſt doubted, but afterwards reſolved that action lies; for taking all the words together, they ſhall be intended ſpoken in the worſt ſenſe, viz. that the plaintiffs were actors in the robbery, and the rather it being ſaid that they will be hanged for it; and adjudged for the plaintiff. Cro. J. 302. pl. 1. Trin. 10 Jac. B. R. Long v. King. Bulſt. 147. King and Long v. Lorking, S. C. and judgment for the plaintiff by four judges; but Fenner J. ſomewhat doubted. ——S. C. cited by Eyre, Comb. 232. but Holt Ch. J. ſaid he thought the words were actionable. —— Cro. J. 331. pl. 12. King v. Bagg, S. C. It was held that the words of themſelves are not actionable, and that ſaying (they will be hanged for it) do not inforce the firſt words, and therefore the judgment was reverſed in the exchequer-chamber. ——Jenk. 339. pl. 92. S. C. —— S. C. cited accordingly Palm. 63.

66. Action on the caſe was brought for theſe words, *I have matter enough againſt thee; for John Halden hath found forgery againſt thee, and can prove it;* and after verdict it was reſolved by the court, that the words are too general, and will not maintain an action, no more than if he had ſaid that another had forged a warrant; for it might be a warrant for a buck, and this is not a right affirmative. Hutt. 41. Mich. 18 Jac. Powell v. Ward. Hob. 305. pl. 385. Powell v. Winde, S. C. adjudged not actionable, there being no certainty of what the forgery was. ——Hob. 327. pl. 398. S. C. accordingly. ——S. C. cited Comyn's Rep. 262. Arg. in pl. 144.

67. *He hath got the pox by a yellow-haired wench in Moorfields, and it will coſt him* 10*l. if he eſcapes with his life;* adjudged actionable upon the firſt words, and they rejected the laſt. And Twiſden J. took a difference between the words *(got)* and *(caught)* the pox, and that the firſt means the French pox. Sid. 324. pl. 3. Paſch. 19 Car. B. R. Lym v. Hockley. Lev. 205. Lerome v. Hockley, S. C. but mentions only the firſt words; and adjudged actionable; and Twiſden and Morton J. held that ſo it would be if the words had been, that he got it of a *yellow-haired woman.* ——2 Keb. 181. pl. 5. Hockley v. Limbe, S. C. adjudged for the plaintiff, niſi, &c. ——Ibid. 183. pl. 14. Limbe v. Hockley, S. C. adjudged.

68. *She*

68. *She caused L.'s servant to steal and purloin* 30 *, and received them and sold them, which was the cause why his master broke.* Adjudged actionable, and affirmed in error, because charged with procuring felony, and receiving stolen goods. All. 5. Mich. 22 Car. B. R. Hinacre v. Lemon.

So *from my house*, not actionable; per Doderidge J. Arg. 2 Bulst. 82.

69. *Thou hast stolen as much lead out of my master's house as is as big as a house.* It was moved in arrest, &c. that it might be lead fixed to the freehold, and be the covering of the house. But per cur. if the words had been, *stole off the house*, it might be so intended; but the words being *out of the house*, it must be intended lead lying there. Lev. 156. Hill. 16 & 17 Car. 2. B. R. Ering v. Street.

70. Action for these words, *you are a forger of bonds, a publisher of forgery, and sue upon forged bonds.* The jury found the defendant not guilty as to the first words. Resolved that the last words were not actionable, it not being laid that he knew of the forgery. Vent. 3. Mich. 20 Car. 2. B. R. Twisleton v. Hobbs.

[498]

See (Y. a) pl. 35, 36, 37, 38, 39, 40.

(Y. a. 2) Words relating to the Government.

I am put out of the parsonage-house by *F.*

1. *HE is not the queen's friend.* Adjudged not actionable. Cro. E. 268. in pl. 5. Arg. cites 16 Eliz. Bursted v. Peck.

the patron, who is *neither the queen's friend, nor a true subject.* Adjudged not actionable. Cro. E. 268. pl. 5. Hill. 34 Eliz. B. R. Fowler v. Aston.

Thou art an enemy to the state. Adjudged actionable, and affirmed in error; for they cannot have any good construction, but are very slanderous. Cro. E. 602. Hill. 40 Eliz. C. B. Charter v. Peter.

He is disaffected to the government, being spoke of a *justice of peace*, and he thereupon turned out of the commission, was adjudged actionable in the court of exchequer, and affirmed in the exchequer-chamber; but was afterwards reversed in the house of lords. Show. Parl. Cases 12. Duval v. Price.

See (G. a.) pl. 6.—— Le. 33. 336. pl. 469. Trin. 32 Eliz. S. C. Wray

2. *Thou serveſt no true subject*, being spoke to a servant of the plaintiff, was adjudged actionable, because it was shewn that he was a *justice of peace, and a deputy-lieutenant, and near in service to the queen.* Cro. J. 202. in pl. 1. cited as the case of Sir W. Walgrave v. Agas.

thought the words not actionable of themselves, but that the quality of the person of whom they were spoken may add weight to them. Gawdy J. held the words actionable of themselves; Fenner J. thought them not actionable.—Cro. E. 191. pl. 5. S. C. adjudged for the plaintiff.——Roll. Rep. 444. in pl. 8. Arg. cites S. C. as adjudged.——Palm. 69. Arg. cites S. C. as adjudged.——Cro. J. 202. pl. 1. cites S. C.——S. C. cited by Holt Ch. J. in delivering the opinion of the court. 7 Mod. 111. Mich. 1 Ann. as adjudged actionable, being spoke of one in that high station; and Holt said that that case has not been questioned.

* 4 Le. 121. pl. 244. S. C. and the court were of the same opinion, the words being too general;

3. *Thou art a mutinous and seditious man, and didst procure* * [move] *the queen's subjects to sedition*, is not actionable, it not being said he moved them to sedition *against the queen;* per Gawdy, and to this the other justices inclined, but it was only upon motion. Cro. E. 214. pl. 8. Hill. 33 Eliz. B. R. Peake v. Pollard.

for it might be a stirring up the tenants of a manor to tumult and sedition, which is not any great scandal, and the sedition mentioned in the statute of 23 Eliz. and thereby made felony, must be sedition against the queen.

4. *Thou*

4. *Thou haſt a traitor to thy maſter.* Action lies for the maſter, the words being ſpoke to his ſervant. Cro. E. 906. pl. 15. Mich. 44 & 45 Eliz. B. R. Proctor v. Fitzwilliams.

To ſay *he is a traitor*, is actionable. Arg. Cro. J. 275. in pl. 5. Paſch. 9 Jac. B. R. and ſo it was held there by all the court. ——— *Thou art a traiterly rogue, and I will prove it*; per cur. is actionable, and judgment for the plaintiff. 2 Keb. 47. pl. 101. Paſch. 18 Car. 2. B. R. Brunt v. Spencer.

5. *Thou art an arrant papiſt; and it were no matter if ſuch were hanged; and thou and ſuch as thou would pull the king out of his ſeat, if they durſt.* Adjudged not actionable. Godb. 147. pl. 187. Hill. 3 Jac. Kingſton v. Hill.

S. C. cited as adjudged accordingly. 2 Brownl. 166.

6. *I will hang him, for he hath ſpoke words which are high treaſon*, are actionable; for the firſt words inforce the ſlander. And Fleming Ch. J. thought it might be dangerous to the plaintiff to have ſet forth the very words; for words of treaſon are arcana imperii. Yelv. 107. Mich. 5 Jac. B. R. Blanchflower v. Atwood.

Godb. 153. pl. 198. Mich. 5 Jac. B. R. S. P. and ſeems to be S. C. and adjudged accordingly by the whole court. ——— Cro. J. 276. in pl. 5. cites it by name of Blandford v. Atwood, and ſays the precedent of this caſe was ſhewn. ——— S. C. cited per cur. Win. 124.

* *He hath ſpoke treaſon, and that I will prove.* It was held at firſt by 2 juſtices that the words are actionable, and 2 others held e contra, and that the words ſhall be taken in mitiori ſenſu, and Fleming Ch. J. doubted; but afterwards he, by aſſent of the parties, conſented that judgment be entered for the plaintiff, and that he ſhould take one 3d of the damages given, and releaſe the reſidue; and ſo it was done. Cro. J. 275. pl. 5. Paſch. 9 Jac. B. R. Berisford v. Preſs. ——— Yelv. 197. S. C. adjudged that the words are actionable. — Hutt. 76. cites 9 Jac. S. P. Pewall v. Vardoſte. ——— Bulſt. 147. S. C. *you have ſpoken words, which I think are treaſon*, and ſays that the defendant went to a juſtice of peace and informed, and thereupon the plaintiff was bound over to the aſſiſes, and the defendant bound to proſecute, which he did, and the plaintiff was acquitted by verdict, and then brought this action; and per tot. cur. judgment was entered for the plaintiff. ——— S. C. cited Arg. Roll. Rep. 427. in pl. 20. adjudged actionable.

He is a rogue, and a papiſt dog, and he ſaid he would kill the king, is actionable. Keb. 14. pl. 33, 34. 91. Paſch. 13 Car. 2. B. R. Green v. Green.

Thy father will be hanged; for he hath ſpoke treaſon againſt the king and parliament, is actionable for all the words except (and parliament,) and they are void and ſurpluſage; and judgment for the plaintiff, niſi. 2 Keb. 478. pl. 11. Paſch. 21 Car. 2. B. R. Hingſtone v. Peek.

* [499]

7. To ſay *he hath committed treaſon*, was held per tot cur. Cro. J. 275, 276. Paſch. 9 Jac. B. R. in pl. 5. to be actionable; for though the words are general, yet it is an expreſs charging him with matter of treaſon.

8. If *words tend to diſloyalty*, they ſhall be *taken moſt ſtrong againſt him that ſpeaks them*; per Mountague Ch. J. Roll. Rep. 445. pl. 8. Hill. 14 Jac. in caſe of Lewes v. Walter.

9. *He put in two horſes to colonel W.* (innuendo colonel W. who was governor of B.) *and as ſoon as any warrants came for preſſing men for the ſervice, he acquainted the cavaliers, ſo that none, that were fit, could be preſſed; and he holds a conſtant correſpondency with the cavaliers.* It was objected that the words were uncertain throughout; but the court held them certain enough, being taken all together; for if true, the plaintiff thereby will be expreſsly made a delinquent, and his eſtate be ſequeſtered; and the plaintiff had his judgment. Sty. 400. Hill. 1653. B. R. Trevilian v. Welman.

11. *He is a baſe fellow, and I will queſtion him ere long, for that he would have taken away the king's life.* The court conceived the words

words actionable. Keb. 112. pl. 13. Mich. 13 Car. 2. B. R. Dolbin v. White.

11. Caſe, &c. for theſe words, ſpoken at an election for knights of the ſhire, *you and your crew brought the late king to his death.* It was moved in arreſt of judgment, that the words are not actionable; for they ought to be taken in mitiori ſenſu, not that the plaintiff killed the late king, but that he attended him to his death. But per cur. the words import ſcandal, and in common acceptation they amount to his having a hand in the king's death. Hard. 203. pl. 1. Mich. 13 Car. 2. in the exchequer, Lewes v. Roberts.

Sid. 381. pl. 13. Dalton v. Sadd, S. C. adjudged for the plaintiff. —— 2 Keb. 411. pl. 36. S. C. adjudged for the plaintiff.

20. *You are a ſcurvy fellow, I am no traitor; I have ſeen you in rebellion.* Adjudged actionable; for by the oppoſition of the words they cannot be intended but of a traiterous rebellion, and the by-ſtanders cannot intend them otherwiſe; and if any pardon had been after, the defendant ought to ſhew it in pleading. Lev. 251. Mich. 20 Car. 2. C. B. Dalton v. Sudde.

7 Mod. 107. S. C. adjudged for the plaintiff per tot. cur. and afterwards affirmed in the houſe of lords. ——— 2 Ld. Raym. Rep. 812. S. C. adjudged; and error being brought in parliament, after long debates at ſeveral days, judgment was affirmed by 48 lords againſt 34.

12. *Do not vote for him; for he is a Jacobite, and for bringing the prince of Wales and popery to deſtroy our nation*, being ſpoke of a juſtice of peace and deputy-lieutenant, who intended to ſtand for knight of the ſhire, is actionable. 2 Salk. 694. pl. 5. Mich. 1 Ann. B. R. How v. Prinn.

[500] (Z. a) For Words. In what Caſe it lies. *Where the Words in Mitiori ſenſu are not actionable.*

Cro. J. 438. pl. 9. S. C. but not this rule. —— Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon. The ſame rule laid down by Walmſley; and it ſeems the other juſtices were of the ſame opinion.

[1. WHERE the *words* are *dubious, and may receive a double interpretation*, the *one way that they ſhall be actionable, and the other way not*, they ſhall be taken in mitiori ſenſu, ſo that they ſhall not be actionable. Mich. 15 Jac. B. R. in GARDINER AND SPURDANCE'S CASE.]

[2. *But where* the words are *not doubtful, nor in common acceptance receive a double conſtruction*, there *they* ſhall be taken according to the common acceptance, and ſo, if in common acceptance they found in ſlander, they ſhall be actionable, and *ſhall not be ſtrained to any foreign conſtruction*, to make them not actionable. Mich. 15 Jac. B. R. between GARDINER AND SPURDANCE, per curiam.]

The caſe was on theſe words, viz. *he was one of them that broke Mr. P.'s houſe, and did take and carry away part of the money that was ſtolen*, and Walmſley held it not actionable by that rule; and it may be here intended that he broke the houſe upon juſt cauſe, and brought the money to another place upon juſt cauſe; and ſo was the opinion of the other juſtices.

Though in the old books the rule was to take the words in mitiori ſenſu, yet Holt Ch. J. ſaid they would give a favour to words, and would give a ſatisfaction to them who are hurt in their reputation, and would take words in a common ſenſe, according to the vulgar intendment of the by-ſtanders; and the *rule of mitiori ſenſu is to be underſtood where words in the natural import are doubtful, and equally to be underſtood in the one ſenſe as well as the other*; per Holt Ch. J. Skin. 364. pl. 8. Mich. 5 W. & M. in B. R. in caſe of Somers v. Houſe. —— S. P. accordingly, 10 Mod. 196. Hill. 12 Anne B. R. in caſe of Harriſon v. Thornborough.

[3. *As* if a man ſays to a woman, *thou didſt poiſon thy huſband, and I will juſtify it to thy face*, the ſaid woman ſhall have an action upon the caſe, averring that her huſband was dead before the words ſpoken, though he does not *ſay that ſhe poiſoned him to death, nor voluntarily*; it might be that ſhe poiſoned him againſt her will by an ill herb put into his pottage, or with a portion in which poiſon was mixt, or that ſhe delivered to him poiſon prepared by another, when ſhe herſelf knew nothing of it, or that ſhe might poiſon him; and he might recover again, or die after the year and day; for theſe are * foreign intendments; but the words in common acceptance imply that ſhe had poiſoned him to death voluntarily and knowingly. Mich. 15 Jac. B. R. between GARDINER AND SPURDANCE, per curiam, adjudged. Mich. 37, 38 Eliz. B. R. between † MEGGS AND GRIFFIN, adjudged, for ſaying that ſhe had poiſoned her firſt huſband in a meſs of milk. Trin. 39 Eliz. B. R. between ‡ WEBB AND POORE, adjudged. Paſch. 7 Jac. B. BINFORD'S CASE, adjudged.]

Cro. J. 438. pl. 9. S. C. adjudged for the plaintiff, though it was alſo farther objected, that it was *not ſaid when ſhe poiſoned him, nor that he died of that poiſon.*

* Fol. 72.

† See (X. a) pl. 4. S. C.

‡ See (P. a) pl. 8. S. C. and (E. b) pl. 7. S. C.

[4. If one ſays to another, *thou haſt killed J. S.* an action lies, though it might be taken that he killed him as his executioner by law; for in common parlance it is taken for a felonious killing. Mich. 15 Jac. B. R. in GARDINER AND SPURDANCE'S CASE, per curiam.]

Cro. J. 438. pl. 9. S. C. but S. P. does not appear.—— S. P. Godb. 181. pl. 257. Mich. 9 Jac. C. B. Carle's caſe.——S. P. cited as adjudged not actionable in C. B. becauſe J. S. might come to his death, and the other peradventure be the means thereof by execution, battail, phyſic, &c. and ſo the words too general to maintain an action. Cro. J. 306. pl. 2. Mich. 10 Jac. B. R. in Toofe's caſe, which was for theſe words, viz. *T. killed thy huſband* (innuendo J. D. lately dead;) but adjudged actionable.

Thou haſt killed a man at M. in Eſſex. All the court held that the words being *alleged to be ſpoken maliciouſly*, ſhall be taken moſt ſtrongly againſt him that ſpoke them; and adjudged for the plaintiff. Cro. E. 317. pl. 2. Paſch. 36 Eliz. B. R. Godfrey v. More.

Thou haſt killed my wife, though there was no averment that his wife was dead, nor ſaid that he did it violently, yet it ſhall be intended, unleſs the defendant ſhews that ſhe is living; and adjudged for the plaintiff. ‖ Cro. E. 823. pl. 24. Paſch. 43 Eliz. B. R. Talbot v. Caſe.

Thou art a rogue, and a raſcal, and haſt killed thy wife, (innuendo Elizabetham *uxorem* ſuam) no action lies for the firſt words; and as to the *uxor* it ſhall be intended that ſhe is dead, and ſhall not have ſuch foreign conſtruction as that ſhe was divorced; and the court further held, that the words ſhall be intended according to the uſual ſpeaking, that he killed her voluntarily; and whatſoever way he killed her, the words are very ſcandalous; and adjudged actionable. Cro. C. 489. pl. 14. Mich. 13 Car. B. R. Wilner v. Hold.

The words, he hath killed a man, ſhall be taken in mitiori ſenſu; per Scroggs Ch. J. Trin. 31 Car. 2. B. R. in pl. 61. 2 Show. 77.

‖ S. C. cited Comb. 161. Mich. 1 W. & M. in B. R. and Dolben J. ſaid that of late it hath been ruled contrary to that caſe, and that there ought to be an averment of the party's being dead.—— See (E. b) pl. 3. and the notes there.

§[501]

[5. If A. was murdered by B. and after C. ſays to E. *thou art one of thoſe that did help to murder A.* an action lies for theſe words, though it might be that he helped to murder him without his knowledge; for the murder implies malice, and if it was otherwiſe, it ought to be averred by the defendant. Mich. 11 Jac. B. R. between FOXCRAFT AND LACY, adjudged.]

See (C. b) pl. 5. S. C. and the notes there. and (H. b) pl. 17. S. C. —Hob. 89. pl. 120. S. C. adjudged for the plaintiff, and that judgment affirmed in error.——Jenk. 297. pl. 52. S. C.

[6. In

Sty. 245. S. C. Jerman J. doubted whether the declaration was good, becauſe it did not allege that the party died of the poiſon; but adjudged for the plaintiff, niſi, &c.

[6. In an action upon the caſe, if the plaintiff declares that the defendant ſaid of the plaintiff, *that rogue* Davies *the apothecary hath poiſoned my uncle*, (innuendo J. S. then dead) *I will have him digged up again, and hang him*; though he did not name his uncle, nor might it appear that he intended J. S. yet it appears by the words themſelves after, that he would have him dug up, ſhews that he was dead, and though he does not ſay that he poiſoned him to death, or voluntarily, yet the words intend ſo of themſelves, and therefore the action lies. Hill. 1650. between Davies and Okeham. Intratur Mich. 1650. Rot. 557.]

Words ſpoke of an *apothecary* were, *it is a world of blood he has to anſwer for in this town through his ignorance; he did kill a woman and 2 children alſo, and he killed J. P. at P.* (And in another place the defendant ſaid, *he was the death of J. P.*) *he has killed his patient with phyſic*; adjudged actionable. 11 Mod. 221. Paſch. 8 Ann. B. R. Tutty v. Alewin.

See (X. a) pl. 1. S. C. —(D. a) pl. 4. S. C. and the notes there.

[7. If a man ſays of a woman, that *J. S. hath had the uſe of her body, by which ſhe loſes her marriage*, an action upon the caſe lies; for uſe of her body, in common ſenſe, is unlawfully and diſhoneſtly, and not as a phyſician to phyſic her, as was objected. Paſch. 5 Jac. B. R. between Dame Morrison and Cade, adjudged.]

[8. If a man ſays of J. S. *as ſoon as Buſhe had killed Smith, he came to J. S. and told him how he had killed Smith, and J. S. gave Buſhe money to ſhift him away*, no action lies for theſe words, with an averment that *Buſhe* had killed *Smith*, becauſe this word *(kill)* is too general; for a man may kill another lawfully, as upon an aſſault to rob him, or as an officer, &c. Paſch. 7 Jac. B. between Perram and Roe, adjudged.]

Godb. 167. pl. 234. S. C. adjudged againſt the plaintiff.—This caſe was denied by the court. 2 Salk. 679. Trin. 4 Ann. B. R. in pl. 10.

[9. If one ſays to another, *thou muſt needs be richer than I; for thou didſt coin thirty new ſhillings in a day*; *thou art a coiner of money*, no action lies for theſe words; for perhaps he was a coiner of money in the *Mint*, and earned money thereby. Paſch. 8 Jac. B. between Ward and Poole, adjudged.]

Thou haſt coined gold, and art a coiner of gold, adjudged not actionable; for it may be he had authority to coin, and the word ſhall be taken in mitiori ſenſu. Godb. 375. pl. 464. Trin. 3 Car. C. B. * Mills's caſe.——S. C. cited Godb. 391. in pl. 477.——S. C. cited Arg. 2 Ld. Raym. Rep. 1185. But Holt Ch. J. and Powell ſaid, that if that caſe were to be adjudged now, they would adjudge it otherwiſe. And Mr. Page mentioned a caſe in C. B. which Powell agreed, where theſe words, *you are a coiner of money*, were reſolved to be actionable, and the caſe in Roll's Abridgment denied.

*[502]

Poph. 150. S.C. *I arreſt you upon felony*, adjudged that the action lies.——

[10. If one man puts his hand upon the ſhoulder of another, and ſays, *bear witneſs, my maſters, I arreſt him of felony*, an action lies; for this arreſt is as much as if he had ſaid, I charge him with felony. Hill. 17 Jac. B. R. between Searl and Maunder, adjudged per curiam.]

2 Roll. Rep. 141. S. C. ſays the plaintiff alleged that the defendant ſpoke the words maliciouſly and falſely, and therefore he had judgment.

The defendant being in company with the plaintiff and a conſtable, *ſaid to the conſtable*, viz. *there he is, take him; for I charge him with flat felony*, without alleging that the words are ſpoken falſely and maliciouſly. Roll Ch. J. held them actionable, and the words themſelves appearing ſcandalous, therefore the plaintiff need not aver they were ſpoken falſely and maliciouſly; and judgment for the plaintiff, niſi. Sty. 59. Mich. 23 Car. B. R. Nevill v. Mott.

[11. If

[11. If one says of another, *he hath stole my piece*, (innuendo quoddam tormentum, &c.) *and I charge him with flat felony*, no action lies for these words; for the first words are merely uncertain, inasmuch as it cannot be known what piece he intended, whether of wood or, &c. and the other words, *I charge him with felony*, are but an accusation of felony. Trin. 21 Jac. B. R. between WHEELER AND POPLESTON, adjudged.]

2 Rol. Rep. 342. Wheeler v. Appleton, S. C. adjudged that no action lies.—Godb. 339. pl. 434. S. C. adjudged against the plaintiff. But by Haughton J. if the whole matter had been set forth in the declaration, as to have shewn that the parties before this speech had had discourse of a gun, then the action in this case would have been maintainable; but here the word (piece) is uncertain, and so the action will not lie.——S. C. cited Poph. 187.——All. 7. S. C. cited per cur. and says the defendant justified that the plaintiff did steal his gun; and though the *justification*, which *pierced the defendant's meaning to be of a gun*, was found against him, and piece was a word of uncertain signification, which could not be explained by the innuendo, judgment was given against the plaintiff for the reasons aforesaid.

[12. If one says of another, *he hath stolen by the highway side*, no action lies, because it may be a stick, or an apple from a tree. Pasch. 38 Eliz. B. R. between DENYSON AND BURKE, adjudged.]

Fol. 73.

Cro. E. 459. (bis) pl. 6. Pasch. 38 Eliz. S. C. adjudged per tot. cur. for the defendant.——Goldsb. 143. pl. 58. Brough v. Denyson, S. C. held by Popham and Fenner not actionable.——S. C. cited Arg. Bulst. 112.

[13. If one says of another, *he was produced for a witness at the assises, and sworn, and was reproved in his oath of J. S.* no action lies for these words; for it might be that he was reproved in his oath, and yet not be forsworn; for if he was reproved in any circumstance of his oath, yet he is not forsworn, if the very substance for which he was produced be true. Pasch. 38 Eliz. B. R. between BROWNE AND BRINLY, adjudged.]

Mo. 407. pl. 547. Brown v. Brinckley, Trin. 37 Eliz. B. R. S. C. says the plaintiff was produced for a witness, and the defendant said, that *he was disproved before the justices of assise by the oath of Mr. K.* (innuendo that he was disproved in his oath) adjudged not actionable; for the innuendo cannot supply such intendment.——Ow. 58. S. C. adjudged not actionable; for the disproof might be in a collateral matter, or some circumstance. The ch. justice and Fenner only were in court.

[14. If one says of another, *thou art a prigging pilfering merchant, and hast pilfered away my corn and my goods from my wife and my servants, and this I will prove*, no action lies, because (as it seems) it does not appear that he intended that he took these goods feloniously, and therefore they shall be taken in mitiori sensu. Mich. 37, * 38 Eliz. B. R. adjudged, (but there another reason is given) between CARTER AND HUNT.]

Hutt. 14. Charter v. Hunt, S. C. not actionable.——Mo. 409. pl. 556. Carter's case, S. C. not actionable, and judgment given in a base court was reversed.——Cro. E. 424. pl. 24. S. C. The whole court held the words not actionable; for they do not impeach him of felony, and so judgment was reversed.——Ow. 56. Anon. S. P. and seems to be S. C. and judgment reversed; but says, sed quære rationem.

*[503]

[15. If one says to another, *thou art a filching fellow, and didst filch from J. S. 4l.* no action lies; for the uncertainty of the words, and of the sense of them, and the words ex vi termini, is no more than if he had said pilfering or cheating. Mich. 17 Jac. B. between BRADSHAWE AND WALKER, per curiam. Vide the same case Hob. Rep. case 323.]

Hob. 249. pl. 325. S. C. adjudged per tot. cur. not actionable; for the words are of an uncertain sense.——Brownl. 13. S. C. adjudged accordingly; for it shall not be intended that he stole the money.

money.——Palm. 29. S. C. but the words there are, you are a filching fellow; *for you ſtole from J. S. 4 l.* and held not actionable.——Hutt. 34. S. C. reſolved not actionable; and judgment accordingly.

[16. If a man *ſays to a miller* that keeps a mill, *thou haſt ſtolen 3 pecks of meal*, an action lies; for though the corn was delivered to him to grind, yet if he ſteals the meal this is felony, being taken from the reſidue. Hill. 8 Car. B. R. between LANGLEY AND BRADSHAW, adjudged in a writ of error upon a judgment in Canterbury court, and the firſt judgment affirmed.]

[17. If one ſays to another, *thou art a thief, and didſt break open my cheſt, and ſteal my deeds*, an action lies; for this is felony to break a cheſt and ſteal deeds. Trin. 16 Car. B. R. between BLUMLY AND ROSE, per curiam adjudged, this being moved in arreſt of judgment.]

See (I. b) pl. 2. S. C.—Yelv. 21. Mich. 44 & 45 Eliz. B. R. Barham v. Netherſal, S. C. adjudged quod querens nil capiat, &c. by Gawdy and Yelverton only in court ——Noy 155. S. C. and adds, viz. *and he doth uſe to ſet fire of barns about Michaelmas, when they are full of corn*; but ſays, that though it was objected that it was not furniſhed that there were barns burnt about Michaelmas, nor ſhewn that they were near any dwelling-houſe, yet adjudged for the plaintiff.——S. C. cited Godb. 287. in pl. 413.——S. C. cited Bulſt. 112.

[18. If one ſays of another, *he did burn my barn, and none but he*, no action lies; for it ſhall be taken in mitiori ſenſu, that it was not a barn with corn, nor near to any manſion-houſe. Co. 4. 20. BARHAM's caſe adjudged.]

See (I. b) pl. 3. S. C.—Cro. E. 834. pl. 4. Lovet v. Hawthorn, S. C. and 3 judges held the words not actionable, but Fenner e contra, becauſe the wilful burning of any barn is an odious act, and a great ſlander. Et adjornatur.

[19. So if one man ſays of another, *he hath burnt my barn, and if my lord had done him juſtice, he ſhould have been hanged for it*, no action lies. Trin. 43 Eliz. B. R. between LEVETT AND HAWTHORN, per curiam.]

Godb. 287. in pl. 413. cites Humfries's caſe, S. P. adjudged not actionable, becauſe he did not ſay he *had ſtolen* 12 s. but that if he had ſaid nothing but *he hath picked my pocket*, the action would have been maintainable.——Thou haſt picked my pocket, is not actionable, unleſs it be ſaid *feloniouſly*, or *I will hang thee*; for as Wylde J. ſaid, it is a common ſaying, that the lawyers have picked my pocket. Freem. Rep. 277. pl. 310. (bis) Paſch. 1676. Anon.——*D.'s wife* (innuendo the plaintiff's wife) *picked* 5 l. 6 d. *out of H.'s wife's pocket, and her huſband* (innuendo the plaintiff) *was conſenting to the ſame.* Judgment for the plaintiff, and held that the words ſhall be taken in † pejori ſenſu, and are ſlanderous both to the feme, and alſo to the baron, in charging him to be conſenting. Yelv. 136. Mich. 6 Jac. B. R. Dromant v. Wellover.——*Thou art a pick-pocket rogue, and haſt picked thy maſter's pocket and his money-box; and I will prove it.* It was objected that the words were too general and uncertain. Judgment was arreſted till the plaintiff ſhould move. Sty. 127. Trin. 24 Car. B. R. Stent's caſe.

† [504]

[20. If one ſays of A. *he was a pickpocket, and had picked my pocket, and took* 12 s. *of money out of my pocket*, no action lies for theſe words, becauſe it may be done as a treſpaſs, or in jeſt, and not feloniouſly. Mich. 15 Car. B. R. between HASEL AND AUMAN adjudged, in arreſt of judgment, per curiam, intratur Trin. 15 Car.]

See (G. a) pl. 3. S. C. and ſupra, pl. 11. S. C. * Hob. 305. pl. 384. Hill.

[21. If an infant brings his action by guardian, and declares that the defendant ſaid to him, *I charge you with felony*, though it may be the infant was of ſuch an age that he could not commit felony, yet becauſe this is collateral, it ſhall not be intended

without ſhewing of the other ſide. Mich. 5 Jac. B. R. between * Basy and Child adjudged. Hill. 2 Car. between Wood and Merrick in B. R. it was adjudged in arreſt of judgment, that no action lies for the ſaid words, being ſpoke to a man of full age, becauſe it is not any affirmative that he was a felon; for he might be charged upon a ſuſpicion. Hob. Reports, caſe 381. between † Pollard and Mason accordingly, where the words were, *I charge him with felony, for taking money out of the pocket of J. S.*]

17 Jac. Poland v. Maſon, S. C. adjudged not actionable. ——Hob. 326. pl. 397.

Fol. 74.

S. C. adjudged accordingly.———Hutt. 38. Maſon v. Thompſon, S. C. adjudged per cur. præter Warburton qui hæſitavit.——Brownl. 18. Cowland v. Maſon, S. C. ſays the court was divided. ——2 Ld. Raym. Rep. 959. cites S. C. and Holt Ch. J. and the court denied it to be law; for the taking out of a man's pocket muſt be intended a felonious taking.

[22. If A. ſays of B. *he did violently ſet upon me in the king's highway, and took away my purſe with 4s. in it from me, and after he had my purſe, did threaten to cut me off in the middle, and I was glad to fly for my life;* though he does not ſay that he robbed him, or that he did this feloniouſly, yet this is tantamount, and in common underſtanding is but a deſcription of a robbery. Mich. 8 Car. B. R. between * Lawrence and Woodward adjudged, this being moved in arreſt of judgment. But in this caſe juſtice Croke cited two caſes, 10 Car. B. R. between † Holland and Stoner, *thou art a lewd fellow; thou didſt ſet upon me in the highway, and tookeſt away my purſe.* Adjudged in B. R. that the action lies for theſe words; but it was after reverſed upon a writ of error in the exchequer chamber, becauſe it might be that he took it in jeſt, or as a treſpaſſer. But 10 Jac. B. R. between ‡ Leveston and Cawdry, *thou art a lewd fellow; thou didſt ſet upon me in the highway, and tookeſt away my purſe; and if thou wilt go with me before a juſtice of peace, I will charge thee with felony.* And adjudged in B. R. that action lies for theſe words; and this was affirmed in a writ of error, becauſe the laſt words ſhew his intention to have been to charge him with robbery.]

* Cro. C. 277. pl. 16. S. C. adjudged actionable by 3 J. becauſe the words (violently taking from him his purſe, and threatening to kill him, and that he was in fear of his life) is *a deſcription that he took it feloniouſly*, and by robbery; but Crooke doubted, becauſe it is not a direct charge of ſuch taking. —Jo. 302.

pl. 8. S. C. ſays it was adjudged per tot. cur.

† Cro. J. 315. pl. 18. S. C. Mich. 10 Jac. in the exchequer chamber, adjudged not actionable; and ſo reverſed a judgment to the contrary given in B. R.———Bulſt. 112. Stowe v. Holland, S. C. Paſch. 9 Jac. B. R. adjudged actionable.——S. C. cited Cro. C. 277.

‡ Cro. J. 312. pl. 13. Lewis v. Cawardly, S. C. adjudged actionable in B. R. and affirmed in the exchequer chamber.

He hath beaten me, and taken away my purſe and 20s. in money. The court (abſente Anderſon) held the words not actionable; for it may be intended that he took it as a treſpaſſer; for he charges him not with felony. Cro. E. 351. pl. 9. Mich. 36 & 37 Eliz. B. R. Lyne v. Backhouſe.

I met A. B. C. and D. upon Whitehill at Cheſham town's-end, in the evening, as I (the defendant) *was going home, and there they bid me deliver my purſe; and I being afraid, put my hand into my pocket, and took out 2s. 6d. and gave it over my ſhoulder to one of them, I knew not which.* Adjudged by all, præter Yelverton, that action lies; for every circumſtance imports ſlander, without any ſtrained conſtruction or implication. Yelv. 145. Mich. 6 Jac. B. R. Gold v. Robins.

He would have robbed me, and robbed me of my dagger, and took it from me, is actionable, per tot. cur. and judgment for the plaintiff. 2 Bulſt. 227. Paſch. 12 Jac. Gilpin v. Shine.

[505]

23. *Thou waſt the cauſe that J. S. did hang himſelf, and that R. N. did cut his own throat, and thou beginneſt with no man but thou undoeſt him,* not actionable; for it might be that they had each done ſome offence, and that the plaintiff had got them puniſhed for

M. was the cauſe of the death of D.'s child, and I will ſwear it on a book.

for it according to law, and that what they did was for grief, and ſo not unlawful in the plaintiff. Dal. 89. pl. 5. 15 Eliz. B. R. Anon.

Per Williams J. if the diſcourſe had been that the party dead had been poiſoned, murdered, or come to ſome other untimely death by violence, and then the defendant had uſed ſuch words, it had been actionable; but otherwiſe they are too general; and ſo the whole court agreed clearly that they are not actionable, and gave judgment againſt the plaintiff. 2 Bulſt. 10, 11. Mich. 10 Jac. Miller v. Buckden.

So where the words were, *thy huſband was the death of J. P. and had it not been for thee and thy huſband, he had been alive until this day*; Glyn Ch. J. ſaid he might be the *occaſion and not the cauſe*, as by ſending J. P. a journey, &c. or by ouſting him of his eſtate, by which he occaſionally languiſhed, &c. 2 Sid. 71. Paſch. 1650. B. R. Skelton v. Earth.

24. *He is a maintainer of thieves.* Godb. 90. in pl. 100. Clench J. cited it as adjudged actionable in Ld. Shandois's caſe.

Cro. E. 52. pl. 1. cites S. P. adjudged accordingly, in caſe of Lea v. Penniſton.——S. C. and S. P. cited accordingly, Roll. Rep. 427. in pl. 20.——S. C. cited by Tanfield Ch. B. as adjudged accordingly, Cro. J. 268. in pl. 30.

25. *He hath aided pirates contrary to the laws of the realm, and againſt a proclamation in that behalf.* Clench J. thought the words here as forcible as if he had ſaid *ſcienter*. Adjornatur, to ſearch for precedents. Godb. 89. pl. 100. Mich. 28 & 29 Eliz. Anon.

Cro. E. 62. pl. 1. Hill. 29 Eliz. B. R. Morgan v. Kiſſe, ſeems to be S. C. but there the words are, *he maintained, victualled, and helped to let go certain pirates, contrary to the laws of the realm, and the proclamation made.* Adjudged for the plaintiff; for it being ſaid he maintained them againſt the law and proclamations, it ſhall be intended in the worſt ſenſe. Roll. Rep. 427. in pl. 20. S. C. cited as adjudged actionable, for ſaying, thou art a maintainer of pirates.——S. C. cited accordingly, by the name of Skite v. Morgan. 3 Bulſt. 260.——S. C. cited Cro. J. 629. in pl. 1.

Thou didſt harbour and maintain rebels and traitors. It was objected, that it was not averred that the defendant ſaid that the plaintiff knew them to be traitors; but Periam J. took a difference between the words (keep) and (maintain,) that (maintain) implies a thing prohibited, and therefore not ſufferable; and therefore the action is maintainable. And he, and Windham and Rhodes held the action well brought. (Anderſon abſente propter ægritudinem.) Goldſb. 48. pl. 7. Anon.

26. *Thou haſt ſitten upon the pillory*, but did not ſay in what manner; not actionable. Cro. E. 62. pl. 3. Mich. 29 & 30 Eliz. B. R. Anon.

Le 101. pl. 131. S. C. the words were, *ſuborn, procure, and bring in falſe witneſſes in ſuch a court at Weſtminſter*, &c. It was found that he procured and brought in, but was acquitted of the ſuborning. No judgment appears.

27. Words, viz. *thou haſt procured falſe witneſſes to ſwear in ſuch an action*, adjudged actionable; for when it is ſaid he procured witneſſes, it is intended, *in malam partem* that he procured them to ſwear for him which would ſwear falſly. But if the words had been, *you brought in falſe witneſſes*, action would not lie for them. Cro. E. 93. pl. 1. Paſch. 30 Eliz. B. R. Prowſe v. Carew.

28. *Thou haſt ſought the blood of thy huſband, and waſt his death; for if thou hadſt been an honeſt woman he had been alive yet*, and avers in facto her huſband was killed. It was ruled that the action lies; for the words ſhall be taken to be ſpoken in malam partem, and adjudged for the plaintiff. Cro. E. 239. pl. 8. Trin. 33 Eliz. B. R. Gaſtrell v. Townſend.

29. *My Ld. Preſident of the North ſhewed Mr. Stapleton's hand ſet to a book, whereby he had conſented to the late rebels of the North,*

but by the means of Mr. Fairfax, my Ld. Preſident was perſuaded, and the matter ſuppreſſed. Adjudged that the words are actionable; for it cannot be his hand unleſs wrote by himſelf, but another may write his name; and when he ſaid he conſented to the rebels, and ſhewed not any certain perſon, this cannot be otherwiſe intended but that he conſented to all the rebels in their rebellion; but if he had ſaid that he *conſented to A. * and B. which were rebels*, this perhaps may be intended that he conſented to them in ſome other matter. Cro. E. 251. pl. 17. Mich. 33 & 34 Eliz. C. B. Stapleton v. Frier.

30. *Thou getteſt thy living by ſwearing and forſwearing;* not actionable; for he might have the fines of ſuch as commit perjury; cited per cur. Cro. E. 888. in pl. 1. as Dr. Stanhope's caſe. 4 Rep. 15. a. b. pl. 4. Stanhope v. Blith, S. C. Paſch. 27 Eliz. B. R. but this reaſon does not appear there.

31. *Thou didſt rob Carpenters hall, and deceive the company of* 20*l.* being ſpoke of one of the company who had been maſter of the company, and as ſuch had the goods and money of the company delivered to him, but it *not* being *affirmed that he was maſter at the time when* he robbed the hall, it ſhall be intended that he was not; and therefore the words do not amount to a breach of truſt only, but are actionable. Cro. E. 787. pl. 28. Mich. 42 & 43 Eliz. C. B. Thaxbie v. Smith.

32. *Thou art a cut-purſe*, is not actionable; per cur. Godb. 181. Mich. 9 Jac. C. B. in pl. 257. Obiter.

33. *She hath married the huſband of another woman.* It was moved in arreſt of judgment, that the plaintiff's *wife might be be dead or beyond ſea for* 7 *years*, and then the caſe is out of the ſtatute of 1 Jac. cap. 11. and though it be *alleged that he had no other wife*, yet the words muſt be taken as they were ſpoken before the auditors. And perhaps the meaning might be, that the plaintiff was contracted to, and ſo in conſcience was the huſband of another woman. And judgment was given againſt the plaintiff. Allen 37. Hill. 23 Car. B. R. Eels v. Smith.

34. *Thou art a cheating knave, and haſt ſtolen two bonds from me* (innuendo two bonds *for payment of money from the defendant.)* Per cur. the words are not actionable. Sid. 35. pl. 3. Paſch. 13 Car 2. C. B. Lizard v. Clare.

35. *She* (innuendo the plaintiff) *had a child, and either ſhe or ſomebody elſe made it away.* Bridgman Ch. J. held, that (making it away) muſt be underſtood of killing it, and ſo actionable; but the 3 other J. e contra, that it ſhall be taken in mitiori ſenſu. And thereupon Bridgman conſented that judgment be arreſted. Cart. 55. Hill. 17 & 18 Car. 2. C. B. Faulkner v. Cowper.

36. *He hath broke* 3 *or* 4 *of his father's ribs, of which he ſhortly after died; and I will complain to a juſtice of peace of him; he may be hanged for the murder, although it was done* 20 *years ſince.* Adjudged for the plaintiff; for taking all the words together, they muſt neceſſarily intend a murderous killing. Vent. 117. Paſch. 23 Car. 2. Phillips v. Kingſton.

37. *He is as very a rogue as ever went by the highway; he killed a man on board a ſhip, and if he had not bought it off with a piece of money, he had ſuffered for it.* Scroggs Ch. J. ſaid, they could not imagine this any other than an unlawful killing, when it is ſaid (he would have ſuffered for it.) And per cur. the words are actionable, and judgment for the plaintiff. 2 Show. 77. pl. 61. Trin. 31 Car. 2. B. R. Bonfield v. Linton.

38. *You are no Harris, and have none of the blood of the Harris's in you.* Plaintiff alleged that the words were ſpoke *intentionally to diſinherit him.* Not actionable; for the words might be meant as to courage, humour, or good nature, and do not of themſelves import him a baſtard. And judgment was ſtayed. 2 Show. 95. pl. 92. Paſch. 32 Car. 2. B. R. Harris v. Roberts.

3 Salk. 326. pl. 6. Anon.

39. *He broke my houſe like a thief.* Not actionable. 2 Vent. 172. Paſch. 2 W. & M. in C. B. Anon.

[507]

S.C. & S.P. accordingly; and the defendant further ſaid, *I can tell you who it was that killed my huſband; it was George Button.* The court held that the words here are to be taken in the worſt ſenſe, viz. to be a killing malitioſe & voluntarie, and not by accident.

40. *George Button* (the plaintiff) *is the man who killed my huſband*; her firſt huſband being dead. The court was of opinion that theſe words were actionable; for ſhe by whom they were ſpoken, averred the death of her huſband. And as to the caſes cited to prove theſe words are not actionable, diſtinguenda ſunt tempora; for in thoſe days people were very litigious, and therefore the judges diſcouraged actions for ſlanderous words; but now too much liberty is taken to abuſe people with their tongues; and therefore they ſhould be reſtrained by juſtice. So that now any words maliciouſly ſpoken ſhall be taken in malam partem; for the uſe of words is to expreſs the mind, and ſhould always be intended as they are underſtood by indifferent perſons. So judgment was given for the plaintiff. 8 Mod. 24. Hill. 7 Geo. 1721. Button v. Heyward & ux'.

And there is no room to ſuppoſe the party alive after the verdict. The queſtion is now only, what is underſtood by the hearers? The notion of taking words in mitiori ſenſu has been exploded many years; 50 or 60 years. Ch. J. Holt's rule was what was underſtood by by-ſtanders; he would ſay that the caſes were one way, and another; but wherever words were ſpoken, tending to the diſparagement of a perſon, he ſhould be always of an opinion that the action would lie. Wherever the apprehenſion of the hearers, and the meaning of the ſpeaker was ſcandalous, the words ſhall be taken in the worſt ſenſe. If this was intended here of an innocent killing, the defendant might have juſtified it in a plea; and unleſs it doth appear upon record, that the perſon was not dead, but alive, the words are actionable. MS. Rep.

41. In an action upon the caſe for ſcandalous words, the declaration ſet forth, that in a diſcourſe between the plaintiff and the defendant, the defendant ſaid to the plaintiff, *you* (meaning the plaintiff) *did ſhut up my ſiſter* (meaning Anne the late wife of the plaintiff, and ſiſter of the defendant, then lately deceaſed) *and murdered her; and I will prove it.* There was judgment for the plaintiff below, and upon a writ of error it was inſiſted, that the word (murder) does not neceſſarily import the taking away another's life felonioufly, or with a malicious intent, which is neceſſary, in order to conſtitute an offence; and therefore (murdravit) without the words (malitia ſua præcogit') will not be ſufficient in an indictment. But the court held that the word (murder) in its common ſignification imports a felonious killing, unleſs explained

plained by ſomething ſubſequent, which the party might have taken advantage of here by a ſpecial juſtification, or by evidence, like the caſe in Cro. C. 510. where the court ſaid, that to call one a murderer is actionable, and ſhall not be intended that he was a [murderer of hares] unleſs ſuch foreign intendment be diſcovered or ſhewn in pleading. And the judgment was affirmed. 2 Stra. 1130. Paſch. 13 Geo. 2. B. R. Rivers v. Light.

(A. b) For Words. In what Caſes it lies for the Words for a collateral Reſpect. In what Caſes, where the *Words* are *not underſtood.*

[1. IF a man ſpeaks *ſcandalous words* of another, *in a language that the auditors do not underſtand*, no action lies for them, becauſe they cannot be any diſcredit to him when they are not underſtood. Trin. 39 Eliz. B. R. between JONES AND DAWKES agreed and adjudged.]

Cro. E. 496. pl. 16. Jones v. Davers, S. C. adjudged againſt the plaintiff. — does not appear.

See Mo. 182. pl. 325. Trin. 26 Eliz. Anon. — (H. b) pl. 14. S. C. but S. P. — S. C. cited Cro. E. 865. in pl. 45.

[508]

[2. *As* if a man ſpeaks *in Latin* certain ſcandalous words of me, in the preſence of men that do not underſtand Latin, no action upon the caſe lies, becauſe it is no diſcredit to me. Trin. 39 Eliz. B. R. between JONES AND DAWKES agreed and adjudged, though it was *averred that the auditors underſtood linguam Romanam*, for this might be Italian, which is now the Roman language.]

Cro. E. 496. pl. 16. S. C. adjudged againſt the plaintiff. — (H. b) pl. 14. S. C. but S. P. does not appear. — S. C. cited Arg. 2 Show. 435. in pl. 399.

[3. *So* if one man *in Welſh* calls another *thief*, in the preſence of ſuch who do not underſtand what is intended thereby in ſcaccario adjudged, cites Trin. 39 Eliz. B. R. Hob. Rep. caſe 351.]

Hob. 268. at the end of pl. 353. ſays, that ſlanderous words in Welch bear no action, except you affirm that they were ſpoken in the hearing of ſuch as underſtood the Welch tongue; for the ſlander and damage conſiſt in the apprehenſion of the hearers. — Cro. E. 496. pl. 16. Mich. 38 & 39 Eliz. B. R. cites S. P. to have been adjudged accordingly. And of that opinion was the whole court.

4. Plaintiff declared, that the defendant ſpake ſuch words in *Welſh*, and that in *Engliſh* they ſignified, *thou haſt murdered thy wife*; but did not aver that the words were ſpoken before *Welſhmen*, or ſuch as underſtood the *Welſh* tongue, but only in præſentia & auditu quamplurimorum ſubditorum dominæ reginæ. The *action* was brought in the *county of Monmouth*, which was once parcel of *Wales*, but is now an *Engliſh county*. All the *juſtices* and barons held, that for this *cauſe* the *judgment* was *erroneous*; for it ſhall not be intended that any there underſtood the ſaid *tongue*; and then it was not any ſlander. Cro. E. 865. pl. 45. Mich. 43 & 44 Eliz. in the exchequer, Price v. Jenkins.

(B. b) In what Cases it lies. Where the *Words* are *repugnant*.

See (H. a) pl. 22. in the notes there.

[1. IF a feme covert says to another, *thou hast stolen my goods*, whereupon he to whom they are spoken asks of her what goods, and the feme answers *my plow stuff*, and in the declaration the plaintiff avers innuendo the plow-stuff of the baron of the feme, no action lies; for the feme covert cannot have goods. Pasch. 11 Jac. B. R.]

My turkies are stolen, and Charnel hath stolen them, spoken by the *wife*; adjudged the words actionable, (though the *wife could have no turkies*) because she had charged him with stealing of them. Cro. E. 279. pl. 7. Pasch. 34 Eliz. B. R. Charnel's case.

Words spoken by the defendant's wife of the plaintiff's wife, viz. *thou art a thievish rogue, and a thieving quean; for thou hast stolen my faggots*, viz. 5 faggots of the defendant's and his wife. It was said it was impossible; for a *feme covert* hath not goods that can be stolen. Adjudged actionable and scandalous, and shall be construed according to common intendments, that she charged her with the stealing of her husband's faggots, which is felony, and whose the goods were is not material. Cro. J. 600. pl. 24. Mich. 18 Jac. B. R. Stamp v. White. —— Palm. 358. Strong v. White, S. C. adjudged for the plaintiff.

So, thou art a thief, *for stealing my corn out of my barn*, actionable. Sty. 135. Mich. 24 Car. B. R. Gibbs v. Dunn.

F. stole my plate out of my chamber, being spoke by a *feme covert*, was held actionable; for in common speech it is well known that the wife accounts the husband's goods as her goods. Adjudged in B. R. and affirmed in the exchequer-chamber. Cro. C. 52. pl. 10. Mich. 2 Car. C. B. Powell v. Plunkett.

See (P. c) pl. 4. where after a verdict it was intended that they were her goods dum sola, and stolen then.

[509]

The plaintiff declared that the defendant had a wife, who is still living, and that defendant said of him, *thou hast killed my wife*, adjudged not actionable; but had she been dead it had been otherwise. 4 Rep. 16. a. pl. 9. Hill. 39 Eliz. C. B. Snag v. Gee. —— S. C. cited Poph. 187. Arg. —— Litt. Rep. 310. Mich. 5 Car. C. B. the S. P. accordingly per cur. obiter. —— 3 Bulst 167. S. C. cited by Coke Ch. J. —— S. C. cited Arg. Win. 39. —— S. C. cited Arg. Mar. 109. in pl. 187. —— S. P. per cur. Jo. 141. at the end of pl. 7.

[2. If one says to another, *thou hast murdered J. S.* no action lies, if it be averred that J. S. is yet in full life. H. 11 Jac. B. R. PETT'S CASE, adjudged.]

Roll. Rep. 286. pl. 3. S. C. adjornatur; and upon a 2d motion Doderidge J. held it is uncertain how it shall be taken; and therefore, for the disfavour of such actions, the action lies not; and adjudged accordingly against the plaintiff.

[3. If one man says to another, *thou hast stolen me* (innuendo *defendant*) *an hundred of slate*, no action lies, because the innuendo has made the words repugnant; for he could not steal the defendant, as it must be taken by the words. Hill. 13 Jac. B. R. between WHITE AND BROUGH, adjudged.]

Fol. 75.

Poph. 187. Reynor v. Haller, S. C. adjudged accordingly. —Jo. 141. pl. 7. Keymer v. Haller, S. C.

[4. If a man in an action upon the case, declares that the defendant said of him, *he is a base gentleman, and had 3 or 4 children by A. S. his maid servant*, (innuendo quandam A. D. at the speaking of the words the wife of J. D.) *and after killed them, or caused them to be killed*, ubi revera he never was guilty of any incontinency with the said A. S. nor any other, nor of any such felony or murder. After a verdict for the plaintiff, it was moved in arrest of judgment, that inasmuch as he had averred that he never was guilty of any incontinency with A. S. this is all one as if he had

had averred that he never had any child by A. S. and that if he had ſo averred no action would lie; for then it would appear to the court that there was no ſuch in rerum natura, as is ſuppoſed to have been killed; as if one man ſays to another that he killed J. S. and avers that there never was any ſuch as J. S. no action lies. But it was adjudged for the plaintiff, becauſe the averment is not ſpecial that he had not any child by A. S. but generally that he was not incontinent with her. Mich. 2 Car. regis, between KEMER AND HALLET, adjudged, this being moved in arreſt of judgment.]

held accordingly. —— Lat. 159. Keymer v. Clark, or Halley, S.C. but that is only upon the words, whether actionable or not, and not upon the pleadings;

and agreed by 3 juſtices that the words are actionable.——S. C. cited Arg. as to the words being actionable. Cart. 55.——S. C. cited Comb. 232. by Eyre J. and ſaid that the words were held actionable only by reaſon of the preface (baſe gentleman.) But Holt Ch. J. ſaid the words were actionable, and that without ſuch introduction or calling him baſe gentleman.

5. *He* (innuendo the plaintiff) *and one Allen are perjured knaves.* It was moved that (he) cannot be referred to 2 perſons, neither can (perjured knaves) be referred to one perſon; but the court held it well enough, though it be falſe Engliſh; for the ſenſe appears. And adjudged for the plaintiff. Cro. J. 100. pl. 33. Mich. 3 Jac. B. R. Turner v. Darcie.

6. *Thou art a knave, and haſt forged my huſband's will againſt his mind.* Win. 39. Arg. cites it as ruled that no action lies. 10 Jac. Mallard v. Wife.

Ibid. 40. Hobart Ch. J. ſaid he agreed this caſe, becauſe the words are repugnant and contrary; for if it be forged it is not her huſband's will.

One ſaid of Fenner J. thou haſt forged my father's will. Palm. 441. Jones J. cited it, and ſaid the opinion was, that it will ſcarce bear an action.

7. To ſay of a *widow* that *her children* (innuendo her children which ſhe had *by her former huſband*) *are baſtards* by one F. is actionable, ſhe alleging a communication and loſs of marriage; for though in truth they cannot be * baſtards in law, yet in reputation they may be ſo. Judgment for the plaintiff. Cro. C. 322. pl. 4. Mich. 9 Car. B. R. Brian v. Cockman.

* See (D. a) pl. 8. S. P.

[510]

8. *M. ſtole a ſheep of his,* (innuendo of the defendant's) *and that it was not the firſt he ſtole by an hundred.* It was moved in arreſt that (his) muſt refer to M. which is proximus antecedens, and ſo the words are repugnant; for one cannot ſteal his own ſheep. But the court held the words actionable as laid in the declaration. 8 Mod. 30. Hill. 7 Geo. 1721. Muck's caſe.

(C. b) In what Caſes it lies. In reſpect of the *Uncertainty* of the Perſon *of whom* they were *ſpoken.*

[1. IF a man ſays to the ſervant of J. S. *I am a true ſubject, and thou ſerveſt no true ſubject,* J. S. may have an action. between SIR WILLIAM WALGRAVE AND AGAR, adjudged.]

[2. If

See (Y. a) pl. 36. S. C. and the note there. —(X. a) pl. 1. S. C. but S. P. does not appear.

[2. If one says to another, *that he said there is no prince in England*, an action lies, though there are several princes in *England*, as earls, marquisses and dukes; for when a discourse is of a prince simply, this intends the king's eldest son. My Reports, 14 Jac. between LEWES AND WALTER, adjudged.]

See (H. b) pl. 2. S. C. * Cro. J. 443. pl. 20. Brown v. Low, S. C. adjudged for the plaintiff; for it shall not be intended that he had more masters of that name.

[3. If one man says of another, *my* * [*thy*] *master, Mr. Browne, hath robbed me of all my goods*, an action lies for *Browne* his master; for his person is apparently described by his surname, and by the name of master, which is a relative. Mich. 15 Jac. B. R. between BROWNE AND LOAD, adjudged, this being moved in arrest of judgment.]

In case for words, the plaintiff alleged *that the defendant adtunc & ibidem colloquium habens with a servant of the plaintiff, said you are a great rogue and rascal, as great a rogue as your master, &c.* It was held that such allegation was sufficient; for the (adtunc) refers to the whole clause, and imports that he was then servant when the discourse was between them; and judgment for the plaintiff. Comyns's Rep. 267. pl. 147. Mich. 4 Geo. 1. C. B. Upton v. Pinfold.

R. S. and T. were sworn in evidence against B. and he said *one of you is perjured*. R. brought an action for these words, and alleged that the defendant spoke those words, (innuendo of the plaintiff.) Cited Cro. E. 497. in pl. 16. per Popham, to be adjudged in Sir John Bourn's case.

[4. If A. says to B. *one of us two is perjured*, and B. *says* to A. *it is not I*, and *A. says* again, *I am sure it is not I*, B. shall have an action for these words; for the subsequent words shew apparently that he intended him. Dubitatur Pasch. 42 Eliz. B. R. between COE AND CHAMBERS.]

See (Z. a) pl. 5. S. C. but S. P. does not clearly appear.—— See (H. b) pl. 17. S. C. † Hob. 89. pl. 120. S. C. Trin. 11 Jac. adjudged and affirmed in error. ——— Jenk. 297. pl. 52. S. C. accordingly.——S. C. cited Godb. 391. in pl. 477. as adjudged that the action would not lie for 2 reasons; first, because (thete) was uncertain in the person. 2dly, It was uncertain in the thing; for it might be that they had authority to do it.

[5. If there be a bill exhibited in the exchequer-chamber against 6 [16] for a conspiracy, and upon communication thereof J. S. said, *these defendants are those that helped to murder W. N.* [† *meaning one W. N. who was murdered by one T. O. who was hanged for it.*] Every one of these 6 [16] defendants may have an action ‡ upon the case, as well as if they had been specially named. Hob. Reports, between FOXCROFT AND LACY, adjudged.]

A. B. and C. were subscribing witnesses to a will, and they proved the same in the prerogative court. In discourse of the said will the defendant said, *they* (innuendo A. the plaintiff, and B. and C.) *or some of them forged the will, and they are perjured, and I'll prove them so.* Per cur. the first words are only introductive to the 2d, and the 2d contain a positive charge of perjury against them all; and gave judgment for the plaintiff. 2 Barnard. Rep. in B. R. Pasch. 6 Geo. 2. Hughes v. Winter.

‡ [511]

So where the words were, *thy son hath murdered my child*, and in action brought by the son it was held that neither innuendo the plaintiff, nor an averment that the defendant spoke the words of the plaintiff,

6. If one says to J. S. *thy son hath robbed me*, and the son brings an action, he *must aver that J. S. had no more sons*, or otherwise he cannot maintain the action. *But* if one says to a son, *thy father*, or to a wife, *thy husband hath robbed me*, the action lies for the father or husband without such averment; for there cannot be more fathers or husbands. Cro. J. 444. Mich. 15 Jac. B. R. agreed per cur. in pl. 21.

tiff, would ſerve; for it is but a general allegation of words which import no ſlander, without averring that the plaintiff was the only ſon of his father. But in the caſes above of thy father, &c. thy huſband, or thy maſter, it had been good; wherefore, abſente Lea Ch. J. judgment was given for the defendant. Cro. J. 635. pl. 1. Paſch. 20 Jac. B. R. Harvey v. Chamberlain. ——— Palm. 283. S. C. accordingly; but ſays if it had been, *thy ſon William*, it had been certain enough.

7. A. and B. diſcourſing of J. Symms and W. Symms, A. ſaid, *the Symms's make half-crown pieces, and J. Symms did carry a cloak-bag full of clippings.* In an action for theſe words it was objected that he did not ſay, *theſe Symms's*, but *the Symms's*; and that a cloak-bag of clippings was uncertain; for it might be clippings of wool, &c. or clippings of ſilver from the goldſmith's, who in making plate make clippings; neither is any certain time ſhewn when the words were ſpoke; and therefore adjudged that the action would not lie. Godb. 391. pl. 477. Paſch. 3 Car. B. R. Symms's caſe.

8. An action was brought for ſaying, *H. got a witneſs to forſwear himſelf in ſuch a cauſe. You or he* (innuendo the plaintiff) *hired one B. to forſwear himſelf.* It was moved that the words are not actionable; for though the firſt branch, if alone, is certain enough, yet when he goes on, and ſays, you or the plaintiff hired one B. to forſwear himſelf, it becomes wholly uncertain to whom the words relate. It was alſo moved that the action lay not, unleſs B. had actually forſworn himſelf; but per cur. the words, you or he, &c. do not render the former uncertain; for they relate not to the getting, &c. but to new matter, viz. who paid the money; beſides, if the words were A. or D. did, &c. either A. or D. might bring an action, but then there muſt be an averment that neither of them did it. It is not neceſſary to the maintaining of this action, that B. did, in fact, forſwear himſelf, the innuendoes here are not introductory of new matters of fact, but only explanatory of the foregoing words. Judgment pro quer. 10 Mod. 196. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

(D. b) For what Words it lies, in reſpect of the *Uncertainty of the Thing.*

Fol. 76.

[512]

[1. IF one man ſays to another, *thou haſt two wives, and I will hang thee, or do the beſt I can to hang thee*, an action lies for theſe words, though it might be that he had 2 wives before the ſtatute which makes this felony, or otherwiſe it might be that one of might have 2 wives, and yet it is not felony within the ſtatute, as not knowing of the firſt wife's life; yet becauſe he ſaid he would hang him for it, and the words were ſpoken falſely and maliciouſly, it ſhall be interpreted that he intended this to be felony within the ſtatute; and the words altogether import as much, and ſo found in ſlander. Mich. 10 Car. B. R. between WILLIAMS AND TEDBURY adjudged per curiam, after a verdict for the plaintiff, becauſe *the words were ſpoken in anger.* Intratur Hill. 9 Car. Rot. 1160.]

[2. In

Jo. 366. pl. 5. Dr. Sibthorp's case, S. C. adjudged accordingly. ——Cro. C. 417. pl. 6. S. C. adjudged accordingly. *Thou hast robbed the church* (innuendo the church of A.) *and thou hast stolen the lead off from the church* (innuendo the church of A. aforesaid) Fenner and Williams J. thought the words not actionable; but Popham, Yelverton, and Tanfield e contra; for they are to be taken according to common parlance, and in the worst sense; and therefore (robbing the church) must mean in a felonious manner, and the innuendo shews he meant the material church; and the words (and thou hast pulled off the lead) is a further addition, and not a shewing wherein the felony he intended, consisted; and therefore Tanfield said there was a difference, where he said (for thou hast) and (and thou hast, &c.) and adjudged for the plaintiff. Cro. J. 153. pl. 2. Pasch. 5 Jac. B. R. Benson v. Morley.

[2. In an action upon the case, if the plaintiff declares that he was a doctor of divinity, and parson of B. and there being a communication of the plaintiff, the defendant said these words of the plaintiff, *he is yonder in the church, and is robbing the church*, & adtunc & ibidem, said of the plaintiff these other words, *Dr. Sibthorpe* (innuendo *the plaintiff*) *hath robbed the church* (innuendo *the church of B. aforesaid.*). After a verdict for the plaintiff, upon not guilty pleaded, the plaintiff shall have judgment, though it was objected that the word church had a double signification, scilicet, the church material, and the church catholic; and it is usual for divines to say, that men rob the church who do not pay their dues to the parish, or that keep appropriations in their hands; and it might be that he intends that he keeps some things, goods, or land that appertain to the church. Yet the action lies, for the words cannot bear any such sense, inasmuch as he says he is yonder in the church, by which it appears he intends the material church; and the statute of 23 H. 8. that takes away clergy from those that rob churches, has the same words as are here, without any description what church he intended. Mich. 11 Car. B. R. between Dr. Sibthorpe and Robinson adjudged per curiam, this being moved in arrest of judgment. Intratur Trin. 10 Car. Rot. 1398.]

(Y. a) pl. 3. S. C.

[3. If A. says of B. *I have found out B. now; I have found records which he hath forged, and he shall dearly pay for it; I have catched the forgerer*, an action lies for these words, though it does not appear that he intended a record; but it may be that he intended a copyhold record, or other thing which is not a true record, but only a record in appellation; for it shall be intended, according to the words, a true record. Mich. 13 Car. B. R. between Garbut and Bell adjudged per curiam, this being moved in arrest of judgment.]

[513] See (K. b) pl. 3. S. C.

[4. If A. says these words, *that perjured rogue and villain Potter*, without more words precedent or subsequent, yet *Jo. Potter* shall have an action for these words, alleging a communication of him at the speaking of the words. Hill. 11 Car. B. between Potter and Loveday adjudged, this being moved in arrest. But a writ of error was brought.]

2 Bulst. 216. S. C. and by Doderidge J. the words are too general; and the whole court agreed that they are not actionable. And judgment against the plaintiff.

5. *Mr. C. came into Cornwall with a blue coat, but now he hath gotten much wealth by trading with pirates, and by cozening by tale of pilchards, and by extortion.* Coke Ch. J. said that the words (by trading with pirates) are too general; for an honest man might trade with a pirate, not knowing him to be one. Godb. 252. pl. 349. Pasch. 12 Jac. B. R. Crook v. Averin.

6 Thou

6. *Thou art a ſacrilegious perſon, and committeſt ſacrilege every day.* It was objected that this ſhall not be intended of robbing churches, which is felony, but of detaining tithes, which by the civil and canon law is ſacrilege; & adjornatur. But afterwards the court were of opinion for the defendant. Sid. 376. pl. 4. Mich. 20 Car. 2. B. R. Gaudy v. Smith.

Lev. 250. S. C. adjudged for the defendant, though the words were laid to be ſpoke maliciouſly, and to cauſe him to be brought in queſtion for his life. ——— 2 Keb. 401. pl. 8. S. C. adjornatur. 430. pl. 63. adjudged for the defendant. ——— *She was guilty of ſacrilege*, not actionable. Freem. Rep. 67. pl. 80. Mich. 1672. C. B. Lady Stukely's caſe.

(E. b.) For *what* Words it lies, *without any Averment.*

Fol. 77.

[1. IF one man ſays to another, *Waterman and thou didſt kill thy maſter's cook* (innuendo *J. S. ſervant to J. D.*) *and thou waſt never tried for it, and I will bring thee to trial for thy life.* An action lies for theſe words, though there was not any diſcourſe before of any man that was killed, and without alleging that he was his maſter, or that he had any cook that was killed, becauſe it is a great ſlander to ſay that he killed his maſter's cook, though he was *not ſhewn who was his maſter's cook*; for he intends thereby that he had killed a certain man, and it ſhall be intended that he had a maſter, and that his maſter had a cook, and that he was killed, till it be found or ſhewn to the contrary by the defendant, inaſmuch as he by the words has affirmed it. Paſch. 15 Jac. B. R. between COOPER AND SMITH adjudged. But Houghton was againſt it, becauſe he thought that the innuendo had made it ill, becauſe this is innuendo J. S. the ſervant of J. D. where the words were of a cook; and he has averred him to be his ſervant, which is another perſon; as if a man ſaid that he killed J. S. and the plaintiff in the action ſays innuendo J. N. this deſtroys the action. Note, that cook and ſervant may ſtand inſimul; and ſo the court ſaid.]

Cro. J. 423. pl. 5. S. C. adjudged for the plaintiff. —Bridgm. 60. S. C. adjudged for the plaintiff. ——Poph. 128. S. C. adjudged for the plaintiff *Thou art a murderer; for thou didſt kill M—. S.'s man.* Adjudged in B. R. for the plaintiff. But becauſe he did not ſhew that any of S.'s ſervants was ſlain, nor any innuendo that any was ſlain, it was reverſed in the exchequer chamber. Cro. J. 331. pl. 10. Mich. 11 Jac. B. R. Barons v. Ball.

An action was brought for ſaying, *thou haſt murdered A. thy late ſervant.* Exception was taken that the plaintiff did not aver that ſhe was dead; but curia contra; for if ſhe were not dead, or if there were no ſuch, the ſcandal is the greater; and judgment for the plaintiff, niſi. 3 Keb. 624. Paſch. 28 Car. 2. B. R. Green v. Warner.

[514]

[2. If a man ſays to another, that *he has killed the wife of J. S. or one of the ſons of J. S. or* that * *he has ſtole his horſe*, an action lies, without any averment that J. S. had any wife or ſon, or that he had any horſe; for this ſhall be intended till the contrary is ſhewn. Paſch. 15 Jac. B. R. in COOPER AND SMITH'S caſe, agreed per curiam.]

Thou haſt killed my brother; per tot. cur. the words are not actionable without averment that he was dead. Mar. 109. pl. 187. Trin. 17 Car. C. B. Anon.

* S. P. per cur. obiter in S. C. Bridgman 60. ——— Noy. 55. S. P. accordingly per cur. obiter. ——See the notes on pl. 1.

[3. If

See (Z. a) pl. 4. and the notes there.—This point does not appear in any of the books cited above.

[3. If one says to another, *thou hast killed a man*, an action lies, though he did not design any particular man; for this is a great slander. Pasch. 15 Jac. B. R. in COOPER AND SMITH's case, agreed per curiam.]

——And in such case he *need not aver that a man is killed*; per Twisden J. Sid. 53. Mich. 13 Car. 2. B. C. in pl. 18.—And so if he had said, *thou hast killed J. N.* for Twisden said, that though it had been controverted heretofore whether the death of a man ought to be averred, yet it is now settled that it need not be averred that the man is dead; for it shall be intended, unless it appears by the declaration that he is alive. Sid. 53. ut supra.——S. P. by Twisden, and the action lies, unless it appears upon the record that the party is alive; and the plaintiff had his judgment notwithstanding such exception taken. Vent. 117. Pasch. 23 Car. 2. B. R. Phillips v. Kingston.

Sty. 66. Roll Ch. J. cited S. P. to have been adjudged actionable.—Cro. J. 184. pl. 4. Mich. 5 J. B. R. Holt v. Astgrigg, seems to be S. C. and was, *H. struck his cook on the head with a cleaver, and cleaved his head, the one part lay on the one shoulder, and the other on the other.* Adjudged not actionable, it not being averred, unless argumentatively, that the cook was killed; per cur. Fleming and Williams absentibus; for slander ought to be direct, against which there may not be any intendment; but here, notwithstanding such wounding, the † party may be living; and then it is only a trespass.

† Quære.

[4. If a man says of J. S. *he hath killed his cook, and the said J. S. or others for him, did give* 12 *quarts of wine to* Shelden's *wife, that she should not certify her knowledge therein*, J. S. shall have an action without averment that he had any cook, or that the cook died, inasmuch as his life does not appear within the record. Pasch. 5 Jac. B. R. between Sir THOMAS HOLT AND TAYLOR, adjudged.]

2 Bulst. 42. Billing v. Knight, S. C. the words there are, *he came to such an house, where one lay sick in his bed, and the plaintiff got upon the bed, and with his knee did break his blood-bulk, and thereby killed him.* Adjudged for the plaintiff per tot. cur.

[5. If one says to another, *thou didst kneel upon the body of J. S. so as the blood gushed out of divers parts of his body, whereby he died*, an action lies, without averment of the death of J. S. inasmuch as the defendant himself has said he is dead. Mich. 10 Jac. B. R. between ELLIS AND KNIGHT adjudged.]

See (I. b) pl. 4. S. C.—Hob. 6. pl. 12. S. C. adjudged for the plaintiff in B. R. but reversed in the exchequer-chamber, because it appeared not by the words that he poisoned him willingly, nor that Smith was dead at the time of speaking the words.——Cro. J. 343. pl. 9. Pasch. 12 Jac. S. C. adjudged in B. R. and that judgment reversed.——Roll. Rep. 24. pl. 2. S. C. but S. P. does not appear.——Jenk. 293. pl. 40. S. C.——S. C. cited by Hobart Ch. J. Hob. 268.

[6. If one says to another, *thou hast poisoned Smith; and it shall cost me* 100*l. but I will hang thee*, no action lies for these words, without averment of the death of Smith. Pasch. 11 Jac. between JACOB AND MILES adjudged; the same case, Hobart's Reports 8. and case 351.]

If one says to B. *thou hast poisoned J. S.* it is actionable, though J. S. be living; for one may be poisoned, and yet not to death; for it may break out otherwise, as in boils, vomitings, &c. Per Yelverton J. Yelv. 31. Mich. 44 & 45 Eliz. B. R. Arg.

[515]

See (P. a) pl. 8. and (Z. a) pl. 3. S. C.—Cro. E. 569. pl. 3. S. C. says it was objected that the action lies not be-

[7. If one says of another, *I will call him in question for poisoning his own aunt; and I make no question but to prove he hath poisoned his aunt*, an action upon the case lies, without any *averment of the death* of his aunt at the time of the speaking of the words; for it shall be intended that she is dead, till it be shewn to the contrary, inasmuch as her life does not appear within the record. Trin. 39 Eliz. B. between WEB AND POOR adjudged.

But

But it is said by Fenner, that the poisoning without death gives a cause of action.]

cause it is not averred that his

aunt was poisoned; for otherwise it was no offence; sed non allocatur.——Noy. 63. S. C. and per tot. cur. the action is maintainable without averment of the death of his aunt; because one may be poisoned, and yet not die. So it is not like Snagg's case; for it is impossible for a man to be murdered and he not die.——S. P. by Twisden and Keeling J. Sid. 227. Mich. 16 Car. 2. B. R. in pl. 23.

[8. If one says to another, *thou hast committed burglary, in breaking his house, and stealing his goods*, no action lies, because it does *not appear whose* house and goods he intends. Trin. 44 Eliz. B. R. between BROWN AND ST. JOHN adjudged.]

Fol. 78.

See (Y. a) pl. 59. S. C. ——Cro. E. 889. pl. 3. S. C. and though it was said *(innuendo the house of one B.)* yet that is not sufficient, and so being uncertain the action was adjudged not maintainable.

[9. If a man says of the gaoler of a county prison, *he doth let go prisoners, and is a partaker with them, and he had never a sheet on his bed until he let prisoners go out of the gaol to steal them*, no action lies for these words, without an averment that he had some sheets upon his bed. Mich. 42, 43 Eliz. B. R. HEATH'S CASE, adjudged.]

Cro. E. 783. pl. 20. Heath v. Pole, S. C. and it was also objected that it was not averred that they

stole any sheets for him, wherefore it was adjudged for the defendant.——S. C. cited Arg. 2 Bulst. 141.

[10. If a man says of J. S. *he did murder Hodge Horwood*, (quendam Rogerum Horwood innuendo) *the blood was tracked to his gate, and laid him upon his henroost*, an action lies for these words, though he names him *Hodge Horwood*, and though no communication is laid to have been of him, and though no averment is made of the death of *Hodge Horwood*, and though he says (quendam Rogerum Horwood innuendo), which implies in a manner that he is alive; for the words strongly imply that he is dead. Pasch. 11 Car. B. R. between WILLET AND SANDS, adjudged per curiam, this being moved in arrest of judgment.]

11. *He was confederate with Campian the jesuit*, not actionable; for it is not said he knew him to be a jesuit, nor in what manner he was confederate with him. Cro. E. 251. in pl. 17. cites it as ruled 26 Eliz. Brown v. Lisle.

Thou was partaker with the rebels in the north, not actionable,

the words being too general, it not being averred that he *knew they were rebels*. Bulst. 109. cites it as adjudged.

12. *Thou art as very a thief as any is in Warwick-gaol*, was held clearly to be actionable, with an averment that such a one was there for horse-stealing, but without such averment it would not be good. Cro. E. 214. pl. 9. Hill. 33 Eliz. B. R. Lacy v. Reynolds.

S. C. cited by Fenner J. Yelv. 90. —S. C. cited per cur. Hutt. 72. and S. P.

adjudged there; the words being *he is as arrant a thief as any is in England*, &c. but did not aver that there was any thief in England, Potter v. Brown.——Win. 70. Hill. 21 Jac. C. B. the S. C. and Hutton, Winch, and Jones held that there needed no such averment, and took a difference where the words relate to a particular place, and when to an intire realm, and the same law when it is tied to one kind of felony; for it is very well known that there are thieves in England, and in every other realm. But ibid. 89. Trin. 22 Jac. C. B. the court, viz. Hobart, Hutton, and Winch, arrested the judgment for want of such averment.——Cro. J. 687. pl. 2. Fuller v. Browning, S. C. and held that

that for want of averment the words will not maintain an action, and judgment for the defendant.——— S. C. cited by the name of Walter v. Brown, Cro. C. 40. in pl. 1. ſays that no judgment was there given for the plaintiff.

Cro. E. 342. pl. 11. Mich. 36 & 37 Eliz. B. R. the S. C. adjudged accordingly; but there inſtead of the word (robbery) are the words (a purſe cut.)

13. *There was never a robbery committed within* 40 *miles of Wellingborough, but thou hadſt thy part in it;* adjudged that no action will lie, without an averment that there was a robbery committed within 40 miles, &c. for otherwiſe it is no ſlander. Cro. E. 308. pl. 11. Mich. 35 & 36 Eliz. B. R. Ball v. Roane.

14. *He is a maintainer of thieves, and keepeth none but thieves in his houſe, and I will prove it.* The juſtices held the words were not actionable; for he does not ſay that he knew them to be thieves whom he maintained. Cro. E. 746. pl. 24. Hill. 42 Eliz. B. R. Ball v. Bridges.

Action will lie for ſome words, without particular averment of any damage, as to call a man *thief, traytor*, or the like, theſe are *malum in ſe*. Agreed. Mar. 2. in pl. 3. Paſch. 15 Car. B. R. Anon.

15. *Thou art a thief, and haſt robbed my ſon.* Per cur. this is good, without any averment that he hath or had a ſon, becauſe the words (thou art a thief) are actionable, by reaſon of the diſcrediting the party in the audience of others, who know not if he had a ſon or not. Noy 55. Ellwin v. Moore.

16. *If ever man was perjured Wittam was;* but becauſe it was not averred that any man was perjured, judgment was ſtayed by Tanfield, he only being in court. And he ſaid the reaſon why, in theft and perjury, there muſt be an averment is, that they are ſuch bad things in themſelves that they ſhall not be intended without it. Noy 116. Wittam's caſe.

17. *Thou has hoiſtered* [houſed] *thieves, and ſtolen goods, and the thieves and goods were found in your houſe, and the thieves were had before ſuch juſtices, and committed by them to priſon, and were hanged, and if the juſtice had not been your friend it had been hard with you.* It was objected that becauſe it is not laid that he knew a felony was done, and that theſe were felons, and the goods felonious goods, the words were not actionable; for he can be in no danger by houſing them or their goods. But per cur. clearly, the words taken all together as laid are very ſcandalous, and actionable, and eſpecially the latter words; and adjudged for the plaintiff. Bulſt. 109. Paſch. 9 Jac. B. R. Tabbe v. Matthew.

Thou haſt ſtolen my maſter's tobacco; but becauſe he did not aver that his maſter had tobacco, the plaintiff could not have judgment. Cited by Richardſon Ch. J. Litt. Rep. 166. Mich. 4 Car. C. B.

18. *Thy father is a thief, and hath ſtolen more goods than I am worth.* Adjudged per tot. cur. that the words are actionable, without any averment of what the defendant was worth at the time of ſpeaking the words. 2 Bulſt. 141. Mich. 11 Jac. Painter v. Warn.

19. Of an attorney, *he hath forged the laſt will of J. S.* It was moved in arreſt of judgment, that it is not alleged that the will is *ſuppoſed to be forged;* but per cur. that is neceſſarily implied; and adjudged actionable. Hutt. 29. Hill. 16 Jac. Cardinall's caſe.

20. *He*

20. *He was indicted for felony at a ſeſſions holden at*, &c. but did not *aver that he was not indicted*; and for that reaſon judgment was ſtayed. Hob. 219. pl. 290. Paſch. 16 Jac. Bland v. Edmunds. Brownl. 13. S. C. and held the declaration naught, for want of averment. —— Hutt. 18. Bland's caſe, S. C. adjudged for the defendant.

* 21. *As ſure as God governs the world, and king James this kingdom, ſo ſure hath J. S. committed treaſon*, &c. J. S. may well maintain his action, without averring that God governs the world, or king James this kingdom; for they are *things apparent*. Cited per Twiſden J. Sid. 53. in pl. 18. as adjudged in king James's time.

22. *My little boy in my houſe is A. D.'s baſtard; I wonder you will keep company with her.* In action for theſe words ſhe alleged that ſhe loſt divers good matches, but did *not aver that there was any communication of marriage with her, nor that there was any little boy there*; and for theſe defects judgment was ſtayed. Litt. Rep. 166. Anne Diſtol's caſe.

23. *That whore, that B.'s wife, murdered my child, and would have killed me, I find it.* Per cur. the plaintiff need not ſhew that the child is dead, and this is ſufficiently affirmative. Litt. Rep. 310. Mich. 5 Car. C. B. Browne's caſe.

24. *He kept his wife baſely, and ſtarved her.* Theſe words of themſelves will bear no action; but if the party of whom the words were ſpoken were in election to be married to any other, and by ſpeaking of theſe words is hindered, there with ſuch an averment they will bear an action. Agreed per cur. Mar. 2. Paſch. 15 Car. B. R. in pl. 3. Anon. Cro. C. 155. pl. 4. Paſch. 5 Car. B. R. Wicks v. Shepherd, ſeems to be S. C. and the words are, *he is a ſharking fellow*, &c. *and uſed himſelf violently to his former wife, and denied her neceſſaries*, &c. and alleged that ſuch a woman refuſed to marry him by reaſon of theſe words. And adjudged for the plaintiff, and that judgment affirmed in the exchequer-chamber; but agreed that the words, without ſuch circumſtances, will not maintain an action. ——— So where the words were, *you are a hobore, and a perjured hobore*, and lays loſs of marriage, ſhe muſt ſet forth particularly with whom ſhe loſt it. —— 12 Mod. 597. Mich. 13 W. 3. Wetherell v. Clerkſon. —— 2 Lutw. 1295. S. C. the words there are, you are a whore, *and a forſworn jade*. And judgment arreſted for the ſame reaſon.

Words ſpoke of a ſuitor to a woman were, *what do you mean to entertain him? for he was a very harſh man to his former wife, and would not allow her neceſſaries, and is of ſmall eſtate*; by which the feme refuſed him. Adjudged actionable. Litt. Rep. 193. Arg. cites Shepherd's caſe.

One ſaid of a maid, *ſhe is a man, and not a woman.* She laid ſpecial damages. Action lies. Cut. 55. Arg. cites Mich. 1658. Pye v. Wallis.

She is a burſten bellied queen, and her guts hang down to her garters. Adjudged actionable, a communication of marriage being alleged. Litt. Rep. 193. cited by Harvey as a caſe remembered by him.

25. The count was of a communication between J. S. and the defendant of the laſt will of R. deceaſed, and that defendant ſaid of the plaintiff, *he hath forged his uncle Row's will.* Exception was taken that it was not averred that R. was dead at the time of the words; ſed non allocatur; it being ſaid that there was a *diſcourſe of the will of R. deceaſed*, and there *(deceaſed)* goes to the deſcription of his perſon, and expreſſeth that he was then dead. Beſides the words imply it; for if he were not dead, he could not forge his will. Vent. 149. Mich. 23 Car. B. R. Dorrel v. Jay.

26. Caſe for ſaying of the plaintiff to her mother, *your daughter* (innuendo the plaintiff) *is a brazen-faced whore, and deſerves to be hanged*, but did not aver that the mother had not any daughter beſides herſelf; but the court held it well enough, the declaration being that the defendant habens *colloquium of the plaintiff* did ſpeak the words, which makes it certain enough. And judgment for the plaintiff. Sty. 150. Mich. 24 Car. B. R. Ralph v. Davye.

27. *I have an honeſt man in Langattock, who will prove that Williams* (the plaintiff) *ſaid he had killed a man in Ireland, and buried him in the ſands*; and the plaintiff averred that he never did ſay ſo. It was moved in arreſt of judgment becauſe he did *not aver that he did not kill a man in Ireland*, nor that there was not a man in Langattock who could prove that the plaintiff ſaid ſo; but adjudged that if the words had been laid as ſpoken from the report of another, then it muſt be averred that the other did not ſo report; but here the defendant undertakes to prove it [518] himſelf by a man he had in Langattock. 3 Lev. 171. Trin. 36 Car. 2. C. B. Williams v. Lewis.

2 Salk. 693. pl. 1. Mich. 7 W. & M. in B. R. Taffan v. Rogers, S. P. exactly, and ſeems to be S. C.

28. Caſe by a *butcher*, and declares of a colloquium of the plaintiff, and of a quarter-part of a cow which he had to ſell, and that the defendant ſaid, that *the cow of which the quarter was part died of calving*, per quod he loſt his cuſtomers; and judgment for the plaintiff. It was aſſigned for error that there wanted an *averment that the cow was dead*. Per cur. the *alleging loſs of cuſtomers* is too general; but had it been laid that he expoſed a quarter of a cow to ſale, and by reaſon of thoſe words *loſt the ſale*, it would have been actionable; but as it is now laid, it is not, and therefore judgment was reverſed. Comb. 161. Mich. 1 W. & M. in B. R. Rice v. Pidgeon.

29. *He is a rogue, and robbed the Hockley butcher*; it was objected that it did not appear that there was a Hockley butcher; to which Holt Ch. J. anſwered that then the fault is the greater, it is a double crime; and judgment for the plaintiff niſi. Comb. 247. Paſch. 6 W. & M. in B. R. Smith v. Williams.

(F. b) For what Words it lies, in Reſpect of the *Uncertainty of the Thing*, *without* an *Averment*.

Cro. J. 231. pl. 11. S. C. *thou art as bad as thy wife when ſhe ſtole my cuſhion.* Judgment was reverſed in the exchequer chamber.

[1. IF a man ſays to J. S. *thou uſeſt me now as thy wife did when ſhe did ſteal my cuſhion*, no action lies for J. S. and his wife for the ſlander to the wife, without an averment; for it is not directly ſaid that the wife had ſtole his cuſhion. Mich. 10 Jac. B. R. between RATCLIFF AND MICHEL adjudged e contra (ſcilicet, that the action lies;) but this was reverſed per curiam, in a writ of error in the exchequer chamber, for the ſame cauſe.]

chamber, it not being averred that any felony was committed; and then it is no ſlander.——Godb. 250. pl. 351. Mich. 11 Jac. ſays that judgment upon theſe words was reverſed in the exchequer-chamber, becauſe they were not actionable.——S. C. cited Comyn's Rep. 268. Mich. 4 Geo. 1. C. B. in pl. 147.

[2. If

[2. If a man says of J. S. having a discourse of his answer in chancery, *if he will justify his answer in chancery to be true, I will prove him perjured*, an action lies, without any averment that he justified his answer to be true; for this shall be intended, and the slander is apparent. Mich. 3 Car. B. R. between FRIER AND CORBOLT adjudged per curiam, the which intratur Hill. 2 Car. Rot. But there the plaintiff shewed how he justified his answer, in a second answer in chancery; but this was before the speaking of the words, which was not sufficient, and so taken as no averment.]

Lat. 219. Prior v. Colbold, alias Frier v. Cabold, S. C. Hyde Ch. J. and Jones held the action lies, but Whitlock J. doubted, because the words are contradictory. Afterwards it was doubted, because not averred that he had justified his answer after the words spoke. Judgment for the plaintiff.

[3. In an action upon the case by A. against B. if the plaintiff declares that one J. S. preferred a bill in chancery against him, shewing the effect of the bill, to which he made a true answer upon his oath, according to the course of the court, and that after he himself, and one C. discoursed insimul, and then came into the same place the said B. and one D. whereupon the *plaintiff said to C. I* will not talk any more with you now, your two affidavit-men are come*; whereupon B. *the defendant said of the plaintiff, A. need not say so; for he was absolutely forsworn in his answer to J. Stiles's bill, innuendo* the said bill and answer. Though there was not any discourse of the plaintiff before, yet the action lies; for it shall be intended this bill in chancery, if it be not shewn of the other part that there was another bill in any other court preferred by the said J. S. Mich. 9 Car. B. R. between Sir RICHARD STRODE AND STRODE ALLEN adjudged, this being moved in arrest of judgment.]

See (F. a) pl. 25. S. C. —Cro. C. 321. pl. 3. Sir Richard Snowde's case, S. C. adjudged accordingly.

* [519]

4. The defendant said to J. B. son of the plaintiff, in the presence of divers, *thou* (præfat' J. B. innuendo) *and thy father* (innuendo the plaintiff) *were both perjured, and I* (innuendo the defendant) *will prove you both perjured.* It was moved in arrest of judgment, that it was *not averred that J. B. was the son of the plaintiff.* But it was held well enough, for that it was *alleged that the words were spoken to J. B. his son.* And it was adjudged for the plaintiff. Cro. E. Mich. 36, 37 Eliz. B. R. Brent v. Ingram.

5. *I never came home and poxed my wife*; after verdict judgment was arrested; for per tot. cur. the words are too loose to bear an action. 8 Mod. 290. Trin. 10 Geo. 1725. C. B. Clarke v. Dier.

(G. b) For what Words it lies, in Respect of the *Uncertainty of the Thing*, with an *Averment*.

Fol. 78.

[1. IF a man says to a feme covert, *thou bold Collebine, bastard-bearing whore, thou didst throw thy bastard into the dock at Whitechappel*, no action lies for these words, with an averment that before the speaking thereof an infant was found dead in the dock

Jo. 356. pl. 6. S. C. adjudged against the plaintiff.

(D. a) pl. 11. S. C.

dock of J. S. at *Whitechappel*; for it does not appear that he intended this infant. Hill. 10 Car. B. R. between COLLOBINE AND HIS WIFE, plaintiffs, v. VINOR, adjudged, this being moved in arreſt of judgment.]

[2. In an action upon the caſe, if the plaintiff declares that whereas there was a diſcourſe of the plaintiff touching a ſuit in chancery, in which the now plaintiff was defendant and J. S. plaintiff, and that *Carlton* and *Pett* were examined in the ſaid ſuit, the defendant ſaid theſe words of the plaintiff, *he hath ſuborned Carlton and Pett to forſwear themſelves; and I will have them in the ſtar-chamber for it, and make them to ſpend* 100 *l.* yet no action lies upon this declaration, becauſe it is *not averred that Carlton and Pett* were examined upon their oath in the ſaid cauſe, nor whether they *were examined* upon any matter then in iſſue between them. Mich. 11 Car. B. R. between BULL AND KNOWLES per curiam, in arreſt of judgment, ſtaid.]

(K. b) pl. 2. S. C.

[3. In an action upon the caſe, if the plaintiff declares that the defendant was plaintiff in an action brought againſt S. in the court of *Bathe* in the *Guild-Hall* there, and that the defendant there pleaded to iſſue, and it was there tried, and the plaintiff at the trial of the ſaid plea was produced as a witneſs on the part of the ſaid S. and he there, in the ſaid court, before the judges and jurors for the trial thereof impanelled and ſworn in due form of law (being examined upon oath) did depoſe the truth, according to his knowledge of and concerning the ſaid iſſue; yet the defendant having a communication with A. S. concerning the ſaid plea and trial, ſaid theſe words of the plaintiff, *your brother Delamor took a falſe oath* (innuendo the ſaid oath) *againſt me; I would not have taken ſuch an oath for all the world.* This is not a good averment to make the words actionable, becauſe it is *not averred that the iſſue was joined*, nor that there was any trial; but only he ſays that at the trial he was ſworn, &c. which is not ſufficient. Hill. 11 Car. B. R. between DELAMOR AND HESKINS adjudged for this cauſe among others, that the action does not lie. Trin. 11 Car. Rot. 900.]

[520]

4. *You have done as ill, and worſe, and it will coſt you as much to be quit as it coſt him*, (meaning one R. S. who had been *attainted of felony.*) Gawdy thought it not actionable, the words being uncertain; but the other juſtices doubted, & adjornatur. Cro. E. 31. pl. 6. Trin. 26 Eliz. B. R. Smith's caſe.

5. *Thou art a pocky raſcal*, (innuendo *the French pox*) and an averment that in common intendment the words are ſo underſtood, held not actionable; otherwiſe if the *averment* had been *of ſuch intendment in a particular place*, as Welch words, and healer of felons in the weſt country. Judgment ſtayed. 2 Show. 285. pl. 280. Paſch. 35 Car. 2. B. R. Jackſon v. Hall.

(H. b) Where the Words are *uncertain of whom* they were ſpoke. *What* ſhall be *a good Averment that they were ſpoke of him.*

[1. WHERE the *words in themſelves* are *certain, ſo that it may be intended that the ſpeaker intended a perſon certain*, there they may be made actionable by an averment. Mich. 3 Jac. B. R. in WISEMAN'S CASE, by Tanfield.]

Cro. J. 107. pl. 2. Wiſeman v. Wiſeman, S. C. & S. P. by Tanfield; but where the words import in themſelves apparent uncertainty, it is otherwiſe.

[2. If one man ſays to another, *my maſter Mr.* Brown *hath robbed me of all my goods*, Brown may have an action againſt him, averring that he ſaid the words of him, without averring that he was his maſter; for the averment that he ſaid them of him implies as much, (and peradventure * it ſhall not be intended that there are more Browns.) Mich. 15 Jac. B. R. between BROWNE AND LANE, adjudged, this being moved in arreſt of judgment.]

See (C. b) pl. 3. S. C. and the note there.

* Fol. So.

Your maſter Euſeby (innuendo the plaintiff) [and it ſeems it was his chriſtian name] *is a rogue, a raſcal, and a forger of bonds.* But becauſe it did not expreſsly appear that the perſon to whom the words were ſpoke was ſervant to the plaintiff at the time of ſpeaking them, judgment was ſtayed by the court. Brownl. 10 Hill. 12 Jac. Jotham v. Ball.

My maſter was not content to take my living from me, but ſent his man Andrews to kill me. Per tot. cur. the declaration is uncertain; for the words (my maſter) comprehends a generality, and doth not refer to any perſon certain, and therefore it cannot be intended the defendant meant to tax the plaintiff more than any other perſon, and therefore the count ſhould have ſaid innuendo the plaintiff, or averred that the defendant was his ſervant at the time, ſo that it might appear to the court expreſsly that the plaintiff was intended; and it may be he had at that time more maſters. Mo. 63. pl. 174. Trin. 6 Eliz. Bray v. Andrews. ——Dal. 66. pl. 29. S. C. in totidem verbis.

[3. If a man ſays to J. S. *go tell thy landlord Hendy he is a thief, for he ſtole John Dier's purſe*, an action lies for *Hendy* againſt him, averring that the words were ſpoke of him to the ſaid J. S. † without averring that he is landlord to J. S. For he is certainly enough deſcribed by the word landlord, and he avers that they were ſpoken of him. Mich. 10 Car. B. R. between *Hendy and* adjudged.]

† [521]

S. C. cited by Doderidge J. 2 Bulſt. 82. as adjudged good. —— S. C. cited by Roll, who ſaid that the declaration was laid only with an innuendo of the plaintiff, then landlord, &c. and adjudged good; but that in another caſe where one ſaid, *your landlord (without a ſurname) is a thief*, in ſuch an innuendo it was, after great debate, (the court being at firſt divided in opinion) adjudged naught; but there if the plaintiff had *averred that he*, to whom the words were ſpoke, *had no other landlord*, it had been good. Allen 32. Mich. 23 Car. B. R.

[4. If a man ſays to A. *thy huſband and his maſter have ſtolen my wood*, the maſter ſhall not have an action, averring only that he ſaid the words of him, without an averment that he was the maſter of the huſband of A. Trin. 11 Jac. B. R. between LIFORD AND STAMP, per curiam.]

2 Bulſt. 81. Liſard v. Stamp, S. C. and per tot. cur. the declaration is wholly uncertain, and ſo not good; and adjudged againſt the plaintiff. ——(Y. a) pl. 47 & 48. S. C. but S. P. does not appear.

[5. If a man ſays, *where is this baker, he hath perjured himſelf*, &c. J. S. who is a baker may have an action againſt him, averring

3 Bulſt. 72. Baker's caſe, S. C. ad-

judged per tot. cur. for the plaintiff. ——Roll. Rep. 227. pl. 34.

ring only that he ſaid the words of him, naming himſelf Baker in the declaration, though he does not allege that there was any diſcourſe of him before; for his perſon is ſufficiently deſcribed. Trin. 13 Jac. B. R. *Scory's caſe.*]

Scory, alias Scorier, Baker's caſe, S. C. and Coke Ch. J. and Doderidge held the declaration good, by alleging the words ſpoke of the plaintiff; and Coke held that if a perſon ſhould ſay of him, *where is this chief juſtice*, or of a counſellor, *where is this counſellor*, &c. it would be ſufficient. And Doderidge ſaid that the words *your father-in-law is perjured*, (innuendo ſuch a one) has been adjudged actionable; for the perſon is deſcribed.

That murderous knave Stroughton lay in wait to murder me. One Tho. Stroughton brought action thereupon, and ſaid the words were ſpoke of him. After verdict it was moved in arreſt, that the words were uncertain, and therefore not actionable; but after divers motions it was adjudged for the plaintiff. Cro. J. 108. Hill. 3 Jac. B. R. cited by Tanfield J. as a caſe wherein himſelf had been of counſel.

Cro. J. 107. pl. 2. S. C. adjudged per tot cur. that the action well lay.

[6. If a man ſays, *my brother is perjured*, J. S. the brother of him that ſpoke the words, ſhall have an action againſt him, averring that he ſpoke the words of him being his natural brother, without any averment that he had not more brothers; for it may be well intended that they were ſpoken of a perſon certain. Mich. 3 Jac. B. R. between *Wiſeman and Wiſeman*, adjudged, this being moved in arreſt of judgment.]

* Cro. J. 673. pl. 7. S. C. the court at firſt doubted; but upon view of precedents, and being informed it was a common courſe

[7. If a man ſays of J. S. *he*, &c. and after J. S. brings an action for theſe words, and the declaration is that the defendant *dixit de querente he*, &c. this is ſufficient, without alleging that there was any diſcourſe of him before. Paſch. 11 Jac. B. between JACOB AND STERLING, per curiam. Mich. 21 Jac. B. R. between * SMITH AND WARD, adjudged; and ſo the ſame term it was there adjudged between FURNIAL AND COTTEREL, after verdict for the plaintiff.]

ſo to declare, when it is alleged that he ſaid de præfato the plaintiff hæc verba, it is neceſſary to be intended of the ſaid plaintiff, and the finding his ſpeaking the words of the plaintiff helps the caſe; wherefore it was adjudged for the plaintiff. ——Ibid. ſays a precedent was ſhewn, where the S. P. was adjudged accordingly, and affirmed in error. Hill. 18 Jac. B. R. Saunders v. Woolrick.

He (innuendo the plaintiff) *is not worthy, &c.* Exception was taken that the (he) may be ſpoken of any other, and the innuendo will not help it; but per tot. cur. hic & ille make a demonſtration what perſon he intended, and it is alſo alleged that he ſpoke de querente thoſe words; and adjudged for the plaintiff. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. C. B. Taylor v. How. ——S. P. *he* (innuendo the plaintiff) *ſtole a ring, &c.* Win. 102. Mich. 22 Jac. C. B. Crompton v. Philpot. ——Raym. 86. Mich. 15 Car. 2. Arg. ſays that in ancient time it was the conſtant courſe in declarations to lay a colloquium † of the plaintiff, and it was a grand doubt if it was good without it, until Cro. J. 673. Smith and Ward's caſe, and there reſolved that (de querente) ſupplies the colloquium. ——Sid. 52. pl. 18. Mich. 13 Car. 2. B. R. Dacy v. Clinch, *he* (innuendo the plaintiff) *is a witch, &c.* The court ſaid it was good enough; for the declaration being (de querente) it ſhall be intended to be ſpoke of the ſame plaintiff, eſpecially after verdict, and cited Cro. J. 231. Gyer v. Ormſted; and alſo the caſe of Smith v. Ward. ——See Beamond v. Haſtings.

† [522]

All. 32. Pierſon v. Dawſon, S. C. it was objected that the words are not laid to be ſpoke of the plaintiff, but only in the innuendo, which cannot ſufficiently aſcertain the declaration; but adjudged for the plaintiff. ——Sty. 46. S. C. adjudged for the plaintiff.

[8. If an action upon the caſe, if the plaintiff declares that the defendant ſaid cuidam Mar' P. matri querentis, *your ſon is a thief*, the plaintiff ſhall have an action, without [alleging] any communication of the plaintiff, ‡ or averment that he ſaid Mar' P. had not any more ſons; for this is a ſufficient averment that he was the ſon of the ſaid Mar' P. and there ſhall not be intended a *plurality of ſons.* Mich. 23 Car. B. R. adjudged, after a verdict for the plaintiff. Intratur Trin. 23 Car. Rot. 1052.]

There being a colloquium betwixt the father of the plaintiff and the defendant, he ſaid that *Taylor did ſteal the mare of J. S. and thy ſon was conſenting to it*, without averring that the father had no more ſons than the plaintiff; and therefore adjudged per tot. cur. for the plaintiff. 3 Buſſt. 249. Mich. 14 Jac. Lewkener v. Godnam.

‡ Original is (one;) but it ſeems it ſhould be (or.)

[9. If a man ſays, *the* Boxes *are traytors, they have clipped money, and it is no matter if they be robbed; for they can get it again with clipping, and who ſhould do it but Edward Boxe;* no action lies for *John Boxe* and *Edward Boxe* for theſe words, with an averment that the words were ſpoke of them; for *without a communication precedent* it cannot appear that he intended them; for there may be ſeveral *Boxes* beſides them, and the laſt words are only by way of *interrogation*. Paſch. 44 Eliz. B. R. adjudged.]

[10. If a man ſays, *he that goeth before there is perjured*, and thereupon J. S. brings an action upon the caſe, alleging that there was a diſcourſe of the plaintiff between the defendant and one J. N. and thereupon the defendant ſaid theſe words; and does not allege that he ſaid theſe words of the plaintiff, nor avers that the plaintiff was then going before. Mich. 8 Car. B. R. between AISH AND GERISH, per curiam, this being moved in arreſt of § judgment, and the poſtea ſtayed accordingly; and after the ſame term judgment was given againſt the plaintiff.]

In ſome caſes though there be not any communication of a man, yet he ſhall have action, and § Fol. 81. the *innuendo ſhall make the certainty*; as if A. B. and C. are walking along the ſtreet, and J. S. ſays to C. *yonder goes a thief*, or *he is a thief*, pointing to A. an action lies for A. per Doderidge and Haughton. 2 Roll. Rep. 244. Mich. 20 Jac. B. R. Arg.

[*But* in the ſaid caſe, *if the plaintiff declares quod defendens colloquium habens cum J. N. de & concernente querentem adtunc & ibidem præſentem & ante præfatum J. N. ſolum ad tunc euntem*, Anglice, going *before the ſaid J. N.* [he] *then only* [*going before him*] *ſaid theſe words* of the plaintiff, *he* (innuendo *the plaintiff*) *that goeth before thee (prædictum J. N. innuendo) is perjured;* the action lies upon this declaration, becauſe it is alleged that there was a diſcourſe of the plaintiff, and that he only was going before J. N. and that the defendant ſpoke theſe words of the plaintiff. Mich. 9 Car. B. R. between MERCER, ALIAS AISH, PLAINTIFF, AND GERISH, DEFENDANT, adjudged upon demurrer, they being the ſame parties between whom the firſt action was ſtayed. Intratur Trin. 9 Car. Rot. 523.]

[11. If there be a *communication* between A. and B. concerning *Green* the plaintiff, and thereupon B. ſays to A. *where is that long-locked, ſhag-haired, murdering rogue*, whereupon C. demands of him whom he intends thereby, and he anſwers *Green of Forſet*, innuendo the plaintiff; this is a good averment that the words were ſpoke of ‖ the plaintiff, without other averment that he ſpoke the words of him, inaſmuch as it is alleged there was a communication of the plaintiff, and it ſhall not be intended that there were other *Greens* beſides the plaintiff. Mich. 9 Car. B. R. between GREEN AND LINCOLN, adjudged, this being moved in arreſt of judgment. Intratur Hill. 8 Car. Rot. 1252.]

Cro. C. 318. pl. 12. S. C. but S. P. does not appear. —Jo. 326. pl. 7. S. C. but S. P. does not appear. —— (I. a) pl. 6. S. C. but S. P. does not appear.

‖ [523]

[12. Where the *words in themſelves* are *uncertain, ſo that it cannot be intended* that *they were ſpoke of any perſon certain*, there they *cannot*

Cro. J. 107, pl. 2. S. P. by Tanfield;

because in those words there is an *apparent uncertainty*;

cannot be made actionable by any averment. Mich. 3 Jac. B. R. by *Tanfield, as if a man says one of my brothers is*, &c. no action lies by any averment. Mich. 3 Jac. B. R. per Tanfield.]

and though one of the brothers would bring an action, and aver they were spoken of him, yet because it appears to the court that there were divers brethren, & non constat to any of which he spoke, no action lies, though he be found guilty by verdict.

S. C. cited by Popham as adjudged that the action did not lie. Cro. E. 497. in pl. 16.

[13. In an action between A. and B. if 3 men severally before the justices of assize give evidence to a jury against A. and thereupon A. says to them, *there is one of you that is perjured in the giving of this evidence*, without naming any of them, no one of them can have action with an averment that the words were spoke of him. between and SIR J. BORNE; adjudged; cites Trin. 39 Eliz. B. R.]

J. C. was one of those that robbed H. R. is actionable. Goldsb. 85. pl. 7. Pasch. 30 Eliz. Cutts's case.

(A. b) pl. 1. S. C. but S. P. does not appear.——*My enemy* (innuendo the plaintiff) *is an extortioner*, and divers other slanderous words, which were clearly actionable.

[14. If a man says *my enemy*, &c. charging him with slanderous matters, which will maintain an action, yet no action lies by any with an *averment the words were spoke of him*, and by an innuendo, &c. because the words in themselves are altogether uncertain. Trin. 39 Eliz. B. R. between JONES AND DAWKES, adjudged. So in this case the action does not lie with an *averment* also, *that at the time of the speaking of the words he himself is the defendant's enemy, and that then the defendant had no other enemy but the plaintiff*, for this is uncertain, and it cannot be known whether he hath another enemy besides the plaintiff. Quære Trin. 39 Eliz. B. R.]

It was objected that the words (my enemy) cannot be intended of the plaintiff more than of any other; and the (innuendo the plaintiff) is not material; for it did not appear so to them that heard it; but if it had been *averred that at the same time he was the plaintiff's enemy, and that the defendant had not any other enemy*, there peradventure it would be otherwise; and the whole court were clearly of that opinion; and gave judgment against the plaintiff. Cro. E. 496. pl. 16. Mich. 38 & 39 Eliz. E. R. Jones v. Davers.

[15. In an action upon the case for words against A. and Eliz. his wife, if the plaintiff declares that there was a *discourse between* Eliz. B. *the wife of the plaintiff, and the* said Eliz. C. *the wife of the defendant* concerning the plaintiff, whereupon the said Eliz. C. said eidem Eliz. C. of the plaintiff, *thy husband keepeth keys of houses in the day-time, and stealeth hay out of them in the night*, this is a good averment * that the wife of the defendant spoke the said words of the plaintiff, though it is averred that the said Eliz. C. spoke the words eidem Eliz. C. for she could not speak them to her, but eidem shall be intended to Eliz. the wife of the plaintiff, and it is averred also that she spoke of the plaintiff, and therefore good. Hill. 9 Car. B. R. between NICHOLS AND BRAMPTON AND ELIZ. HIS WIFE, adjudged in a writ of error. Intratur Mich. 7 Car. Rot. 181.]

* Fol. 82.

[16. In an action upon the case by *Ireland* against B. if the plaintiff declares that there was a *colloquium* between C. and the defendant, concerning a robbery of the defendant, and that the defendant then said to C. that he was robbed of 100 l. by J. S. who

who was in *Newgate*; though he confeſſed that *G. Ireland* (innuendo the plaintiff) was party in the ſaid felony with him, and then the defendant ſaid of the plaintiff to the ſaid C. *where is young Ireland?* C. anſwered, *in Gray's Inn Lane with his father*: to which the defendant anſwered, *he is as arrant a rogue as J. S.* (prædict' J. S. innuendo) and to this declaration the defendant juſtified the ſpeaking of other words, abſque hoc, that he ſpoke of the plaintiff the ſaid words, which is found for the plaintiff. Upon this declaration the plaintiff ſhall have judgment, becauſe here was a diſcourſe of the plaintiff before; and here conſtat de perſona inaſmuch as the defendant has juſtified the ſpeaking of other words, and traverſed thoſe, and the plaintiff has averred that he ſpoke the words of the plaintiff; which is alſo found. Trin. 11 Jac. B. R. between IRELAND AND GARDENER, adjudged.]

[17. In an action upon the caſe by J. againſt L. if the plaintiff declares that he and 20 others were defendants in a bill in the ſtar-chamber, at the ſuit of J. S. which J. S. was after murdered by J. D. and that after, the defendant having *diſcourſe of* the ſaid bill and murder, the defendant ſaid theſe words of the plaintiff, *theſe are they that did help to murder J. S.* and avers that he himſelf was one of the defendants to the ſaid bill; an action lies upon this declaration, though it does not appear that the plaintiff and the other were preſent at the ſpeaking of the words. Mich. 11 Jac. B. R. between FOXCROFT AND LACY, adjudged.] Hob. 89. pl. 120. S. C. adjudged and affirmed in error; for they held it ſufficiently laid to intitle every one of the defendants to a ſeveral action, as if they had been ſpecially laid.——Jenk. 297. pl. 52. S. C. accordingly.

[18. If there be a *diſcourſe* between B. and C. of M. F. and C. ſays B. *maſter deceiver hath deceived and cozened the king, and I have him in queſtion for it, and doubt not but to prove it againſt him*, M. F. ſhall have action for theſe words, averring that at the time of the ſpeaking thereof, he was the king's receiver of his court of wards, and that the defendant ſaid theſe words of him. Hill. 17 Jac. B. R. between Sir MILES FLEETWOOD and Auditor CURLE, adjudged in a writ of error upon a judgment in bank, where it was ſo adjudged alſo per curiam; ſee the ſame caſe adjudged Trin. 17 Jac. B. and Hobart's Reports, C. 351.] See (S. a) pl. 36. S. C. and the notes there.

(I, b) For Words. *Innuendo.*

[1. IF one man ſays of another, *he hath forſworn himſelf* (innuendo *before the juſtices of aſſize, &c.*) this innuendo ſhall not make the words actionable, becauſe it cannot be collected by the words that he intended that which by the *innuendo* is ſuppoſed. Paſch. 40 Eliz. B. R. the laſt caſe adjudged.] Cro. E. 699. pl. 14. Anon. S. C. adjudged accordingly. *Thou art falſely forſworn in Bell-court* (innuendo *a court baron held at Bell*) per cur. with this innuendo the action lies, otherwiſe not. Cro. E. 297. pl. 4. Paſch. 35 Eliz. B. R. Green v. Dancy.

In an action for words, the plaintiff declared of a ſuit in Colcheſter court, and a trial there before the bailiff; and that the plaintiff gave in evidence his knowledge, and the defendant ſaid, *Thou art as much*

much forsworn (innuendo in the evidence given as above) *as God is true.* Adjudged that the innuendo will not maintain the action. Brownl. 7. Trin. 12 Jac. Tillet v. Bruen.

He forswore himself at the bar (innuendo the bar of C. B.) will not maintain an action. Hutt. 44. Pasch. 19 Jac. said.

(Z. a) pl. 18. S.C. but S. P. does not appear.—— Yelv. 21.

*[2. If one man says of another, *he did burn my barn* (innuendo *a barn with corn*) *with his own hands, and none but he*; this innuendo will not make the words actionable. Co. 4. Barham 20. adjudged.]

Mich. 44 & 45 Eliz. B. R. Barham v. Netherfal S. C. and S. P. adjudged by 2 judges, they only being in court. —— Noy. 155. S. C. but S. P. does not appear.

Fol. 83.

(Z. a) pl. 19. S.C. but S.P. does not appear.

*[3. So if one man says of another, *he has burnt my barn* (innuendo *a barn with corn, and adjoining to a dwelling-house*) *and if my lord had done him justice, he should have been hanged for it.* This innuendo will not make words actionable. Trin. 43 Eliz. B. R. between Levett and Hawthorne, per curiam.]

—— Cro. E. 834. pl. 4. Lovet v. Hawthorn S. C. and S. P. by the other justices, præter Fennet.

(E. b) pl. 6. S. C. but S. P. does not appear.—— Cro. J. 343. pl. 9. S. C. and it was insisted that († *adtunc*) referred to the time of the declaration, and therefore all the justices and barons held that the action lay not. —— Hob. 6. pl. 12. S. C. in the exchequer-chamber held accordingly, that the action lay not. —— Roll. Rep. 24. pl. 2. S. C. but S. P. does not appear.

*[4. In an action upon the case, if the plaintiff declares that the defendant said to him these words, *thou hast poisoned Smith* (quendam Samuelem Smith innuendo *adtunc defunctum*) *and it shall cost me* 100*l. but I will hang thee.* This is not a sufficient averment of the death of *Smith*, it being only in the *innuendo*, and without this the action does not lie. Pasch. 11 Jac. B. between Jacob and Miles, adjudged, the same case Hobart's Reports 8.]

† So (*modo defunct'* innuendo) extends not to the time of speaking, but of bringing the action. Cro. J. 215. pl. 12. Mich. 6 Jac. Pritchard v. Hawkins, by all the judges and barons in the exchequer-chamber, and so reversed a judgment in B. R. —— 13 Rep. 71. S. C. and judgment reversed in the exchequer-chamber; for instead of (*modo defunct'*) it should have been (*tunc defunct'.*) —— Jenk. 330. pl. 58. accordingly, and that it should have been (*tunc defunct'* at the time of the speaking.)

Thou hast killed my brother (innuendo C. fratrem nuper mortuum.) It was objected that it was not said that he was dead at the time. And per tot. cur. the words are not actionable without averment that he was dead, and the innuendo does not help it. Mar. 109. pl. 187. Trin. 17 Car. C. B. Anon.

So *thou hast murdered thy husband*, innuendo J. S. *jam defunct'*. And because it was not alleged expressly that the plaintiff's husband was dead at the time of speaking the words, it was adjudged against the plaintiff. Yelv. 22. 21. Mich. 44 & 45 Eliz. B. R. Bolderoe v. Porter.

*[5. In an action upon the case by doctor *Everard*, if he declares that he was instituted and inducted into a benefice called *Welby* in *Northamptonshire*, and that the defendant, to the intent to slander his title thereto, said these words, *the parsonage of Welby is none of the doctor's* (querentem innuendo) this is not a sufficient averment that the words were spoke of the plaintiff, there being *no discourse of him before.* Mich. 12 Jac. B. R. between doctor Everard and Ball, adjudged in arrest of judgment.]

*[6. In an action upon the case for these words, *thou art a traitor, and an arch-traitor, and I will hang thee, or hang for thee*; if the *defendant pleads that* the *plaintiff said these traiterous words* of the king, viz. *the king* (*regem Jacobum innuendo*) *is a scurvy king*, by reason of which words he spoke the words in the declaration, this is

is no good *juſtification*. Paſch. 16 Jac. B. R. between WHITBROOKE AND SMITH, adjudged.]

[7. In an action upon the caſe, if the plaintiff declares that the defendant ſaid theſe words, *thou art a thief, and ſtoleſt a mare (innuendo the plaintiff)* without an averment that the words were ſpoke eidem querenti vel de eodem querente, as the uſe is; this is not good, becauſe it does not appear of whom they were ſpoken, and the *innuendo* will not help it. Paſch. 11 Car. B. R. between † BURGESS AND REEVES, adjudged in a writ of error upon a judgment in * bank, and this reverſed accordingly. Intratur Hill. 10 Car. Rot. 974. *though in the writ it was* well, ſcil. *dixit eidem querenti*. Trin. 1650. between ‡ SMITH AND ANDREWS, adjudged in a writ of error upon a judgment in banco. Intratur Trin. 1659. Rot. 1649. and yet there was laid a *communication of the plaintiff*.]

† (K. b) pl. 7. S. C.

‡ (K. b) pl. 7. S. C.

[8. In an action upon the caſe, if the plaintiff declares that whereas J. S. had made to him a bill of 40l. debt, and had ſealed and delivered it, the defendant ſpoke theſe words of him, *that he had ſhewed him a bill of* 40*l. (meaning that bill) releaſed* [cancelled or unſealed] *and after ſhewed it him ſealed, and that he had forged the ſaid ſeal to the writing*; the action does not lie for this declaration, for the *innuendo* is not a ſufficient averment that the words refer to the ſaid bill of 40l. *without alleging a diſcourſe thereof before*. Hobart's Reports 63. between HARVEY AND DUCKIN, Paſch. 13 Jac. B. adjudged; for the words of themſelves are uncertain.]

Hob. 45. pl. 49. S. C. adjudged againſt the plaintiff, for ſince the words were only (a writing) which is utterly uncertain, an innuendo will not change the matter of the words; for that is to make the words otherwiſe than they were by an innuendo. —— Brownl. 9. Harvey v. Bucking S. C. and judgment arreſted. —— S. C. cited Arg. 2 Keb. 640. pl. 67. Paſch. 22 Car. 2. B. R. in caſe of Warre v. Ryder, which was for ſaying that *he forged* the hand of T. R. to *an acquittance*, and the *acquittance being ſhewn*, judgment was given for the plaintiff, the colloquium being now obſolete, and de querente ſufficient.

[9. In an action upon the caſe, for ſaying that *the plaintiff was perjured in his anſwer in the ſtar-chamber*, innuendo in a certain bill of complaint exhibited there by the now plaintiff againſt the now defendant, whereas all know that the plaintiff there is not ſworn to his bill; yet *becauſe the words of themſelves are actionable, though the innuendo is repugnant thereto*, the *action is maintainable*. Paſch. 40 Eliz. B. R. between CORBETT AND HILL, adjudged.]

(F. a) pl. 15. S. C. but S. P. does not appear. —— Cro. E. 609. pl. 13. S. C. adjudged accordingly.

[10. [*So*] in an action upon the caſe, for ſaying of the plaintiffs, *you and your wife are witches, and have bewitched my mare* (innuendo *the mare of the defendant*) [*plaintiff*] this is a repugnant and void *innuendo*, and the action lies for the words without an *innuendo*. Mich. 14 Car. B. R. between SMITH AND COKER, adjudged, this being moved in arreſt of judgment. Intratur Trin. 14 Car. Rot. 1499.]

Fol. 84.

The (innuendo *the mare of the plaintiff*, ſhould have been the mare *of the defendant*) and as it is ſaid the mare of the plaintiff, it is repugnant to the preceding words, &c. And judgment for the plaintiff. Cro. J. 512. pl. 7. S. C. —— Jo. 409. pl. 1. S. C. but S. P. does not appear. —— (H. a) pl. 28. S. C. but S. P. does not appear.

11. *There is a villain now broken into my mother's house to rob her, and is in the house* (innuendo the plaintiff.) It was doubted among the juſtices, if the innuendo can reduce thoſe words to the plaintiff to have action upon them. Mo. 401. pl. 530. Paſch. 37 Eliz. Bale v. Rodes.

Mo. 396. S. P. in pl. 516.——

12. *Innuendo helps nothing, unleſs the words precedent have a violent preſumption of the innuendo.* Cro. E. 428. in pl. 30.

Ow. 57. S. Popham and Gawdy.——*Thou haſt ſtolen half an acre of my corn* (innuendo *corn ſevered.*) Adjudged not actionable, becauſe the innuendo is not to the purpoſe, unleſs the preceding words had purported a vehement ſuſpicion that the corn was ſevered. But otherwiſe it would be if he had ſaid, that *thou haſt ſtolen ſo many load or buſhels of corn*, becauſe there the innuendo might explain it, with a common intendment that the ſpeaking was of corn ſevered. Mo. 396. pl. 516. Hill. 37 Eliz. Cattleman v. Hobbs.——Cro. E. 428. pl. 30. S. C. adjudged accordingly.——Ow. 57. S. C. adjudged accordingly.

An innuendo *in effect ſtands in the place of a prædict', but it cannot make a perſon certain who was uncertain before.* 4 Rep. 17. b. pl. 12. Mich. 41 & 42 Eliz. B. R. per cur. in caſe of James v. Rutlech, which ſee at (Y. a) pl. 21. and the notes there.

The *nature of an innuendo is to explain words doubtful, in ſuch caſe where there is matter ſufficient in the declaration to maintain the action.* But if the words before the innuendo do not ſound in ſlander, no words produced by the innuendo will make the action maintainable; for it is not the nature of an innuendo to beget an action. Arg. and agreed by Gawdy and Yelverton J. they only being in court. Yelv. 21. Mich. 44 & 45 Eliz. B. R. in caſe of Barham v. Netherſal.——S. P. 10 Mod. 197, 198. Hill. 12 Ann. B. R. in caſe of Harriſon v. Thornborough.

* No innuendo will *ſupply matter which give not cauſe of action on the juſtification*, but the words ought to contain ſcandal in themſelves, without any ſupplement. Hutt. 44. Paſch. 19 Jac. ſeems to be ſaid only Arg.——See (Z. a) pl. 13. in the notes, Brown v. Brinkley.

* [527]

13. The plaintiff declared, that the defendant, to defame him, being a merchant, *ſaid de præfato the plaintiff*, viz. *he* (innuendo the plaintiff) *is a bankrupt.* Reſolved, that if (de præfato) had been omitted, the plaintiff could not have judgment; for innuendo makes no certainty where none was before; but as it is, the plaintiff had judgment. 2 Roll. Rep. 243. Mich. 20 Jac. B. R. Scutt v. Hawkins.

But if one declares barely, that the defendant ſaid, *he* (innuendo the plaintiff) *is a thief*, and ſets forth no communication, or ſpecial matter, or the like, the plaintiff never ſhall have judgment; per Doderidge and Haughton. 2 Roll. Rep. 244. Arg.

14 There needs no innuendo where the *words are ſpoken to the perſon himſelf;* per Chamberlaine J. 2 Roll. Rep. 243, 244. Mich. 20 Jac. B. R.

16. In diſcourſe betwixt the defendant and J. S. of one S. Godwin, and A. the plaintiff's wife, the defendant ſpake theſe words of the ſaid S. G. and A. *S. G. hath ſtolen away ſuch goods, and ſhe* (innuendo the plaintiff's wife) *was privy, and conſenting thereunto.* Reſolved the words were actionable, reddendo ſingula ſingulis; and (ſhe) cannot be referred to S. G. but to the plaintiff's wife. And to ſay one is privy and conſenting to the ſtealing the goods is actionable; for he accuſeth her to be acceſſary. And judgment for the plaintiff. Cro. C. 236. pl. 18. Mich. 7 Car. B. R. Mot and A. his wife v. Butcher.

17. *Jezebel your daughter* (innuendo *Frances* your daughter) *hath a falſe key, and hath ſtolen* 10*s. out of my box.* The jury found that the words were ſpoken of her. Per Vaughan Ch. J. Jezebel is taken proverbially for a name of reproach, and ſo he thought a good action lies; to which the others agreed. Cart. 231. Mich. 23 Car. 2. C. B. Aſhby v. Billingley.

18. Caſe,

18. Caſe, for that the defendant went to a juſtice, &c. and ſaid, *I have loſt ſome ſheep, and do ſuſpect quendam J. O.* (innuendo the plaintiff;) and thereupon procured the ſaid J. O. to be arreſted, &c. It was moved in arreſt, that the innuendo was not a ſufficient averment that the plaintiff was the party meant by (quendam J. O.) and *no colloquium laid*, &c. Judgment was ſtaid. 2 Show. 59. pl. 44. Paſch. 31 Car. 2. Oſborn v. Key. Vent. 337. Anon. S.C. and judgment reverſed; and per cur. the declaration not ſaying, that the words were ſpoke of the plaintiff, the innuendo is not ſufficient; and it is the worſe becauſe (quidam J. O.) imports another perſon than the plaintiff.

19. *Thou art a forſworn man, and didſt take a falſe oath againſt me before juſtice Scawen* (innuendo Scawen a juſtice of peace.) Judgment was ſtayed; for though it is actionable to ſay that one is forſworn before a juſtice of peace, yet it does not appear here that Scawen was a juſtice of peace, otherwiſe than by the innuendo; and it may be that a man's name is Juſtice Scawen. 3 Lev. 166. Mich. 35 Car. 2. C. B. Gurneth v. Derry.

(K. b) Where the Words are *uncertain of whom they were ſpoke. What* ſhall be *a good Averment* that they were ſpoke of him. [528]

[1. IN an action upon the caſe, if the plaintiff declares that there was a *diſcourſe* of the plaintiff between the defendant and J. S. and the defendant ſaid theſe words of the plaintiff, *go tell my landlord* (innuendo *the plaintiff*) *I ſay he is a thief, and ſtole two ſhutters for a window; and I will hang him if any law will do it, and if I cannot do it, the bailiff ſhall do it;* this is not a ſufficient averment that the words were ſpoke of the plaintiff, there *not being any averment that he was the landlord of the defendant.* Mich. 11 Car. between SPENCER AND MUDBURNE, the court being divided thereupon in arreſt of judgment. But after, Hill. 11 Car. judgment was given againſt the plaintiff, quod nil capiat per billam.] Cro. C. 420. pl. 10. S.C. the court was divided; and after, to avoid further queſtion, it was advited, that the plaintiff ſhould relinquiſh his action, and amend this fault in the ſecond; and it was ordered by conſent. —— Jo. 376. pl. 2. Hill. 11 Car. B. R. Anon. S. C. and it was inſiſted for the plaintiff, that it being dixit de præfato querente, the innuendo was ſufficient without averment, but per cur. contra. —— S. C. cited Comyns's Rep. 268. in pl. 147. —— See (H. b) pl. 3. and the notes there.

[2. In an action upon the caſe, if the plaintiff, being *Delamore*, declares that there was a ſuit in *Bath* between the defendant and one S. and the defendant pleaded to iſſue; and at a trial *in Bathe* the plaintiff was ſworn as a witneſs, and ſhews his oath; and that afterward the defendant having a diſcourſe with the wife of S. of the ſaid trial and oath, ſaid theſe words of the plaintiff, *your brother Delamore* (innuendo the plaintiff *exiſtentem fratrem of the wife*) *took a falſe oath againſt me in the hall* (*innuendo, &c.*) *I would not take ſuch an oath for all the world.* After not guilty pleaded, and a verdict for the plaintiff, yet the declaration is not good, becauſe (G. b) pl. 3. S. C.

becauſe it is *not averred that the plaintiff was brother to the ſaid wife of S. to whom the words were ſpoken.* Hill. 11 Car. B. R. between DELAMORE AND HESKINS per curiam; and though the judgment given in *Bathe* was reverſed for error in the judgment, yet it was adjudged for the defendant accordingly. Trin. 11 Car. Rot. 900. for the court ſaid that the *innuendo* is not ſufficient, and without an averment it is not good, by ſaying that he ſpoke it of the plaintiff, though the jury has found for him. Quære rationem; for there was another good cauſe of the judgment, ſcilicet, inaſmuch as it was *not averred that the iſſue was joined in any trial, but* only *that at a trial he ſwore*, &c.]

See (D. b) pl. 4. S. C.

[3. If A. having a diſcourſe of *Jo. Potter*, ſays theſe words, *that perjured rogue and villain Potter*, without ſaying any more words, Jo. Potter ſhall have an action for thoſe words, *alleging a diſcourſe of him*, and that the defendant ſaid theſe words of him without other averment. Hill. 11 Car. B. adjudged, between POTTER AND LOVEDAY, this being moved in arreſt. But a writ of error was brought.]

He did not aver that he was his ſon, or that he had but one ſon. Held per tot. cur. Crooke abſente, that it was not good. Mar. 62. pl. 96. Mich. 15 Car. —— Comyns's Rep. 268. Arg. cites S. C.

[4. If *Jo. Johnſon*, junior, brings an action upon the caſe for theſe words, averring that the defendant ſaid theſe words of him to one *John Johnſon*, ſenior, *I will take my oath that your ſon ſtole my hens.* Though the plaintiff be the ſon of him to whom the words were * ſpoken, and the plaintiff avers that the defendant ſaid theſe words of him, yet the action does not lie, *without averment that he is the ſon of the ſaid* John Johnſon, ſenior, *to whom the words were ſpoken.* Mich. 15 Car. B. R. between JOHNSON AND DIER, per curiam, in arreſt of judgment; and this ſtayed accordingly.]

* [529]

Fol. 85.

[5. If *Robert Nelſon* brings an action upon the caſe, and declares that the defendant having communication with certain of the king's liege people of the plaintiff, ſpoke of the plaintiff theſe words, *Captain Nelſon (innuendo the plaintiff) is a rogue and a thief, and hath ſtolen away my goods, and I will prove him a thief.* This is a good declaration to maintain an action, *without any averment that he was a captain*, or known by this name, inaſmuch as there was communication of the plaintiff, and it is averred that the words were ſpoke of the plaintiff, and there *ſhall not be intended plurality of Nelſons.* Trin. 22 Car. B. R. between NELSON AND SMITH adjudged, this being moved in arreſt of judgment. Intratur Paſch. 22 Car. Rot.]

See (F. a) pl. 29. S.C. and the notes there.

[6. And *the like caſe*, Mich. 22 Car. B. R. between OSBORN AND BROOKES, the caſe being that the defendant having communication with J. S. of the plaintiff, ſaid of him, *Captain* Oſborn *is forſworn, and his oath is upon record.* Intratur Trin. 22 Car. Rot. 767. per curiam, but not adjudged, as I believe.]

[7. In an action upon the caſe, if the plaintiff declares that the defendant ſpoke certain ſcandalous words, viz. *thou ſtoleſt my mare*, &c. or ſuch like, *without an averment that they were ſpoke eidem querenti, or de eodem querente*, as the uſe is, becauſe otherwiſe it

cannot

cannot appear to the court that they were ſpoke to the plaintiff, or of him. Paſch. 11 Car. B. R. between * BURGESS AND REEVES adjudged in writ of error upon a judgment in bank, and this reverſed accordingly, though it was *innuendo* the plaintiff. Intratur Hill. 10 Car. Rot. 674. though the writ was well, ſcilicet, dixit eidem querenti. Trin. 1650. between † SMITH AND ANDREWS adjudged in a writ of error upon a judgment in *bank*. Intratur Trin. 1649. And yet there was alleged a diſcourſe of the plaintiff, and that the defendant ſaid the words, *he, &c.*]

* (I. b) pl. 7. S. C.

† (I. b) pl. 7. S. C

[8. In an action upon the caſe, if the plaintiff declares that the defendant *habens colloquium cum querente*, the defendant in preſence and hearing of ſeveral other perſons ſaid theſe words, *thou (innuendo the plaintiff) art a thief*, &c. but does *not allege that they were ſpoke of or to the plaintiff*, according to the uſual courſe, yet is this good; for it ſhall be intended they were ſpoke to the plaintiff; for inaſmuch as the colloquium was between the plaintiff and defendant, it cannot be intended but that the words were ſpoke to him with whom the colloquium was, it being alleged to be ſpoke upon the colloquium. Mich. 1651. between BISHOP AND FITZHERBERT, per curiam. Intratur Trin. 1651. Rot. 1301.]

Sty. 298. S. C. adjudged for the plaintiff. *I never was a traitor to the ſtate, as you have been.* It was moved that the words were not ſhewn to be ſpoke of or to the plaintiff; but it was anſwered that the words being ſpoke upon conference betwixt the parties, a ſufficient averment thereby appears that the words were ſpoken of the plaintiff. Judgment for the plaintiff, niſi, &c. Sty. 435. Hill. 1654. B. R. Lamplugh v. Hewſon.

§[530]

[9. In an action upon the caſe for words, if the plaintiff declares that the defendant having a *diſcourſe of* the plaintiff with diverſe perſons, ſaid theſe words of the plaintiff, viz. *your father (meaning the plaintiff) hath ſtruck and killed Nicholas Ruſſel.* After a verdict § for the plaintiff he ſhall not have judgment upon this declaration, becauſe it is *not averred that he was father to him to whom the words were ſpoken, nor that he had any ſon there at the time of the ſpeaking* the words, ſo that it is uncertain of whom the words were ſpoken, and without ſuch an affirmative it is not ſufficient to ſay that he ſpoke them of the plaintiff. Hill. 1652. between BURROWES AND USHER, adjudged, contra querentem per curiam, after a verdict for the plaintiff. Intratur Trin. 1652. Rot. 1037.]

S. C. cited Comyns's Rep. 268. in pl. 147. *Thy father (prædictum querentem,* innuendo) *is a thief; for he ſtole my ſheep.* The declaration is not good, becauſe it does not ſhew that the words were ſpoke to the plaintiff's ſon; per tot. cur. præter Gawdy. Goldſb. 187. pl. 131. Hill. 43 Eliz. Badcock's caſe.——Cro. E. 416. pl. 11. Mich. 37 & 38 Eliz. B. R. Badcock v. Atkins, S. C. adjudged for the defendant by all except Gawdy; for it cannot be intended to be ſpoke of the plaintiff more than of any other perſon, unleſs it had been averred that his ſon was preſent. But Gawdy held it ſhould be intended; for otherwiſe he could not have ſaid (thy father.) —— S. C. cited per cur. Cro. E. 429. in pl. 32. and ſays, that in this caſe the words were ſpoken in the preſence of divers others. —— S. P. adjudged accordingly per tot. cur. and the innuendo does not help it. Cro. C. 92. pl. 16. Mich. 3 Car. C. B. Phelps v. Lane. —— S. P. Cro. C. 177. pl. 25. the court were divided; Hyde Ch. J. and Jones doubted if the action was not maintainable, becauſe it was alleged that the defendant ſpoke of the plaintiff, and is found guilty; but it was anſwered that ſo the words are in every declaration, and ſo it was in the caſe of Harvey v. Chamberlain, and in that of Bennet v. Codnam; but the words not being put in certain, nor aided by averment, the declaration is not good, nor can be helped by the verdict. Et adjornatur. Mich. 5 Car. B. R. Shalmer v. Foſter.

I did not know that W. (innuendo *the plaintiff*) *was thy brother; he hath forſworn himſelf, and I will prove him perjured, &c.* The plaintiff declared that he ſpoke theſe words in the preſence of one Lumley. It was objected that it was not averred that Lumley was the plaintiff's brother; ſed non allocatur; for being alleged to be ſpoken in the preſence of one only, it cannot be intended but it was the plaintiff, if the other revera be his brother, and therefore may be helped by the innuendo; but otherwiſe where ſpoken in the preſence of divers others. Cro. E. 429. pl. 32. Mich. 37 & 38 Eliz. B. R. Woodroff v. Vaughan. —— Mo. 365. pl. 498. S. C. but S. P. does not appear.

10. *Mr. Price, you do my Ld. Burleigh wrong that you do not apprehend Jeremy Johnſon* (innuendo the plaintiff) *for a felon, and ſeize his goods; for he* (innuendo the plaintiff) *hath ſtolen a ſheep from Wright of Riſby*, (innuendo John Wright.) It was moved in arreſt of judgment, becauſe the words are *not alleged either in the writ or count to be ſpoke of the plaintiff, but only in reciting them*, he ſays, innuendo the plaintiff, which will not maintain the action; and the court was of that opinion, and gave judgment for the defendant. Cro. J. 126. pl. 12. Trin. 4 Jac. B. R. Johnſon v. Aylmer.

11. *Your daughters* (innuendo the plaintiffs) *are whores, and play the whore for their ſilk gowns, and are J. S.'s whores*; and laid ſpecial damage. Exception was taken that it was uncertain of whom the words were ſpoke, ſince there might be more daughters; but per cur. it could not be better laid, the innuendo being of the plaintiffs. Judgment for the plaintiffs, niſi. Keb. 525. pl. 15. Trin. 15 Car. 2. B. R. Henacre, &c. v.....

[531] (L. b) *How* it ſhall be *brought for Words not well known* to the Juſtices, *without an Averment*. And where an Averment ſhall aid it.

Fol. 86.

[1. IF an *action* be brought *for words of ſlander, according to the phraſe of the country where they are ſpoken*, though the court does not know what they ſignify, yet the action lies without an averment of the ſignification; for the *judges of themſelves ought to take notice of Engliſh words ſpoke in any county*. Mich. 14 Jac. B. adjudged. Hob. Rep. 169. cites 6 Jac. in *banco*. An action lies for theſe words, * *thou art a healer of felons*, without an averment how the words are taken, being informed that in ſome countries they are taken for a furtherer of felons.]

* S. P. adjudged actionable, the words being ſpoken in Devonſhire, where (healer) ſignifies the ſame as hider or concealer. Noy 153. Pridham v. Tucker.——Yelv. 153. Paſch. 7 Jac. S. C. in B. R. adjudged for the plaintiff, there being theſe additional words, viz. *and haſt ſhewed ſuch favour to a horſe-ſtealer in thy conſtableſhip, that thereby both the horſe and thief were conveyed away, and it lieth in my power to hang thee.*——S. C. cited Hob. 127. in pl. 157. as adjudged, and that without any averment how the words were taken, becauſe the court was informed and took knowledge that in ſome countries it was taken for a ſmotherer and coverer of felons.

S. C. cited per cur. 12 Mod. 592. Mich. 13 W. 3.

[2. If B. ſays of A. a *merchant*, (having a diſcourſe with him concerning ſeveral reckonings and accounts between them for ſeveral ſums of money, to the ſaid A. by B. then due,) *thou art a baſe knave, a cheating knave, thou haſt cozened me of* 400*l.* *or* 500*l. thou art a beggarly knave, and I will make thee fly England.* Though no action lies for theſe words of themſelves, yet if there be an averment that *theſe words* (thou art a beggarly knave, and I will make thee fly England,) *in London*, where theſe words were ſpoken, *have the ſame ſenſe as* if he had called him *bankrupt*; in this caſe, if the defendant demurs upon this declaration, or if it be found by verdict, the action lies for theſe words. Trin. 13 Car. B. R. between DUNCAN AND KNOT, adjudged upon a demurrer; and ſo in ſuch a caſe, in effect, adjudged upon a verdict the ſame term.]

[3. If

[3. If a man ſays to A. who is *a dyer* by his trade, *thou art not worth a groat*, no action lies for theſe words, though it be *averred that in Exeter, where theſe words were ſpoken, it is tantamount*, as if he had ſaid, *thou art a bankrupt;* for theſe words are well known to the judges, and there needs no averment, and the averment will not inforce them contrary to the true ſenſe of the words, which is well known to the judges; and if he is not worth a groat, yet his credit may be good, as is the caſe of many tradeſmen. Paſch. 15 Car. B. R. between MOON AND AXE, adjudged per cur. in a writ of error upon a judgment in *Exeter*, and the judgment reverſed accordingly. Intratur Mich. 14 Car. Rot. 213.]

Mar. 15. pl. 37. Paſch. 15 Car. Mead v. Axe, S. C. adjudged upon a writ of error not actionable; but if he had *laid ſpecially that he was damnified, and had loſt his credit, and that none would truſt him*, the words would be actionable upon this ſpecial matter.——S. C. cited by the name of Moon v. Moxham, as adjudged accordingly. Raym. 184. Arg.—— S. C. cited accordingly, 2 Keb. 549. in pl. 25 Arg.——S. C. cited per cur. 12 Mod. 592. Mich. 13 W. 3. and ſays the averment ſignifies nothing in the caſe, for it does not alter the name of the words; for to ſay of a trader in any place that he is not worth a groat, imports a ſcandal, and nobody will truſt a man that is thought to be worth nothing.

[4. If a man ſays of A. to his maſter (who is a *ſhoemaker*, and A. his *journeyman*, and the foreman of his ſhop, and uſed to cut leather to make ſhoes, and to ſell goods for his maſter,) *it is no matter who hath him; for I warrant whoſoever hath him, he will cut him out of doors;* theſe words, with an averment that in *London* (where they were ſpoken) amount to as much as if he had ſaid that he would undoe his maſter, which ſcandalizes him in his trade, [are actionable.] There were other words alſo, ſcilicet, he went to J. S. to receive for me 20l. and cozened me of 20s. before he came home; but the court relied not upon theſe, but gave judgment for the other words that the action lies. Paſch. 15 Car. B. R. between ELLIS AND HUNT, adjudged per curiam, it being moved in arreſt of judgment that the action did not lie. Intratur Hill. 14 Car. Rot. 1218.]

See (U. a) pl. 8. S. C. and the notes there.

[532]

[5. If a man brings an action upon the caſe againſt another, for ſpeaking of him certain ſcandalous *Welch words*, though he does not put the Engliſh of them in the declaration, yet the declaration is good; for the court ought to take information by Welchmen what the words ſignify. Hob. Rep. 169. an anonymous caſe, adjudged, and there cites Trin. 43 Eliz. 3024. between * WILLIAM VERCH, HOWEL, AND EVAN GEORGE, adjudged, B. R. and alſo Paſch. 44 Eliz. Rot. 8034. adjudged.]

Hob. 126. pl. 157. ſeems to be S. C. and was for calling the plaintiff *adulterer* in the Welch tongue, but did not aver what the word did import; but averred that it was in the preſence of divers that underſtood the Welch tongue. The court took information from Welchmen what the word meant in Engliſh, wherein they were ſatisfied it was the ſame as perjured in Engliſh, and gave judgment for the plaintiff.

* Fol. 87.

If words ſpoke in Welch *ſignify that the plaintiff is perjured*, but the plaintiff turns them into Engliſh words which do not amount to perjuy, (as that the plaintiff is forſworn,) an action lies not for them; per Roll Ch. J. and therefore judgment was ſtayed. Sty. 263. Paſch. 1651. Roſſe v. Lawrence.

6. *Thou art a limer, and an outputter*, adjudged actionable, becauſe in the country where they were ſpoke, a limer ſignified a thief,

Palm. 441. cites S. P. as to (out-

putter,) and that it signifies one that robs by the highway.

thief, and an outputter signified a receiver of felons. Arg. Dal. 97. in pl. 27. cites 4 H. 8. Bradno v. the Prior of Tinmouth.

S. C. cited Mo. 419. in pl. 574. as Norfolk's case.——S. P. cited Yelv. 153. as actionable.——Palm. 64. S. P. cited as actionable.——S. P. cited by Jones J. Mar. 2. in pl. 3.

7. *Thou haſt ſtrained a mare*, (innuendo carnaliter cognovit equam.) The jury found the words, and likewiſe the meaning, to be carnaliter cognovit; and adjudged for the plaintiff, becauſe the verdict found preciſely that this was his meaning, and it is a phraſe of the country. Cro. E. 250. pl. 15. Mich. 33 & 34 Eliz. C. B. Coles v. Haviland.

8. Where one called an attorney *champertor*, it was objected that this was *a word of art*, and not to be underſtood by the vulgar, and ſo no damageable ſlander any more than for words in Latin or Welch, except you ſay that the hearers underſtood it; but it was reſolved that this being in Engliſh, and *of a certain and ſingle ſenſe*, the court cannot doubt but it was underſtood. Hob. 117. pl. 145. Box v. Barnaby.

* Het. 175. S. C. adjudged.——Hutt. 8. Gibbs v. Davie, S. C. adjudged accordingly.——Noy 19. S. C. judgment was arreſted; for the words ſhall be taken in mitiori ſenſu.

9. In action for ſpeaking Welch words in preſence of divers underſtanding that language, witneſſes were ſworn as to the ſignification of the words; ſome depoſed they ſignified ſtealing, which others denied; but all agreed that the proper ſignification was bearing (or * carrying away;) and thereupon judgment was given againſt the plaintiff. Hob. 191. pl. 239. Trin. 15 Jac. Gibbs v. Jenkins.

[533]

10. *L. marked and took up the ſheep of B. with a fleſh-mark of his own, as his own ſheep*; and averred that by marking with a fleſh-mark *is underſtood ſtealing in the county of Southampton*, and ſo B. crimen felonie ei impoſuit. Per cur. with theſe averments the words are actionable; and judgment for the plaintiff, niſi. 2 Keb. 289. pl. 66. Mich. 19 Car. 2. B. R. Linter v. Butler.

11. *Two dyers are gone off*, (innuendo become bankrupt) *and for aught I know H. will be ſo too within theſe* 12 *months*. Per cur. the ſignification of the words (gone off) are very well known among merchants, and the innuendo here is not introductory of new matter, but explanatory only of the foregoing words; and judgment for the plaintiff. 10 Mod. 196. Hill. 12 Ann. B. R. Harriſon v. Thornborough.

(L. b. 2) Declaration good. In general.

Caſe, &c. for theſe words ſpoken of a

1. ACTION upon the caſe for calling the plaintiff *falſe juſtice of the peace, vel his ſimilia*; theſe words, *his ſimilia*, were ordered to be *ſtruck out* of the book [declaration] per cur.

for the uncertainty. Br. Action ſur le Caſe, pl. 112. cites 4 E. 6.

juſtice of peace, *he makes uſe of the king's commiſſion to worry me out of my eſtate.* And afterwards the words were laid in Latin (without an anglice ad tenorem & effectum ſequen'.) It was moved, that being laid ad tenorem & effectum ſequen', ſomething may be omitted which may alter the ſenſe; and 'tis not an expreſs allegation that the defendant did ſpeak thoſe very words. And for this reaſon judgment was ſtaid, though the court held them actionable. 3 Mod. 71. Mich. 1 Jac. 2. B. R. Newton v. Stubbs. ——— 2 Show. 435. pl. 399. S. C. adjudged for the defendant. But the reporter makes a quære if the principal caſe was not well enough after a verdict, the (ad effectum) being but ſurpluſage; for it is ſaid hæc falſa & ſcandaloſa verba ad effectum ſequent'. So that it is ſufficiently certain, by ſaying, hæc, &c. and the other words, as idle, ought to be rejected; had it been quædam verba ad effect. ſequent. it had been undoubtedly ill; but however after much debate, judgment was pro def. in Michaelmas term following, it having been after moved.

2. Action for *ſpeaking ſlanderous words at D. and S.* is not good; for it is not poſſible to ſpeak the ſame words at divers places at one and the ſame time; but if it were at divers times, he may have ſeveral actions. Dal. 106. pl. 55. 15 Eliz.

3. In an action upon the caſe for ſlander, and thereupon error was brought, becauſe it was *not expreſſed* in the declaration, *quod malitioſe dixit* thoſe words. And adjudged that that is no error; for the words themſelves are malicious and ſlanderous, ſo judgment affirmed. Noy 35, 36. Mercer v. Sparks.

Ow. 51. Trin. 28 Eliz. S. C. adjudged accordingly. — Jenk. 268. pl. 80. S. C. adjudged and affirmed in error; for ſince the words are ſcandalous, they are eo ipſo malicious.

In an action for words, it is not neceſſary that they be alleged to be ſpoken *falſo & malitioſe*, though ſuch words are neceſſary in indictments. Sty. 392. per Roll Ch. J. Mich. 1653. Anon.

4. In action for ſcandalous words, the plaintiff declared, *that the defendant in præſentia diverſorum malitioſe dixit, he hath, &c.* It was objected that this may be, and yet no ſlander; for it may be in their preſence, and they not hear it. But this exception was waived, for it ſhall be intended that they heard it alſo. Noy 57. Trin. 38 Eliz. Hall v. Hemmſly.

Cro. E. 486. pl. 3. Hall v. Hennerſley, S. C. held accordingly.

5. In action for words, the declaration was, *quod propalavit quædam ſcandaloſa verba, prout in his Anglicanis verbis ſequent'*, (viz.) *thou*, &c. and it may be the words were ſpoken in another language, which they who were preſent underſtood not, and then there is not any cauſe of action, as it hath been adjudged before theſe times. Sed non allocatur; for it ſhall be intended that he ſpake anglicana verba, and the words prout in his anglicanis verbis ſequent' *is tantamount as if he had ſaid, hæc anglicana verba ſequentia.* Cro. E. 573. pl. 13. Trin. 39 Eliz. C. B. Bate v. Rookwood.

[534]

6. Caſe, for that he ſpake of the plaintiff, *quædam ſcandaloſa verba, quorum tenor ſequitur in hæc verba, thou, &c. vel conſimilia*, held not actionable; and Walmſley ſaid it was by reaſon of the word (conſimilia) as it was adjudged in Garter's caſe. Beſides, the alleging that he ſpake divers words, quorum tenor ſequitur is ill; and therefore it was ordered that the roll be amended. Cro. E. 645. pl. 52. Mich. 40 & 41 Eliz. B. R. Hale v. Cranfield.

The words quorum tenor, &c. is ill, per tot. cur. for ſomething might be omitted in the quorum tenor, &c. which was within the words, which would cauſe the words not to be actionable; wherefore judgment was ſtayed. Cro. E. 857. pl. 24. Mich. 43 & 44 Eliz. C. B. Carford v. Clark. — S. C. cited Hardr. 2. — S. C. cited 2 Show. 436. — So being laid that he *ſpake theſe ſcandalous words [hæc ſcandaloſa verba] ad tenorem & effectum ſequentem*, ſome may be omitted which may alter the ſenſe and meaning of

of them; and therefore the judgment was ſtaid, though the court held the words actionable. 3 Mod. 71, 72. Mich. 1 Jac. 2. B. R. Newton v. Stubbs. —— 2 Show. 435. pl. 390. S. C. adjudged accordingly. The reporter adds a quære if the principal caſe was not well after a verdict, the (ad effectum) being but ſurpluſage; ſo that it is ſufficiently certain, by ſaying (*hæc*, &c.) and the other words, as idle, ought to be rejected. That had it been (*quædam verba ad effectum ſequentem*) it had been undoubtedly ill; but ſays that however, after much debate, it being after moved, judgment was for the defendant in the Michaelmas term following.

6. The plaintiff declared, *that the defendant ſpake theſe words of him, thou art, &c.* It was objected that the declaration was ill. Sed non allocatur; for being ſpoken to the plaintiff they are ſpoken of him, and are all one. Cro. J. 39. pl. 2. Mich. 2 Jac. B. R. Kellan v. Maneſby.

Roll. Rep. 70. pl. 24. Sell v Fairee S.C. & S.P. by Coke, Crooke, and Doderidge, S.C. & S.P. cited as adjudged Het. 18.

7. In an action for ſcandalous words, plaintiff *declared quod intendebat & conatus fuit to marry ſuch a woman, and that by reaſon of ſuch and ſuch words ſpoke of him ſhe did refuſe him.* It was moved in arreſt of judgment, that intendebat is only to ſhew what his intention was, and that he ſhould have ſaid, quod colloquium habitum fuit de matrimonio. And per Coke Ch. J. what conatus is, non definitur in lege. And per tot. cur. clearly, the declaration is not good; and adviſed the plaintiff to begin de novo, and to *lay an expreſs colloquium of a marriage, and a breach*, or falling off, *by reaſon of theſe words*. 2 Bulſt. 276. Mich. 12 Jac. Sell v. Facy.

Roll. Rep. 244. pl. 12. Swead v. Badley, S.C. adjudged accordingly; and Coke Ch. J. ſaid that here is injuria, but not damnum. —— 3 Bulſt. 74. Snead v. Badley, S. C. adjudged accordingly.

8. Action for ſlandering his title, and declared *that lands deſcended to him as heir* to his brother, *and he had an intent to aſſure part of them upon his ſon for his advancement, and to make leaſes of the other part;* and the defendant, to fruſtrate his intent, *ſaid*, viz. that *the plaintiff had no more right to the lands than a ſtranger*; but becauſe it was *not ſhewed that he was in communication to make leaſes, or aſſurances* to his ſon, but only that he had an intent, which might be ſecret, and not known to any, the court held it to be ill, and judgment for the defendant. Cro. J. 398. pl. 3. Paſch. 14 Jac. B. R. Smead v. Badley.

2 Roll. Rep. 373. S. C. ſays, that ſo was the opinion of Ley Ch. J. but Doderidge ſaid nothing. —Lat. 218. S. C. adjudged for the plaintiff, nil, &c.

9. Plaintiff declared, *that A. offered him M. his daughter, in marriage, and 300l. portion; and that there was a colloquium at H. between A. and B. and that H. ſaid ſuch ſcandalous words, whereupon M. refuſed to marry him.* But becauſe *no place is laid where the words were ſpoken*, judgment was arreſted; for though the colloquium was at H. yet the words might be ſpoke at another place afterwards, and it is *not ſaid ad tunc & ibidem*, as the common courſe is. Palm. 385. Mich. 21 Jac. B. R. Taylor v. Tally.

[535]

10. *Y. hath forſworn himſelf in a ſuit in the council of the Marches brought by Y.* In action for theſe words, plaintiff ſhews that a ſuit was depending there between himſelf and his wife, and J. S. It was objected that it is not ſhewn that there was a ſuit brought by him alone. Sed non allocatur. The ſuit is not material, for he is ſcandalized; and the declaration is well enough, for the firſt ſuit is not the warrant of it, but only the occaſion of ſpeaking;

ſpeaking; and in common intendment it is a ſuit by the baron, if the laſt ſuit be grounded on the firſt. 2 Roll. Rep. 471. Mich. 22 Jac. B. R. Yates's caſe.

11. A. ſaid that *B. is a good attorney, but that he would play on both ſides.* The words are actionable, but the court gave no judgment, becauſe the plaintiff did * *not declare that the words were ſpoke of himſelf.* Brownl. 5. Paſch. 13 Car. Brown v. Hook.

* Where the declaration only *charged the defendant with ſpeaking the words*, and does *not ſay dixit de querente*, it is not good; for in ſuch caſe they may be ſpoke of any other body, as well as of the plaintiff; per Roll Ch. J. to which Bacon J. agreed, and ſaid, that *the word (dixit) was not in the declaration*; and ſo it appears not whether he ſpoke, or writ, or thought the words. Judgment againſt the plaintiff, niſi, &c. Sty. 70. Mich. 23 Car. Anon.

12. The plaintiff declares, that there was a *communication of marriage between the plaintiff and one M. who was worth* 300*l. and that ſhe deferred marriage* with him, (as much as to ſay) viriſimile fuit, that they ſhould be married; and the defendant, in the hearing of divers perſons, ſaid, *M. is Mr. Edwards's whore* (innuendo the plaintiff.) Whereupon M. refuſed to marry the plaintiff. After a verdict for the plaintiff, it was moved, 1ſt, That there was no agreement of marriage, nor mutual love alleged between the plaintiff and M. 2dly, That the words were not alleged to be ſpoken of the plaintiff, but only in the innuendo; yet upon good debate, judgment was given for the plaintiff. All. 6. Mich. 22 Car. B. R. Edwards v. French.

13. *He hath forged a bond, &c.* The plaintiff declared, that the defendant *hæc ficta & falſa verba dixit.* It was objected that it ſhould be *ficte & falſo dixit.* But per cur. it is well enough. And judgment for the plaintiff. Keb. 273. pl. 60. Paſch. 14 Car. 2. B. R. Motley v. Slaney.

14. In action for ſcandalous words, the plaintiff declared that he is a limeburner, and gets his living by buying and ſelling, and the defendant ſaid of him, *de arte ſua, he is, &c.* After verdict it was objected, that it is *not* ſaid the defendant *ſpoke of the trade* of limeburning, but de arte ſua generally, and he may have another trade. Windham and Twiſden J. held that the words (de arte ſua) are applicable to plaintiff's profeſſion of a limeburner; but Hide Ch. J. and Keeling e contra, and the court being divided, no judgment was given. Raym. 86. Mich. 15 Car. 2. B. R. Terry v. Hooper.

Lev. 115. S. C. the count was, that the defendant *habens colloquium of him & de arte ſua ſaid, he is, &c.* Windham and Twiſden held, that the words being laid to be ſpoke of him † and his trade, are ſufficient, without any colloquium either of him or his trade, the ſame being found to be ſpoken of him and his trade. But the court being divided, judgment was ſtayed.——Keb. 602. pl. 75. Terry v. Cooper, S. C. adjornatur.——Keb. 644. pl. 15 & 16 Car. 2. B. R. S. C. the court was divided; & adjornatur.

† It ſeems the words (and his trade) ſhould be (and his art).

The plaintiff declared that the defendant ſpake of him ſuch and ſuch words (which were ſcandalous) *et ex uteriori malitia de ſtatu* of the plaintiff *colloquium habens*, ſaid ſuch other ſcandalous words, *quorum quidem verborum*, omitting *prætextu*, or any like word, *the plaintiff ſuſtained a ſpecial damage, ad dannum, &c.* Exception was taken, by reaſon of the want of prætextu, or occaſione; and alſo that the words are not laid to be ſpoken of his trade; for the words *de ſtatu* will not import that, but that it ought to be, *arte* vel *miſterio*; but abſente Holt Ch. J. the court gave judgment for the plaintiff, for he declaring that he was a tradeſman, the words (de ſtatu) are equivalent to (arte ſua), and to be intended of his trade, and then being ſpoke of him in his trade, the words are actionable, though the ſpecial damage had been left out of the caſe. Ld. Raym. Rep. 610. Mich. 12 W. 3. Read v. Hudſon.

3 Keb. 54. pl. 33. S. C. adjudged actionable without a colloquium; the words there being, that *he is a cheating knave, and cheats all those that deal with him in trading.*

15. In case, the plaintiff declared that he was a maltster, and the defendant habens colloquium of him and of his trade, said, *have a care of him, and do not deal with him; he is a cheat, and will cheat you; he has cheated all the farmers at E. and dares not shew his face there, and now he is come to cheat at H.* The *jury found* all the words, but that there was *no colloquium of his trade.* But per cur. *the words themselves supply the colloquium, they appearing to be spoke of his trade;* and gave judgment for the plaintiff. 2 Lev. 62. Trin. 24 Car. 2. B. R. Reeve v. Holgate.

S. C. cited per cur. 3 Lev. 338. and S. P. adjudged there accordingly, and that cumque etiam were construed for porro, and that divers clarific authors were cited to that purpose, and of such opinion were all the court in this case, and gave judgment for the plaintiff. Mich. 4 W. & M. in C. B. Cotterel v. Matthews.

16. Case for speaking such words, *cumque etiam*, the defendant *postea such a day ex uteriori malitia, spoke other words* (which were actionable.) After a verdict for the plaintiff, and entire damages, it was objected that the last declaration was not affirmative that the defendant spoke the words, but under a (cumque etiam), which is always ruled ill in trespass. Sed non allocatur; for in an action on the case, as this is, it is good, but not in trespass. And judgment for the plaintiff. 2 Lev. 163. Pasch. 29 Car. 2. B. R. Mors v. Thacker.

In action for words *laid two ways, the last count was cumque etiam*, which is but recital; & dubitatur whether good. 2 Mod. 58. Mich. 22 Car. 2. C. B. Escourt v. Cole.

S. C. cited per cur. 3 Lev. 338. Mich. 4 W. & M. in C. B.

17. Where there were *two sets of words, and the first are alleged to be spoke in auditu quamplurimorum, but the last are not so alleged,* yet per cur. the first auditu quamplurimorum runs through the whole. And judgment for the plaintiff. 2 Lev. 193. Pasch. 29 Car. 2. B. R. Mors v. Thacker.

(L. b. 3) Declaration. How. As to the Colloquium.

1. THE plaintiff declared, quod quidam malefactores ignoti had feloniously shorn the sheep of C. and that there being a communication between the defendant and another concerning the sheering of these sheep, the defendant said, *I do know who did sheer the sheep* (innuendo the said J. S.), and thereupon the other asked who it was, and the defendant answered, that *it was the plaintiff did sheer the sheep* (innuendo *felonice.*) Crooke J. held the words actionable as laid, they being taken all together. But Doderidge and Haughton contra. For the colloquium was of the sheering the sheep only, and not of the felony; and it is not laid that he knew who did sheer them feloniously, and so it is a scandal only by inference, and so clearly not actionable. But per Doderidge, if she had said, *I do know who did it,* this would refer directly to the felony before alleged to be done. It was ordered to stay till moved again by the plaintiff, which he never did, perceiving

ceiving the better opinion of the court againſt him. 3 Buſt. 83. Mich. 13 Jac. Helly v. Hender.

* 2. *He hath forged a bond, and that is not the firſt by an hundred;* the plaintiff declared that the defendant, upon a colloquium with J. S. ſpake thoſe words of the plaintiff, but did *not ſay the colloquium was of the plaintiff;* the court held that the colloquium is ſufficient. Judgment for the plaintiff. Keb. 273. pl. 60. Paſch. 14 Car. 2. B. R. Motley v. Slaney.

3. The plaintiff declared that he was produced as a witneſs in a cauſe in C. B. and depoſed nothing but what concerned the iſſue, and the defendant on diſcourſe of the plaintiff's evidence, ſaid, *M. hath forſworn himſelf in every thing he ſwore in the cauſe.* It was moved that the plaintiff did *not ſhew the matter of the iſſue, nor with whom the colloquium was;* but per cur. the averment is ſufficient; and judgment for the plaintiff. 2 Jo. 5. Intratur Trin. 21 Car. 2. C. B. Mayn v. Okey.

4. *He ſtole the colonel's cup-board cloth.* Though no colloquium was laid, either of the colonel or his cup-board cloth, yet the court held the words actionable; for they charge him with felony. 3 Mod. 280. Paſch. 2 W. & M. in B. R Anon.

5. The plaintiff declared that he is a trader, and that the defendant ſaid of him, *you are a cheat, and have been a cheat for divers years.* Holt Ch. J. at firſt held that the words muſt be underſtood of his way of living, and ſo needed no colloquium of his trade. But in another term mutata opinione judgment was arreſted. 2 Salk. 694. pl. 4. Paſch. 10 W. 3. B. R. Savage v. Robery.

5 Mod. 308. S. C. judgment was arreſted, becauſe they were words of heat, and not actionable, it not being alleged that the cheat was in any thing relating to his trade. ——— See (U. a) pl. 25, 26.

(L. b. 4) Declaration. How. As to the Auditors.

1. IN action for words, the plaintiff counted that defendant ſpoke them *in præſentia diverſorum*, but did *not ſay in auditu*, and this was moved to be ill; for if none heard them it is no ſlander. Sed non allocatur; for it ſhall be neceſſarily intended that it was in auditu, when it was in præſentia, &c. Cro. E. 487. pl. 3. Mich. 38 & 39 Eliz. B. R. Hall v. Henneſley.

Noy 57. S. C. & S. P. accordingly. —Goldſb. 119. pl. 3. S. C. but S. P. does not appear.

The plaintiff declared that the defendant *in præſentia & auditu quamplurimorum ſubditorum domini regis, ſpake theſe words* of the plaintiff, *thou art, &c.* It was moved in arreſt, &c. that this is not good, for perhaps none of them underſtood the words, and conſequently it is no ſlander. Sed non allocatur; for they are only words of form, and it had not been material if they had been left out. Cro. J. 39. pl. 2. Mich. 2 Jac. B. R. Kellan v. Maneſby. ——It being found by verdict that the defendant ſpake the words, it is not material, though he does not ſay in auditu plurimorum. And judgment for the plaintiff. Cro. C. 199. pl. 12. Trin. 6 Car. B. R. Smart v. Eaſdale. ——If it be not ſaid that the words are ſpoken in the preſence of any body, they cannot be ſcandalous; per Bacon J. Sty. 70. Mich. 23 Car. B. R.

2. The declaration was, that the *defendant palam & publice promulgavit de querente* ſuch and ſuch ſcandalous words. Exception was taken that he did not ſay that the defendant ſpoke the words in præſentia & auditu aliorum. But per cur. the

words (quod palam & publice promulgavit) imply that it was in præſentia & auditu, &c. for otherwiſe it is not palam. And adjudged for the plaintiff. Cro. E. 861. pl. 34. Mich. 43 & 44 Eliz. C. B. Taylor v. How.

3. Words ſpoke of a dyer were, viz. *thou art not worth a groat.* The plaintiff averred that theſe words, among citizens of E. where the * words were ſpoke, are underſtood all one as calling him bankrupt. Error was brought, and aſſigned that it was ſaid that defendant ſpoke the words inter diverſos ligeos of E. without ſaying citizens of E. and therefore judgment was reverſed. But the court were clear, that the words of themſelves were not actionable, and that the averment was idle, becauſe the words in themſelves imply a plain and intelligent ſenſe and meaning to every man. Mar. 15. pl. 37. Paſch. 15 Car. Meade v. Axe.

(L. b. 5) Declaration. How. As to ſetting forth his Profeſſion, Office, &c.

1. IN caſe for calling the plaintiff *bankrupt* the plaintiff had a verdict. It was moved in arreſt of judgment, that the plaintiff had *not declared that he was a merchant, or of any myſtery or trade.* And for that reaſon the court held the declaration inſufficient, and the judgment was ſtayed. Goldſb. 84. pl. 5. cites Paſch. 30 Eliz. Anon.

Thou art a beggarly knave and a bankrupt, and art not able to ſhew thy face.

2. *What art thou? a bankrupt, and waſt a bankrupt.* After verdict it was moved, the *declaration was quod cum fuit mercator per magnum tempus*, but *ſaith not he was a merchant at the time of the ſpeaking* of the words. The court held the declaration to be good, being alleged he was mercator per magnum tempus; but they would adviſe. Cro. E. 273. pl. 1. Paſch. 34 Eliz. B. R. Jordan v. Lyſter.

The plaintiff declaring that he was a *merchant* per multos annos jam retroactos. The court doubted of the action, becauſe it is not preciſely alleged he was a merchant at the time the words were ſpoken; and perhaps he uſed the trade for a time, and left it off. And would adviſe of it. Cro. E. 794. pl. 39. Mich. 42 & 43 Eliz. in B. R. Dottor v. Ford.

As where the plaintiff declares, whereas he is a freeman of Wells, exercens artem five myſterium of a linen-draper within the ſaid city,

3. *But* it was held per cur. that where a man is *ſlandered in his profeſſion or trade*, there *it needs not be ſo preciſely alleged that at the time of the ſpeaking he was a lawyer, phyſician, merchant, or* linen-draper; but it is *ſufficient to ſhew* that *he is of ſuch a trade, and has exerciſed it for divers years, without* ſaying *(ultimo)* or *(jam) elapſos*; for one ſhall not be intended to alter his trade or profeſſion, but by preſumption he continues it during his life. Yelv. 159. Trin. 7 Jac. in caſe of Tuthill v. Milton.

for the ſpace of 5 years paſt, and had great gains emendo vendendo, and yet the defendant at B. ſaid, *you are a bankrupt, and not worth a groat.* It was argued that this is a good declaration, though not ſaid ultimo or jam elapſ. nor expreſsly laid that the plaintiff was a linen-draper at the time when the words were ſpoken; and judgment affirmed. Yelv. 158. Trin. 7 Jac. B. R. Tuthill v. Milton.

Plaintiff *declared that he had been an attorney diverſis annis jam elapſis*, and that the defendant maliciouſly ſpoke theſe words of him, viz. *he is a forging knave.* Judgment for the plaintiff in C. B. and error

error brought in B. R. It was argued that the word (forging) is adjectively ſpoken, and therefore the action will not lie, unleſs it appear that he was attorney at the time of the ſpeaking, which did not appear here; for it was ſaid that he was an attorney per diverſos annos elapſos, which might be 30 years ſince, and is not at the time of the words ſpoken, and therefore the words ſhould have been (jam ultimo elapſos.) But where the words in themſelves import a ſcandal in his profeſſion, as (ambodexter) it is otherwiſe; for then he takes notice of his profeſſion. And the judgment was reverſed. 2 Roll. Rep. 84. Paſch. 17 Jac. B. R. Moor v. Symms.

In an action for ſcandalous words ſpoke of a parſon, who declared that he was inducted into a parſonage in Ireland, and executed the office of paſtor by the ſpace of 4 years after. It was moved in arreſt, that he did *not aver that he was parſon at the time of ſpeaking the words*. But per cur. it ſhall be intended that he continued parſon, becauſe he had a freehold in the parſonage during his life; but * having laid a ſpecial time, during which time he exerciſed the office of a paſtor, the court doubted if it ſhould be intended he continued ſo much longer than himſelf had laid it; but inclined for the plaintiff. All. 63, 64. Paſch. 24 Car. B. R. Dod v. Robinſon.

* [539]

4. In an action brought by a counſellor at law for ſcandalous words ſpoke of him, it is not ſufficient to *ſay that he is homo eruditus in lege*, but he muſt ſay that he is *homo conciliarius*; per Jones J. Poph. 207. Trin. 2 Car. B. R. Cary's caſe.

A counſellor is called in pleading *homo conciliarius & in jure peritus*; per Coke Ch. J. 2 Bulſt. 230. Paſch. 12 Jac. in a nota.

5. In action for ſcandalous words, the plaintiff declared that he is *in medicinis doctor*; but it was moved in arreſt becauſe he did *not ſhew that he was licenſed by the college, &c. or a graduate in the univerſity*, according to the ſtatute 14 H. 8. cap. 5. Bankes Ch. J. and Crawley, upon reading the act, agreed it was a general act, ſo that it need not be pleaded, wherefore they gave day to the defendant to maintain his plea. Mar. 116. pl. 193. Mich. 17 Car. Dr. Brownlow's caſe.

6. In caſe, the plaintiff *declared by the name of J. E. merchant; and that by buying and ſelling he got diverſa lucra*, &c. and that the defendant called him a *bankrupt*. It was moved in arreſt of judgment, that the declaration was ill, becauſe it did *not appear that he gained his living by buying and ſelling as a merchant*. The judgment was ſet aſide. Sid. 299. pl. 4. Mich. 18 Car. 2. B. R. Emerſon v. Fairfax.

(M. b) For Words. *Juſtification.* [Or Excuſe.]

[1. IN an action upon the caſe for words, it is a good juſtification (though the words were falſe) *that he was a counſellor of law, retained* in an iſſue between the plaintiff and J. S. *and he ſaid the ſaid words upon the evidence for his client*, if they were directly material to the point in iſſue. Mich. 3 Jac. B. R. between BROOKE AND MOUNTAGUE, per curiam.]

See (B. a) pl. 2. S. P. —Cro. J. 90. pl. 18. S. C. adjudged for the defendant; for a counſellor in law retained hath a privilege to inforce any thing which is informed him by his client, and to give it in evidence,

[2. So the ſaid matter ſhall be a good juſtification, *though the words were not preciſely pertinent to the iſſue, but by a conſequence, and for mitigation of damages*. Mich. 3 Jac. B. R. between BROOKE AND MOUNTAGUE, per curiam.]

[3. *As in falſe impriſonment*, if the *defendant pleads* in bar *that he was mayor of London, and impriſoned the plaintiff till he found ſureties for his good behaviour, being a man of ill fame* and behaviour, to which the *plaintiff replied de ſon tort demeſne abſque tali cauſa*,

it being pertinent to the matter in question, and not to examine whether it be true or false; for that is at the peril of the informer; and a counsellor is at his peril

cauſa, and a *counſellor of law being retained* for the defendant, upon the information of his client, *ſaid* upon the evidence *that the plaintiff was of an ill behaviour, and that he had committed felony.* In an action upon the caſe by the plaintiff againſt him for theſe words, he may well juſtify the ſpeaking of them for the matter aforeſaid, (though they are falſe) though they tend not preciſely in proof of the iſſue; for *they tend to clear a magiſtrate in the courſe of juſtice, and are material to mitigate damages, and* were *ſpoke without malice.* Mich. 3 Jac. B. R. between BROOKE AND MOUNTAGUE, adjudged upon a demurrer.]

to give in evidence what his client informs him of, being * pertinent to the matter in queſtion, otherwiſe an action on the caſe lies againſt him by his client, as Popham ſaid. ——Cro. J. 432. pl. 11. S. C. cited by Haughton as adjudged that no action lay.——S. P. and becauſe it was in his profeſſion, and pertinent to the good and ſafety of his client, though not directly to the iſſue, a prohibition was granted. Hob. 328. pl. 402. Hughs's caſe.

If a counſellor ſpeaks ſcandalous words againſt one in defending his client's cauſe, an action lies not againſt him for ſo doing; for it is his duty to ſpeak for his client, and it ſhall be intended to be ſpoken according to his client's inſtructions; per Glyn Ch. J. Sty. 462. Mich. 1655. B. R. Wood v. Gunſton.

* [540]

See (C. a) pl. 3. and the notes there.

He is a forſworn and perjured man. The defendant juſtified, for that the *plaintiff exhibited an Engliſh bill in the marches of Wales, on which an injunction was granted*

[4. In an action upon the caſe by A. againſt B. if the plaintiff declares that he took his oath in the court of B. R. againſt B. of certain matters to have B. bound to his good behaviour, and thereupon B. then ſaid falſely and maliciouſly, intending to ſcandalize him in the hearing of the judges and officers of the court, and others there being, *there is not a word true in that affidavit, and I will prove it by* 40 *witneſſes*, yet this action is not maintainable; for the anſwer that B. made to the ſaid affidavit was a juſtification in law, and *ſpoke only in defence of himſelf, and that in a legal and judicial way*, inaſmuch as he ſays he will prove it by 40 witneſſes. Paſch. 15 Car. B. R. between MOULTON AND CLAPHAM, per curiam, adjudged in arreſt of judgment, after a verdict for the plaintiff. Intratur Hill. 14 Car. Rot. 459.]

for poſſeſſion of land in queſtion between them for the ſaid plaintiff, *and that the ſaid affidavit was falſe, and the plaintiff committed perjury in that.* This was allowed a good juſtification. 2 Bulſt. 272. Mich. 1 Jac. C. B. Eſtcourt v. Harrington.

S. C. cited Cro. J. 91. in pl. 18. and Popham affirmed it to be good law, when he delivers matter after his occaſion as matter of ſtory, and not with an intent to ſlander any.

[5. In *Fox's* Book of *Martyrs* there is a relation of one *Greenwood* of *Suffolk*, who is there reported to have perjured himſelf before the biſhop of *Norwich*, in teſtifying againſt a martyr in the time of queen *Mary*, and that after he came to his houſe, and there by the judgment of God his bowels rotted out of his belly, in exemplary puniſhment of his perjury; and one *Prit* being lately made *parſon of* the *pariſh* where this *Greenwood* lived, and not well knowing his pariſhioners, and *preaching againſt perjury cited* this *ſtory*; and it happened that *Greenwood* was alive, and in the ſaid church, and after brought action upon the caſe againſt the parſon, and adjudged not maintainable by Anderſon at the aſſiſes, becauſe it was *not ſpoke maliciouſly.* Vide this cited Mich. 3 Jac. B. R. per Coke.]

Thou art a thief. The defendant

pleaded that there was a robbery committed, and the *common fame of the country* was that he was guilty of it. It ſeems that this is no good juſtification in action for words. D. 236 a. pl. 26. Hill. 7 Eliz. Anon.

Anon. — S. C. cited Bridgm. 62. —— Brownl. 3. S. P. ſaid. — S. P. per cur. Hob. 82. at the end of pl. 7.

The plaintiff brought an action againſt one for ſaying of him, that *he heard he was harged for ſtealing of an horſe*; and upon the evidence it appeared that *the words were ſpoke in grief and ſorrow for the news*. Twiſden J. cited it as a caſe which himſelf heard tried before Hobart, and that Hobart made the plaintiff be nonſuited, becauſe it was not ſpoke malitioſe; and all the court now agreed that this is done according to law. Lev. 82. Mich. 14 Car. 2. B. R.

[6. In an action upon the caſe for *calling the plaintiff thief*, if the defendant *juſtifies* it, *becauſe the plaintiff had ſtole a certain thing*, and the *plaintiff replies that after the felony committed, and before* * *the ſpeaking* of the words, *he was pardoned by a general pardon*, this ſhall avoid the juſtification; for by the pardon the felony was extinct. Hob. Reports 92. B. caſe 112. between CUDDINGTON AND WILKINS, adjudged.] * Fol. 88. Hob. 67. pl. 72. S. C. adjudged for the plaintiff, though perhaps the defendant knew him not to be within the pardon. —— Mo. 863. pl. 1187. S. C. adjudged accordingly. —— Mo. 872. pl. 1213. Mich. 14 Jac. C. B. S. C. adjudged accordingly. But Nichols J. ſaid if he had *been convicted*, and pardoned afterwards, it would be otherwiſe. —— Ow. 150. S. C. adjudged for the plaintiff. — Brownl. 10. S. C. and the court were of opinion that by the pardon both the puniſhment and fault † were taken away. —— S. P. per cur. obiter Sid. 52. in pl. 16. —— Hob. 82. pl. 107. S. C. adjudged for the plaintiff, and it was held no great difference, though this had been a ſpecial pardon, and not known to the defendant; for he muſt take heed at his peril to do no man wrong. —— But a *pardon of perjury* will not reſtore the perjured perſon to his credit. Sid. 52. Mich. 13 Car. 2. B. R. in pl. 16. per cur.

Thou art a rebel and a traytor. The defendant juſtified that 28 Dec. 1659. the plaintiff was a ſoldier under one captain C. againſt the king. The plaintiff demurs, preſuming the general pardon had reſtored him to his good fame; but adjudged for the defendant, the plaintiff not ſhewing that he was not one of the perſons excepted therein. Raym. 23. Mich. 13 Car. 2. B. R. Harris's caſe.

† [541]

7. In an action upon the caſe for calling the plaintiff thief, and that he *ſtole* 2 *ſheep* of J. S. the *defendant ſaid that the plaintiff ſtole the ſame ſheep, by which he called him thief, as well he might*; and good per cur. Br. Action ſur le Caſe, pl. 3. cites 27 H. 8. 22.

8. Action upon the caſe for calling the plaintiff *falſe perjured man*; and the defendant juſtified *that ſuch a day and year, in the ſtar-chamber, the plaintiff was perjured, and pleaded certain in what*, &c. by which he called him falſe perjured man, ut ſupra, prout ei bene licuit; and a good plea, per cur. in C. B. by which the *plaintiff ſaid that it was of his own head, abſque hoc that he ſwore modo & forma*. Br. Action ſur le Caſe, pl. 104. cites 30 H. 8. S. P. ibid. pl. 3. cites 28 H. 8. Auſten v. Lewis.

9. *Thou art a traytor*, ſpoken at W. in Suſſex. The defendant *pleads he ſpoke* theſe words *at S. in Hampſhire*, viz. *ſuch things traytors do, abſque hoc that he ſpoke the words at W. in Suſſex*. It was the opinion of the court the juſtification was ill, and the traverſe upon it; for the action is general, and the defendant doth not juſtify the words in the declaration, and adjudged for the plaintiff. Cro. E. 133. pl. 34. Mich. 31 & 32 Eliz. B. R. Bellingham v. Mynors.

10. *Thou haſt played the thief with me, and haſt ſtolen my cloth and half a yard of velvet.* The defendant ſaid the *plaintiff was his taylor, and that upon the day of, &c. he delivered him a yard and a half of* velvet *to make him* hoſe, *and he made them too ſtreight, ratione cujus he ſpoke theſe words*, viz. *thou haſt ſtolen part of the velvet which I delivered to thee, abſque hoc* that he ſpoke any word *aliter vel alio modo*. The court was of opinion that the plea and traverſe

traverſe do not confeſs any word of ſlander, and then the *traverſe* is merely void; but becauſe the *defendant* did not anſwer to the words *(thou haſt ſtolen my cloth)*, it was adjudged for the plaintiff. Cro. E. 239. pl. 7. Trin. 33 Eliz. B. R. Johns v. Gittons.

Noy 34. S. C. accordingly; and Popham's reaſon was, becauſe perjury is an odious thing, and therefore the juſtification of it ſhall not be taken by intendment. —Mo. 537. pl. 701. Wild v. Coopman, S. C. and adds theſe further words, viz. *and didſt procure others to be forſworn*; and adjudged for the plaintiff, becauſe the words are actionable, and the juſtification not good either in matter or form; as to the matter, becauſe though one preſents a thing not true in a leet he is forſworn, becauſe he may do it upon information, as jurors in the ſeſſions or aſſiſes; and as to form, becauſe he does *not anſwer to the procurement of others to be forſworn*, and ſo *juſtified for part only*, and the reſidue remains without defence.

11. *Thou waſt forſworn in ſuch a leet ſuch a day.* The defendant *pleaded that the plaintiff the ſame day with others were ſworn before the ſteward to preſent, &c. and they preſented ſuch a ditch not ſcoured ad nocumentum, &c. which was falſe*, and ſo juſtifies; but did not ſay that they knew it to be falſe of their own proper knowledge, and they might preſent it upon evidence. Gawdy and Fenner held that it is properly and commonly to be intended that the preſentment was falſe of their own knowledge, and ſo perjury; and if they preſented upon evidence, the plaintiff ought to ſhew it in his replication. But Popham ſaid a man may *not juſtify by intendment*, but it ought to be preciſely alleged. Cro. E. 492. pl. 9. Mich. 38 & 39 Eliz. B. R. Wyld v. Cookman.

Noy 34. S. C. and S. P. adjudged accordingly, and ſays the principal cauſe of the judgment was upon this reaſon. ——Mo. 537. pl. 701. S. C. but S. P. does not appear.

12. *And* becauſe it was *not alleged that the ditch was within the leet*, and if not, the preſentment thereof is out of their charge, and then no * perjury, it was agreed per omnes to be an incurable fault; and adjudged for the plaintiff. Cro. E. 492. pl. 9. Wyld v. Cookman.

* [542]

13. Plaintiff declared that a commiſſion iſſued out of the exchequer to the plaintiff, and one J. S. directed, by force whereof they took and returned the examinations of ſeveral witneſſes; and that thereupon the defendant ſaid the *plaintiff had returned as depoſitions the examination of divers that were never ſworn.* The defendant *pleads in bar that he did return the examination of one J. S. who was never ſworn.* Upon a demurrer it was ruled that this was no good juſtification or bar, becauſe it is of one witneſs only, whereas the charge is in the plural number. Adjudged for the plaintiff. Cro. E. 623. pl. 17. Mich. 40 & 41 Eliz. B. R. Fyſh v. Thoroughgood.

14. In an action for ſcandalous words, the defendant *juſtified for other words which were ſcandalous likewiſe*, and actionable, and therefore the juſtification adjudged naught. Brownl. 5 Mich. 12 Jac. Stober v. Green,

Brownl. 2. S. C. ſays, if a felony be committed it is good cauſe to arreſt one for felony, but

15. *Thou didſt ſteal a ſack.* The defendant *pleaded that there was a ſack of a man unknown ſtolen, and that the common fame was, that the plaintiff had ſtolen it, whereupon the defendant did inform* Thomas Kemp, *a juſtice of peace, &c. that he had ſtolen*, and in complaining and informing the ſaid juſtice thereof, he did *there, in the preſence of Kemp and of the plaintiff, ſay unto the plaintiff, and*

of

of him, thou didſt ſteal, &c. quæ eſt eadem, &c. whereupon the plaintiff demurred in law. Hob. 192. pl. 241. Trin. 14 Jac. Rot. 541. 3 Lee. 101. Scarlet v. Stiles. not to ſpeak words to defame one.

16. The plaintiff declares that ſhe was in *communication of marriage* with one S. and that to defame her the defendant ſpoke theſe words, *ſhe hath had three children, and yet was never married*, per quod, &c. And the defendant *pleads that one G. in the preſence of the defendant and others, did ſay the ſame words, that a report was ſpread thereof, and that the defendant was cited into the ſpiritual court to certify what he could ſay therein, and thereupon the defendant did there teſtify that he did hear the ſaid G. ſpeak* ut ſupra, *the which is the ſame parlance*, &c. Adjudged an ill plea; for the plaintiff has alleged that he ſpoke theſe words, &c. and the defendant ſays that he heard one G. ſpeak them, &c. quæ eſt eadem, &c. which cannot be; for to ſpeak words, and to ſay, I heard another ſpeak them, cannot be the ſame thing. 2 Roll. Rep. 284. Hill. 20 Jac. Scarlet v. Jennings.

17. *The plaintiff is a thief to you, and a thief to me, and hath ſtolen* 20*l. from me and* 40*l. from you*; the *defendant ſaid the plaintiff was a thief, and feloniouſly ſtole* 2 *hens from her ſuch a day*, and ſo juſtified; it was the opinion of the court, it was no cauſe of juſtification of all the words; and the laſt is as ſcandalous as the firſt, and therefore the action maintainable. And judgment given for the plaintiff. Cro. J. 676. pl. 12. Mich. 21 Jac. Hilſden v. Mercer. 2 Roll. Rep. 414. adjudged againſt the defendant.

18. *F. ſtole plate out of my chamber*; the defendant ſaid ſhe had loſt plate out of his chamber, and ſuſpecting the plaintiff to have ſtolen it, ſhe ſpake theſe words; the juſtification is ill; for ſuſpicion is not ſufficient. Cro. C. 52. pl. 10. Mich. 2 Car. Powell v. Plunket.

(M. b. 2) Plea in Bar. [543]

1. IF in an action for theſe words, *I will abide by it that C. R. was and is a falſe thief, and was at my door the ſeſſions-day at night, between one and two of the clock after midnight, and would have robbed me, and did break open my doors and put me in jeopardy of my life*, the defendant pleads that the plaintiff non fuit damnificatus in forma qua, &c. this is no good plea, for he acknowledges the ſpeaking of the words, and what damage can there be more grievous than ſuch a report? Adjudged per tot. cur. D. 26. pl. 171. Hill. 28 H. 8. Ruſſel's caſe.

2. B. brings action againſt S. for calling him *perjured man*, and S. *juſtifies that he was perjured in ſuch a court in ſuch a depoſition, and pleaded it certainly, and found for the defendant, and judgment thereupon* accordingly; afterwards *S. again publiſhes the ſame words of B. who thereupon brings a new action for the new publication, and S. pleads the firſt judgment in bar*; adjudged without contradiction a good bar. 2 Brownl. 49. Hill. 8 Jac. C. B. Styles v. Baxſter.

3. Plaintiff

3. Plaintiff declares that whereas ſhe was of a good fame and honeſt reputation, &c. the defendant ſaid of her, *ſhe is a common whore, and I will prove her one*, &c. per quod, &c. The defendant *pleads that* at the time when the words were ſpoken, *the plaintiff was not of an honeſt reputation, as in the declaration is alleged;* adjudged for the plaintiff, niſi. Sty. 118. Trin. 24 Car. B. R. Strachy's caſe.

4. Words ſpoken of the plaintiff, an alderman of Norwich, and a juſtice of peace, viz. *he is a raſcally alderman, a factious alderman, a lampooner*, and *avers, that a lampooner is there underſtood to be a libeller;* the defendant *pleaded in bar a former action* brought by the ſame plaintiff *for the ſame words, only that in that action no interpretation was given of the word lampooner*, and that in that action the plaintiff was barred; upon a demurrer, it was objected that the interpretation of the word *lampooner*, in this action, makes it a different action from the former, and therefore the bar in that is no bar in this. But adjudged that the plaintiff having been once barred in an action for the ſame words, he ſhall not entitle himſelf to a new action by a new interpretation of a new word. 3 Lev. 248. Hill. 1 & 2 Jac. 2. C. B. Gardiner v. Helvis.

(M. b. 3) Replication. Good.

1. IF in an action for theſe words, *thou haſt forged an obligation, and I will prove it;* the defendant *juſtifies becauſe the plaintiff had forged an obligation in the name of J. S.* the plaintiff *replies de ſon tort demeſne*, &c. It was moved in arreſt that it was not ſhewn that the bond was ſealed and delivered; but per cur. it is well enough, for it muſt be ſo intended; for otherwiſe it is not a bond but a writing only. It was alſo moved, that the iſſue was not good, becauſe a ſpecial forgery being alleged, it ought to be ſpecially traverſed; but per cur. it is well enough; but if not, it is aided by the ſtatute 32 H. 8. And judgment for the plaintiff. Cro. E. 607. pl. 7. Paſch. 40 Eliz. B. R. Wade v. Buſſard.

[544] 2. One cannot *rejoin upon words which are not in the declaration nor in the plea;* for if the declaration and the plea be naught, the replication cannot make them good. Per Roll Ch. J. Sty. 70. Mich. 23 Car. Anon.

(M. b. 4) Words. Rules as to Conſtructions of Words.

1. AN action on the caſe does *not lie* for words, *unleſs ſpoke directly, and in the affirmative;* for ſuch action does not lie for words *by circumſtance tending to any ſlander.* Per Meade. Mo. 182. pl. 325. Trin. 26 Eliz.

2. Where

2. Where one *gains his living by a lawful trade* [* *ſcience or art*] as a lawyer, phyſician, &c. and one defames him in exerciſing of that which he profeſſes and exerciſes, action lies. Per cur. 2 And. 41. pl. 26. in caſe of Hele v. Gyddy. * And. 269. pl. 277. S. P. and cites S. C.

3. *Sermo relatus ad perſonam intelligi debet de conditione perſonæ.* 4 Rep. 16. a. pl. 6. Mich. 27 & 28 Eliz. in Birchley's caſe.

4. Where words are *ambiguous*, ſo as they may be expounded in good or ill part, no action lies; for they ſhall be expounded in the beſt ſenſe. Cro. E. 672. pl. 33. Paſch. 41 Eliz. C. B. Anon.

5. In every action for ſlanderous words 2 things are requiſite. 1ſt, That the *perſon ſcandalized* be *certain*. 2dly, That the *ſcandal* be *apparent from the words themſelves*. Reſolved 4 Rep. 17. b. Mich. 41 & 42 Eliz. B. R. in caſe of James v. Rutlidge.

6. Where the words ſpoken do *tend to the infamy, diſcredit, or diſgrace of the party*, there they are actionable; per Williams J. and this rule was affirmed by the court. Bulſt. 40. Trin. 8 Jac. in caſe of Smale v. Hammon.

7. Defamation which is actionable, muſt be ſuch as *præbet occaſionem ruinæ*, viz. ruin *to his profeſſion and trade* which ſupports him, &c. or ruin *to his body, or for which ſome corporal puniſhment ought to be inflicted upon him*; per Mountague Ch. J. Palm. 21. Mich. 17 Jac. in caſe of Godfrey v. Owen.

8. In actions for words are to be conſidered *the words themſelves, and the cauſa dicendi*; for ſometimes in the firſt caſe they will bear an action, and yet when the cauſa dicendi is conſidered they will not; per Barkley J. Mar. 20. pl. 45. Paſch. 15 Car.

9. In actions for words ſpoke by way of hearſay or report, if the defendant *names his author*, he is diſcharged, and the plaintiff put to bring his action againſt the author. See Lev. 82. Mich. 14 Car. 2. B. R. Crawford v. Middleton. And ſee (X. a) pl. 3.

10. Action lies for ſpeaking ſcandalous words of a limeburner, or *of any man of any trade or profeſſion, be it ever ſo baſe, if* they are *ſpoke with reference to his profeſſion*; per Keeling, Twiſden, and Windham. Lev. 115. Mich. 15 Car. 2. B. R. in caſe of Terry v. Hooper.

11. Bridgman Ch. J. ſaid he was not ſatisfied to go by *precedents*, becauſe he held that to be ſcandalous now which was not 20 years ago; that it is *uſe makes words have force; and words that are actionable now, hereafter may not be ſo.* Cart. 55. Hill. 17 & 18 Car. 2. C. B.

[545]

12. If *part* of the words *is actionable*, and *part not*, yet an action lies for them which are actionable; per Roll Ch. J. Sty. [illegible] Trin. 24 Car. in caſe of Smith v. Hobſon. When any of the words are actionable, the plaintiff ſhall have judgment; and ſo it hath been often adjudged; per tot. cur. Cro. E. 788. Mich. 42 & 43 Eliz. C. B. in pl. 28.

13. It is a general rule, that *where one's life may be brought in queſtion*, as to call one thief, the words are actionable; per Wild J. 2 Freem. Rep. 14. pl. 14. Mich. 1671. C. B. in caſe of King v. Lake.

14. If

14. If the words be ſuch as do *neceſſarily relate to his employment*, the words are actionable, *without any colloquium.* Freem. Rep. 277. pl. 309. Mich. 1675. B. R. in caſe of Bell v. Thatcher.

15. *Words which of themſelves are actionable*, without regard to the perſon, or foreign help, *muſt either endanger the party's life, or ſubject him to infamous puniſhment*; and it is not enough that the party may be fined and impriſoned; for if one be found guilty of any common treſpaſs, he ſhall not be fined and impriſoned, yet none will ſay, that to ſay one has committed a treſpaſs will bear an action, or *at leaſt the thing charged* upon him *muſt in itſelf be ſcandalous*; per cur. 6 Mod. 104. Hill. 2 Ann. B. R. in caſe of Ogden v. Turner.

16. To bear an action, words muſt have *a certain ſignification*, they muſt ſo *reflect upon a perſon, that if true he might be liable to ſome legal puniſhment, or if* from the ſpeaking *ſome particular damage does accrue, or is likely ſo to do, and coſts or damages, or* [*if it be*] *on a colloquium of his trade* [the words may bear an action.] Rep. of Caſes of Pract. in C. B. 160. Mich. 13 Geo. 2. Per cur. in caſe of Palmer v. Edwards.

(M. b. 5) Scandalum Magnatum.

¶ [546] Of theſe falſe news there are 5 kinds within this act, 1ſt, If they are *againſt the king*, whereby diſcord or ſcandal may ariſe between the king and his commons, ſignified here by (people.) 2dly, *Againſt the commons*, whereby diſcord or ſcandal may be moved between them and the king. 3dly, *Againſt the king*, whereby diſcord or ſcandal may grow between the king and the peers, or lords and nobles of the realm, ſignified here by the great men of the realm. 4thly, *Againſt the peers*, or lords and nobles of the realm, whereby diſcord or ſlander may happen between them and the king. Laſtly, Whereby diſcord or ſcandal may ariſe between the king, his lords, and commons. 2 Inſt. 227.

1. *Weſtm.* 3 *E.* 1. *cap.* 34. *NONE ſhall publiſh or counterfeit any falſe news, whereby diſcord or ſlander may grow between the king and his people, or the great men of this realm; and he that ſo doth ſhall be kept in priſon until he hath brought him forth into the court which did ſpeak the ſame.*

2. * 2 *R.* 2. *ſtat.* 1. *cap.* 5. *of counterfeiters of falſe news of prelates, dukes, earls, barons, and other nobles, and great men of the realm; and alſo of the chancellor, treaſurer, clerk of the privy ſeal, ſteward of the king's houſe,* † *juſtices of the one bench or of the other, and other great officers of the realm, it is defended that none contrive or tell any falſe things of prelates, lords, and of other aforeſaid, whereof diſcord or ſlander might riſe within the realm; and he that doth the ſame ſhall be impriſoned till he have brought him forth that did ſpeak the ſame.*

3. 12 *R.* 2. *cap.* 11. *When any ſuch mentioned in the ſtatute Weſtm.* 1. *cap.* 34. *and* 2 *Rich.* 2. *cap.* 5. *is taken and impriſoned, and cannot bring him forth that did ſpeak the ſame, he ſhall be puniſhed by the advice of the council.*

It was reſolved by all the juſtices, that horrible and ſlanderous words *ſpoken of queen Mary*, were within this ſtatute, and puniſhable hereby, and not by the ſtatutes of 2 R. 2. cap. 5. nor 12 R. 2. cap. ¶ 11. for the king or queen is an exempt perſon, and not included within theſe words [the great men or nobles, &c.] 2 Inſt. 228.

But it is to be underſtood, that albeit the ſtatute of Weſtm. 1. and of 2 R. 2. be general in the negative, yet do they not extend to all manner of falſe news, or horrible and falſe ſcandals and lies, &c. for

for they *extend only to extrajudicial ſlanders*, &c. and therefore if any man bring an *appeal of murder, robbery, or other felony, againſt any of the peers* or nobles of the realm, &c. and charge them with murder, robbery, or felony, albeit the charge be falſe, yet ſhall they have no action de ſcandalis magnat' neither at the common law, nor upon either of theſe ſtatutes for the bringing of this action, nor for affirming the ſame to his council, attorney, or curſitor for the framing of his writ, or for ſpeaking the ſame in evidence to a jury, or for uſing of thoſe words for the neceſſary commencement or proſecution of this action judicially. And ſo it is in an action of ** *forger of falſe deeds*, or any other action whatſoever; for it is a maxim in law, that *a man ſhall not be puniſhed for ſuing writs in the court of the king, be it rightfully or wrongfully*. And the reaſon thereof is, that men ſhould not be deterred to take their remedy by due courſe of law; and therefore the ſtatutes never intended to prohibit the ſuing out of the king's writs, and the proceeding thereupon. And ſo it is, if in the ſtar-chamber a peer of the realm be charged with forgery, perjury, or the like; but if in the bill the plaintiff chargeth him with felony, or any other *offence not examinable in that court*, that ſlander is within theſe ſtatutes, for that the plaintiff purſueth not his charge in any judicial courſe, ſeeing the court hath no juriſdiction of the ſame. And ſo hath it been adjudged. 2 Inſt. 228.

** See pl. 2.

It appears that not only the tellers and reporters of ſuch falſe news, but the deviſers and inventors thereof, are prohibited, but *no puniſhment is inflicted by the ſtatute of Weſtm. 1. upon the deviſer or inventor, for he is left to the common law to be puniſhed by fine and impriſonment*, according to the quality and quantity of the offence, which is aggravated, in reſpect that it is prohibited by this act of parliament. 2 Inſt. 228.

* It was reſolved that this ſtatute is a general law. 2 Mod. 99. Trin. 28 Car. C. B. in caſe of the Earl of Shaftſbury v. Ld. Digby.

† How far it extends to the judges of both benches, ſee Vaugh. 139. in Buſhell's caſe.

2. C. brought a writ of *forger of falſe deeds againſt Ld. B.* and pending the writ Ld. B. for ſlandering him of forgery by the ſaid ſuit, brought an action de ſcandalis magnatum. The defendant juſtified by his having the ſaid writ before, and concluded that it is the ſame ſlander, &c. Upon demurrer the beſt opinion was that the juſtification was good, and out of the intendment of the law, and ſtatutes of ſlander, &c. for no puniſhment was ever appointed for ſuit in law, though it be falſe, and for vexation; and in this caſe, the ſuit not being determined, it cannot be ſaid whether it be true or falſe. D. 285. a. pl. 37. reports it as Mich. 13 H. 7. C. B. Lord Beauchamp v. Sir Richard Croft.

This caſe is reported at large, Kelw. 26 to 30.— S. C. cited Palm. 189. S. P. cited Hob. 266. in pl. 352. but cites it as 11 Eliz. which ſeems to be a miſtake as to the reign and year, by reaſon of the caſe in Dyer, being taken in among the caſes reported in Trin. 11 Eliz. though D. cites it as Mich. 13 H. 7.

3. *I have heard that your lordſhip hath ſought, by uncharitable means, to bereave me of my life, lands, and liberty*, is actionable, the words being in a letter directed to the lord himſelf. Mo. 142. Arg. cites Trin. 10 Eliz. Lumley (Lord) v. Fox.

I underſtand my Ld. Aburgany is of late grown into a paſſing rage, threatning to make my guts to fly about my heels, and kill me he will, though he ſhould be hanged within one hour after the fact done. A ſtrange kind of dealing in a nobleman, and ſuch it is that upon my complaint unto the lords of the council, it hath pleaſed them to take order for my ſafety as the law doth require. The plaintiff alleged that the defendant ſpoke the ſaid words, viz. dixit & contrafecit. The caſe was, that the defendant never ſpoke thoſe words, but wrote them in a letter to B. verbatim, and the letter was ſhewn to the jury, but no proof was offered that he ſpoke the ſaid words; but ſeveral witneſſes were produced to prove that he ſpoke the ſaid words to the privy council; but there was no direct proof, but preſumptions only. The court ſeemed that this was within the compaſs, and a counterfeiting and publiſhing; and whether a man be the firſt deviſer or not, is not material; for if he be the firſt reporter afterwards, he is in danger of the ſtatute by publiſhing it; and here, though he ſays *(I underſtand,)* yet becauſe he *does not vouch his author*, it ſhall be underſtood that he is the underſtander and deviſer. Dal. 80. pl. 19. anno 14 Eliz. Ld. Aburgany v. Cartwright.

4. *It is no marvel that you like not of me; you like of thoſe that maintain ſedition againſt the queen's proceedings.* The defendant *juſtified*, for that the defendant was vicar of N. which was a be-

S. C. cited by Popham and Clench. Poph. 69.

neſice with cure, and that the plaintiff procured J. S. and J. D. to preach in his church, who * inveighed in their ſermons againſt the book of common prayer, and becauſe the defendant would have hindered their preaching as not licenced, the *plaintiff ſaid to the defendant, thou art a falſe varlet, I like not of thee*; to whom the defendant *replied, 'tis no marvel, though you like not of me; for you like of thoſe* (meaning the ſaid J. T. and J. G.) *that maintain ſedition* (meaning ſeditioſam iſtam doctrinam) *againſt the queen's proceedings*. Reſolved a good juſtification; for the ſenſe of the words muſt be collected from the cauſe and occaſion of ſpeaking them; ſo that in this caſe, by the word (ſedition) the defendant did intend the ſeditious diſcourſe and doctrine againſt the queen's proceedings upon the act 1 Eliz. by which the common prayer book is eſtabliſhed, and not any ſuch public and violent ſedition as was deſcribed, and as ex vi termini the word imports. 4 Rep. 12. b. pl. 1. Trin. 20 Eliz. B. R. Ld. Cromwell v. Denny.

5. *You* (prædict. epiſc. innuendo) *have writ a letter to me, which I have to ſhew, which is againſt the word of God, againſt the queen's authority, and to the maintenance of ſuperſtition, and that I will ſtand to prove againſt you.* 500 marks damages were given, and the court, upon good deliberation, awarded that the biſhop recover the 500 marks damages, and 81. coſts. Cro. E. 1. pl. 2. Hill. 24 Eliz. B. R. Biſhop of Norwich v. Prickett.

Cro. E. 294. pl. 10. Scroggs v. Ld. Mordaunt, S. C. in error by the plaintiff, as adminiſtrator of Bridges; but nothing ſaid as to the point adjudged, but whether an adminiſtrator might maintain a writ of error. —— Mo. 686. pl. 949. S. C. Adjudged in B. R. and error brought in the exchequer-chamber; and the point of the error was argued for the plaintiff in error; but nothing more ſaid about it.

6. *My lord Mordaunt did know that P. robbed S. and bid me compound with S. for the ſame, and ſaid he would ſee me ſatisfied for the ſame, though it coſt him* 100*l. which I did for him, being my maſter, otherwiſe the evidence which I could have given would have hanged P.* It was adjudged that the words were actionable, and ſhall be taken in the worſt ſenſe, and to the diſgrace of the plaintiff. Error was brought in the exchequer-chamber, and error aſſigned in the point adjudged. Quære. Cro. E. 67. pl. 17. Mich. 29 & 30 Eliz. B. R. Lord Mordaunt v. Bridges.

7. Words ſpoken in open ſeſſions, viz. *you have perverted juſtice, and to your ſhame and diſhonour I will prove it*, adjudged actionable; whereupon the defendant juſtified, and afterwards the parties agreed. Mo. 409. pl. 554. Trin. 37 Eliz. Lord Delawarr v. Pawlett.

8. Words were, viz. *the Earl of Lincoln's men, by his commandment, did take the goods of one Hoſkins by a forged warrant*, &c. It was moved in arreſt of judgment that the words were not ſufficient to maintain the action, becauſe it was *not averred that the earl knew the warrant to be forged*; and of the ſame mind was the court at this time. Goldſ. 115. pl. 10. Mich. 39 & 40 Eliz. Lincoln (earl) v. Michelborn.

9. *My lord is a baſe earl, and a paultry lord, and keepeth none but rogues and raſcals like himſelf.* The court divided, whether actionable

tionable or not; and afterwards the defendant died, whereupon the bill abated. Cro. J. 196. pl. 22. Mich. 5 Jac. B. R. Lincoln (earl) v. Roughton.

10. The defendant diſcourſing with T. S. the ſervant of the lord Say, ſaid, *thy lord is a traitor, and I will prove it.* Upon not guilty pleaded, the lord Say had a verdict, and 2000l. damages. It was moved in arreſt of judgment that the ſtatute was miſrecited; for the word * *(lies)* was mentioned inſtead of *(ſlander.)* Sed per curiam, this is a miſrecital in a *word not material*, and not in any ſubſtance of the ſtatute, and therefore well enough. 2dly, It is not averred that the plaintiff was a peer when the words were ſpoken. Sed per curiam, it is that the defendant † *dixit de eodem vicecomite*, which *is a ſufficient averment.* Jo. 194. pl. 5. Mich. 4 Car. B. R. Lord Say v. Stephens.

Cro. C. 135. pl. 10. S. C. adjudged for the plaintiff. —Ibid. 142. pl. 19. S. C. The queſtion there was, whether a *writ of error* in this caſe might be brought in the exchequer-chamber. ——Ley's Rep. 82. S. C. and reſolved that miſrecital of any part of the § ſtatute which does not make the offence, or provide puniſhment, does not vitiate the count; and that the words (thy lord) is ſufficient averment of his being ſheriff [viſcount] at the time; and that afterwards it was reſolved, that ‡ error does not lie in the exchequer-chamber, upon the ſtatute of 27 Eliz. —— Palm 565. S. C. adjudged accordingly for the plaintiff.

* Vide pl. 14. in the notes.

§ [548]

† See pl. 22.

‡ Sid. 143. pl. 20. Paſch. 15 Car. 2. B. R. Earl of Stamford v. Nedham, S. P. adjudged that it does not lie; and ſaid it had been ſo adjudged in Lord Say's caſe, and alſo in the caſe of Nevill v. South. ——S. P. cited as adjudged in Lord Say's caſe. Sid. 240. Arg. in pl. 13. ——5 Mod. 230. Arg. cites S. P. held accordingly.

11. The defendant being a parſon, ſpoke ſcandalous words of the lord Leiceſter in the pulpit. It was moved in arreſt of judgment that this action being brought on the ſtatute, it ſhould have concluded *contra formam ſtatuti*, which not being done, it ſhall be intended an action at common law: and if ſo, then at common law theſe words are not actionable; but adjudged for the plaintiff by 2 juſtices againſt one. 2 Sid. 21. 30. Mich. 1657. B. R. Ld. Leiceſter v. Mandy.

12. The defendant being a parſon, ſaid in his pulpit, *the Lord of Leiceſter is a wicked and cruel man, and an enemy to the reformation*, adjudged for the plaintiff. 2 Sid. 21. 30. Mich. 1657. B. R. Leiceſter (Ld.) v. Mandy.

13. *My lord Abergavenny ſent for us, and put ſome of us into the coal-houſe, and ſome into the ſtocks, and me into his houſe called little eaſe*, adjudged actionable. Le. 336. pl. 466. cites Lord Abergavenny's caſe.

S. C. cited per cur. Vent. 60.

14. Words were, *my lord is no more to be valued than the dog that lies there.* After judgment for the plaintiff in C. B. it was aſſigned for error that there was not any averment that a dog did lie there; beſides the judgment was quod ſit in miſericordia, when it ſhould be quod capiatur, being founded on a ſtatute. Sed adjornatur. Sid. 233. pl. 35. Mich. 16 Car. 2. B. R. Probee v. Ld. Dorcheſter.

Lev. 148. S. C. and the court ſeemed to think the miſericordia ſufficient; but as to the other error, and like to another, which was that the declaration ſaid, *hæc falſa & opprobrioſa verba of him, and did not ſay* * *mendacia, or falſa nova*, but to theſe the court ſaid nothing, but adjornatur to be further argued. But in the mean time Proby was killed, and his executors paid the money, as the marquis told the reporter.

* See pl. 10.

As where the defendant ſaid to J. S. a ſervant of the Ld. P. viz. *I met J. D. whom I do not know, but my lord ſent after me to take my purſe*, an action of ſcandalum magnatum lies, though not poſitively ſaid, my lord B. ſent after him, or that it was to take the purſe feloniouſly; which laſt, though in caſe there of an action by a common perſon it might be a good exception, yet otherwiſe it is in the caſe of a peer; and judgment for the plaintiff. Lev. 277. Mich. 21 Car. C. B. Lord Peterborough v. Mordant.——Vent. 59. S. C. adjudged for the plaintiff.

15. There is a difference between an action on the ſtatute de ſcandalis magnatum, and a common action of ſlander; per cur. And the Ch. J. ſaid, *that words ſpoken* of a common perſon ſhall be taken in mitiori ſenſu; but in the caſe *of a nobleman* they *ſhall be taken in the worſt ſenſe* againſt him who ſpoke them, that the honour of ſuch great perſons may be preſerved. Vent. 60. Hill. 21 & 22 Car. 2. B. R. in caſe of Lord Peterborough v. Mordaunt.

16. The foreman of a grand jury in Cheſhire ſaid of the plaintiff, *he is a tedious man, and a promoter of ſedition and tedious addreſſes*; and upon a motion for *ſpecial bail* it was denied, and ſo it was to the duke of Norfolk, unleſs oath made of the words ſpoken. 3 Mod. 21. Paſch. 36 Car. 2. B. R. Earl of Macclesfield's caſe.

2 Jo. 40. S. C. adjudged for the plaintiff, and the rather, becauſe it was after a verdict.——Freem. Rep. 425. pl. 572. adjornatur.

17. *You are not for the king, but for ſedition and a commonwealth, and by G-d we will have your head the next ſeſſions of parliament.* It was moved in arreſt of judgment that the ſtatute was miſrecited, the words whereof are, that *none ſhall ſpeak any ſcandalous words of dukes, earls,* * &c. *the juſtices of either bench, nor of any other great officer*, &c. but thoſe words (nor of) were omitted in the declaration, which runs thus, *none ſhall ſpeak any ſcandalous words of any duke, earl, &c. juſtices of either benches, great officers of the kingdom*, ſo that it muſt be conſtrued thus, viz. none ſhall ſpeak any ſcandalous words of dukes, earls, being great officers, &c. and ſo the plaintiff muſt not only be an earl, but a great officer, which is not averred. Sed per curiam, this is a general law, and need not be recited; it is true, if the plaintiff will recite a ſtatute, and miſtakes it in a material part, it is incurable; but if he recites truly ſo much as will maintain his action, though he miſtakes the reſt, it will not make his declaration ill; and here the plaintiff recites, that none ſhall ſpeak any ſcandalous words of an earl, which is enough (he being an earl) to entitle him to an action, and his concluſion is, prout per eundum actum plenius liquet. 2 Mod. 98. Trin. 28 Car. 2. B. R. Ld. Shaftſbury v. Ld. Digby.

* [549]

2 Mod. 150. S. C. with the arguments of the counſel, and judges ſeriatim from pag. 149. to 167. adjudged for the plaintiff.

18. Words were, viz. *my lord Townſend is an unworthy perſon, and does things againſt law and reaſon*; upon not guilty pleaded, the plaintiff had a verdict, and 4000l. damages; and upon a motion for a new trial, becauſe of the exceſſive damages, it was denied by 3 judges againſt Atkins J. becauſe the jury are the ſole judges of the damages. And Atkins J. held that an action would not lie for theſe words; but the other 3 held e contra, and ſo the plaintiff had judgment. Mod. 232. pl. 22. Hill. 28 & 29 Car. 2. C. B. Lord Townſend v. Hughes.

20. The

20. The defendant ſaid of the plaintiff, *the earl of Pembroke is of ſo little eſteem in the country, that no man of reputation hath any eſteem for him; he is a pitiful fellow, and no man will take his word for two-pence; and no man of reputation values him more than I value the dirt under my feet.* Reſolved per cur. that the words are actionable upon the ſtatute, though in the caſe of a common perſon they are not actionable. And it was ſaid per Twiſden, that if words be ſpoke of a peer of the realm that are actionable in caſe of a common perſon, the *peer hath* his *election to ſue upon the ſtatute or otherwiſe.* Freem. Rep. 49. pl. 58. Mich. 1672. C. B. Earl of Pembroke v. Staniel.

Sir Francis North cited the Marquis of Dorcheſter's caſe, where theſe words were reſolved to be actionable upon the ſtatute, viz. *he is no more to be valued than that dog that lies there.* Ibid.

21. It was moved for leave to *charge* M. being *priſoner in Newgate, with a ſcandalum magnatum, and ac etiam bille of* 100*l. in order to hold him to ſpecial bail* for ſaying the *D. of S. was a cheat, and had cheated the king and the army.* Per Holt, this being a poor man, to charge him thus will be a perpetual impriſonment to him, and ſpecial bail has been often demanded in theſe actions, yet it has been frequently denied; but he was ordered to find 2 that would ſwear themſelves worth 25*l.* each, and himſelf be bound in 100*l.* 12 Mod. 420. Mich. 12 W. 3. 1700. Duke Schomberg v. Murrey.

22. *Go fetch your lord out, G—d d—n him, I will kill him; he is a villain, and a villainous rogue.* And the defendant ſpoke other words, viz. *he is a ſcrub and ſcoundrel.* It was inſiſted, 1ſt, That the plaintiff ought to prove himſelf a peer. Sed non allocatur; for *in his declaration he * names himſelf Lord Viſcount Falkland, one of the peers of Great Britain;* and if he was not ſo, *the defendant ſhould have pleaded the miſnoſmer;* but by pleading in bar, he admits the plaintiff to be what he ſtiles himſelf. 2dly, That the plaintiff being a *peer of Scotland*, was not *intitled to an action of ſcandalum magnatum* on the ſtatute 2 R. 2. 5. unleſs he had been a peer of parliament; for the precedents of actions of this nature are vocem & locum in parliamento haben', &c. Sed non allocatur, for by the *ſtatute of union* 5 Ann. 8. art. 23. all peers of Scotland, after the union, ſhall be peers of Great Britain, and have rank and precedency, &c. be tried, &c. and enjoy all privileges as peers as fully as the peers of England now do, or hereafter may enjoy, except of ſitting in the houſe of lords, and the privileges depending thereon, and particularly the right of ſitting on the trial of peers. Now the ſtatute 2 R. 2. 5. extends to other nobles and great men of the realm, as well as to peers of parliament, ſo that when the peers of Scotland are by act of parliament made peers of England or Great Britain, they are nobles of the realm; and John Beaumont, who was created viſcount 18 H. 6. when created noble, though by a new title, was intitled to his action on this ſtatute; and though ſome precedents have vocem & locum in parliamento haben', it is not neceſſary. Comyns Rep. 439. Mich. 7 Geo. 2. in the exchequer, Ld. Faukland v. Phipps.

* See pl. 10.

[550]

(M. b. 6) For Slander of Title.

1. A *Remainder-man in tail*, brought action on the case against B. for slandering his title, in *affirming that* tenant in tail *had issue one D. who is alive*. Adjudged that the action lay. Ow. 37. Mich. 15 Eliz. Bliss v. Stafford.

S. P. Jenk. 247. in pl. 37. *for immisçat se rei alienæ ad se nihil pertinenti.*

2. *If a stranger says that J. S. has a better title to the lands than the tenant in possession*, and makes no pretence of title to himself, an action lies. Mo. 188. in pl. 334. Arg. cites it as adjudged in 20 Eliz. Wildgoose's case.

S. C. cited Arg. Cro. E. 197. in pl. 14. says nothing of attorney and client; but that for such words spoke by a stranger, action lies. ——S. C. cited Arg. 2 Le. 112. in pl. 147.

3. *Attorney* tells his client in private, being about to purchase of J. S. that *he had heard* that the father of the vendor had *granted a rent charge* out of the land in fee. Adjudged quod quer' nil capiat. Mo. 187. pl. 334. Hill. 26 Eliz. Johnson v. Smith.

1 Rep. 177. a. b. Mildmay v. Standish S. C. cited and S. P. adjudged and affirmed in error. ——Cro. E. 34. pl. 1. Mich. 26 & 27 Eliz. B. R. the S. C. adjudged and affirmed in error. ——Mo. 144. pl. 287. S. C. adjudged. ——S. C. cited Cro. E. 197. in pl. 14. ——Mo. 188. in pl. 334. Arg. S. P. cited as adjudged in 20 Eliz. Wildgoose's case. ——S. P. agreed by all the justices. Mo. 410. pl. 558. Trin. 37 Eliz. in case of Pennyman v. Rawbanks. ——Cro. E. 427. pl. 28. S. C. and S. P. agreed therein. ——2 Roll. Rep. 409. pl. 49. Trin. 14 Jac. B. R. Lovet v. Weller S. P. where the plaintiff lost the selling his land by reason of the words, and judgment was stayed.

4. If one *claims a title to himself of the land of another, as* if B. publishes that he has a lease of Bl. Acre for 1000 years, he is not subject to an action of slander, though he has not such lease; for this is *his own title*. Jenk. 247. in pl. 36.

3 Le. 177. pl. 229. S. C. in totidem verbis.

5. There is no difference whether the words slandering a title be *spoke to the party or to a stranger*; for in both cases the party is slandered so as he cannot make sale or exchange of his lands, which he was in treaty to do. Per Wray J. and judgment accordingly for the plaintiff. 2 Le. 112. pl. 147. Trin. 30 Eliz. B. R. Williams v. Linford.

There ought to be particular damage set forth; and the saying that they were spoken falso & malitiose is not sufficient, but a communication of selling, &c. should * appear; for there must be both damnum & injuria. Sty. 169. 176. Mich. 1649. B. R. Cane v. Golding. ——And in setting forth a communication of sale, it should be particularly expressed to whom the sale was to be made. Palm. 529. Pasch. 4 Car. B. R. Haywood v. Lowe.

6. In all cases when one intitles a stranger, it is not actionable unless it be *shewn that some damage comes to the proprietor by it*, viz. that he cannot let or sell it, &c. Per Wray Ch. J. Cro. E. 197. Mich. 32 & 33 Eliz. B. R. in pl. 14.

* [551.]

Cro. E. 196. pl. 14. S. C. adjudged for the plaintiff. —— S. C. cited Het. 161, 162.

7. Action upon the case, the plaintiff declared that he was in *communication to demise* the manor and castle of, &c. at so much rent to R. E. and that the defendant, præmissorum non ignara, said, *I have a lease of the said castle and manor of H. for 99 years, and published a demise to be made by one seised of the same before the plaintiff's*

plaintiff's purchaſe thereof, to E. D. her huſband, and offered to ſell it, ubi revera the *defendant knew it to be forged;* by reaſon whereof the ſaid R. E. did not proceed to accept of the ſaid leaſe. Reſolved, that action lies, becauſe the count alleges that the defendant knew of the communication of making a leaſe to R. E. and alſo that the leaſe was forged, and yet againſt her own knowledge had affirmed that it was a good and true leaſe, whereby the plaintiff was defeated of his bargain. 4 Rep. 18. a. b. pl. 14. Mich. 32 & 33 Eliz. Gerard v. Dickenſon.

8. If *J. S. hath land by deſcent,* and *ſells it to J. D.* and *he offers to ſell it to B.* and *one ſaith to C. in common diſcourſe, that J. S. is a baſtard,* and *this cometh to the ears of B.* yet J. D. ſhall have no action; for it was *not ſpoken directly to ſlander the title of J. D.* but oblique this is no ſlander; *but* if he had ſaid to B. *take heed how you buy the land, for J. S. was a baſtard,* action lieth; for it was directly ſpoken to that purpoſe to ſlander the title. Cro. E. 346. per Popham Ch. J. Mich. 36 & 37 Eliz. B. R. in pl. 17.

9. Plaintiff declared that W. B. brother of the defendant, had married one J. who died, and after the plaintiff married her, and whereas the *plaintiff and the* ſaid J. (innuendo *his wife*) *as in her right, were ſeiſed of certain lands,* as well freehold as copyhold, and of the freehold had *levied a fine to the plaintiff and his heirs, who offered to ſell the lands, for the payment of his debts,* to J. S. The defendant ſaid, *ſhe* (innuendo the wife of the plaintiff) *was never lawful wife of my brother W. B. for ſhe was married before to one N. K. who is yet alive, which marriage is fully to be, and hath already been as fully, proved as any other marriage can be proved;* and by reaſon of theſe words, none would buy the lands. Gawdy and Clench conceived that the action lies; for it is brought for ſlandering his title, and not his perſon, and the law intends it was a good marriage with K. and that no divorce was, except the contrary be ſhewed. But Fenner e contra, and that the action lies not by the prejudice of the ſale. Popham ſaid that all the words might be true, and yet ſhe might be the lawful wife of the plaintiff; for it may be ſhe was pre-contracted to the plaintiff, and afterwards married K. and then to W. B. and then divorced from K. and married to the plaintiff. Adjornatur. Cro. E. 346. pl. 17. Mich. 36 & 37 Eliz. B. R. Bold v. Bacon.

10. In caſe for ſlander of title, the plaintiff need not *ſhew what eſtate* he had therein; for his ſeiſin of any eſtate is ſufficient; per tot. cur. Cro. E. 419. pl. 14. Mich. 37 & 38 Eliz. B. R. Marvin v. Maynard.

11. Action for ſlandering his title, for that he ſaid to J. S. who was *in ſpeech to buy* the plaintiff's land, *I know one who hath two leaſes of his land, who will not part with them at any reaſonable rate,* ubi revera there was no ſuch leaſe. The defendant *juſtified by two ſeveral parol leaſes made to himſelf.* It was the opinion of the juſtices, that the words, as they are ſpoken, ſhall not be intendable of himſelf, but of ſome other perſon, and imports a ſlander;

Mo. 410. pl. 558. S. C. Popham aſked, whether one that had ſpoken words, purporting that a third perſon had title,

he could afterwards ſave himſelf by applying it to himſelf for his juſtification; and he held that he could not; but Gawdy and Fenner held that he might; to which Popham replied, that then no man could ever have an action for ſlandering his title.

ſlander; and the *juſtification after ſhall not take away the action* which was *given before*. And adjudged for the plaintiff, but * Fenner e contra. Cro. E. 427. pl. 28. Mich. 37 & 38 Eliz. B. R. Penniman v. Rabanks.

12. A. has no title to *Upton, innuendo Upton-Grey*. Held that the innuendo ſufficiently ſerves to ſhew his intent, what he meant in naming Upton; for it is uſually *known without the addition*, and might be called ſo; wherefore the innuendo ſtands well with his ſpeaking; but if without the innuendo it could not by any intendment be taken ſo, it might have been otherwiſe. And in action on the caſe for thoſe words, judgment pro quer. Cro. E. 419. Mich. 37 & 38 Eliz. B. R. Marvin v. Maynard.

13. *He had rather buy the title of B.* (who was the plaintiff's younger brother) *than the title of the plaintiff;* and further ſays, *he had ſeen an indenture to lead the uſe of a fine, whereby appeared that the plaintiff had no authority to ſell the land.* Not actionable. Yelv. 80. Mich. 3 Jac. B. R. Cruſh v. Cruſh.

14. *Thy brother was a fool, and was never born to do himſelf any good, for that he could not hold his hand from ratifying his father's will; notwithſtanding I have that to ſhew in my houſe, that if his heir, El. G. do not any ſuch act as her father has done, it ſhall bring her to inherit Titſley.* The plaintiff alleged, that he had an intention to make a jointure to his wife, &c. But adjudged the words would not bear action, the plaintiff not having laid that he was about to ſell it, or had entered into bond to make a jointure, and by reaſon of thoſe words it would not be accepted. Yelv. 88. Paſch. 4 Jac. B. R. Sir Tho. Greſham v. Grinſley.

15. The earl of A. gave a manor to the plaintiff in tail. The defendant was a copyhold tenant of an houſe, and lands held of the ſaid manor for life; and the plaintiff being in treaty to make a leaſe to P. for 500l. to commence after the defendant's death, the defendant ſaid, *the late earl of A. made a leaſe of my tenement to one S. for 60 years, to begin after my cuſtomary eſtate ended, and the ſame is a good leaſe;* by reaſon whereof P. nor any other, would not give him 10l. to make a leaſe. The defendant juſtified, that the earl of A. before the gift, made ſuch a leaſe to S. for 60 years, and that S. conveyed it to him. Reſolved by the court, the words ſhall be taken in the worſt ſenſe, according to his intent, which he ſpake when he affirmed it to be a good leaſe. And the words themſelves imply, that he ſpake them to countenance the title of a ſtranger, which is not lawful; and † now he cannot excuſe himſelf, when at the firſt the words did not import ſo much, and he cometh too late now to juſtify. It was adjudged for the plaintiff. Cro. J. 163. pl. 18. Paſch. 5 Jac. B. R. Earl of Northumberland v. Birt.

† S. P. per 3 juſtices. Palm. 531. Paſch. 4 Car. B. R.

16. In an action on the caſe, for calling the plaintiff baſtard, the plaintiff ſet forth that his grandfather was tenant in tail of lands, with divers remainders over; that his father was the iſſue

in

in tail, and that he was his youngeſt ſon; and that W. R. was about purchaſing the land, and offered him a ſum of money for his title, and to join in the conveyance; but afterwards, by reaſon of ſpeaking thoſe words, he refuſed to give him any thing. After judgment for the plaintiff, error was aſſigned, that the plaintiff hath *not aſſigned any ſpecial loſs*, for upon his own ſhewing he had no preſent title. But adjudged, that though he had not a preſent title, yet it appears that by poſſibility he might inherit the eſtate tail; and being offered money for that poſſibility to join in the conveyance, he had a *preſent loſs and damage* by ſpeaking thoſe words, and in futuro he might receive prejudice thereby, in caſe he was to claim any land by deſcent. So the judgment was affirmed. Cro. J. 213. pl. 6. Mich. 6 Jac. B. R. Vaughan v. Ellis. [553]

17. The plaintiff had lands *by deſcent*, part whereof he *intended* to ſettle on his ſon, and to make a leaſe of other part; and to fruſtrate his intent, the defendant ſaid *that he* (the plaintiff) *had no more right to the land than a ſtranger*. Not actionable, becauſe he had an intent to ſettle the land, which might be ſecret, he ſhould have ſhewn that he was in communication to ſettle it, or make leaſes; ſo that there is no ſufficient cauſe of loſs. And adjudged for the defendant, notwithſtanding the precedents in the new Book of Entries, fol. 55. Cro. J. 397. pl. 3. Paſch. 14 Jac. B. R. Smead v. Badley. Roll. Rep. 244. pl. 12. Swead v. Badley, S. C. adjudged againſt the plaintiff.— 3 Bulſt. 74. S. C. adjudged accordingly.

18. E. the plaintiff had lands by deſcent, and the defendant ſpeaking of his wife ſaid, *ſhall Elborough's wife ſit above my wife? he is but a baſtard*. All the court, præter Doderidge, held that theſe words in themſelves are ſcandalous, and dangerous to cauſe his inheritance to be queſtioned; and ſo the plaintiff had laid it in his declaration, that he was put to great charges to defend it. But Doderidge ſtrongly e contra, that neither the words themſelves, nor the manner of ſpeaking them, do import any ſlander, but obliquely; and the allegation of the plaintiff ſhall not help them. But by the other 3; the plaintiff had judgment. Cro. J. 642. pl. 2. Mich. 20 Jac. B. R. Elborow v. Allen. 2 Roll. Rep. 248. S. C. adjudged, abſente Doderidge.— Palm. 299. S. C. adjudged by 3 juſtices for the plaintiff.

19. If I have *colour of title* to land, and I ſay to another, I have better title to the land than you, yet an action will not lie againſt me, though my title be not ſo good as the title of the other is; per Roll Ch. J. nota. Sty. 414. Hill. 1654. Anon.

20. In caſe for ſcandal of title, it was agreed that the *defendant claimed title*, yet if it be *found by verdict to be done malitioſe*, the action lies; but if upon the evidence *any probable cauſe of claim* appeared, it ought not to be found malitioſe. 3 Keb. 141. pl. 11. Paſch. 25 Car. 2. B. R. Goulding v. Herring.

21. *M. hath mortgaged all his lands for* 100*l. and has no power to ſell or let the ſame*. And becauſe no ſpecial damage, nor particular colloquium was laid of a treaty to ſell them to any perſon certain, but only in general, that he *intended to ſell it to any that would buy*, which is too general, the judgment was ſtayed. Freem. Rep. 274. pl. 301. S. C. and it being urged that the laſt words were action.

able, it was anſwered, that theſe ſtayed. 3 Keb. 153. pl. 27. Paſch. 25 Car. 2. C. B. Manning and Avery.

ſhall have relation to the firſt. And judgment for the defendant, niſi.

22. *I have a ſurrender of the lands of B. and intend to ſue for the ſame, and the plaintiff has no title.* Adjudged for the defendant niſi, &c. becauſe the defendant claims title himſelf, and ſo the plaintiff hath none. 3 Keb. 744. pl. 10. Paſch. 29 Car. 2. B. Cock v. Heathcock.

[554] Fol. 88.

(N. b) Nuſance. [In what Caſes Action ſur le Caſe will lie for a Nuſance, and againſt whom.]

Cro. E. 664. pl. 14. S. C. and Popham, Gawdy, and Fenner held, that without a ſpecial grief ſhewn by the plaintiff the action lies not; but Clench e contra, for the ſtopping it is a ſpecial prejudice to the plaintiff, that he cannot go that way, and ſo reaſonable that he ſhould maintain the action. Sed adjornatur. —— Mo. 180. pl. 321. Paſch. 26 Eliz. S. P. accordingly. —— Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26, 27. S. P. by Baldwin Ch. J. accordingly; but by Fitzherbert J. where one has greater damage than another, as in the caſe put by Baldwin of ſtopping a highway, ſo that I cannot go from my houſe to my cloſe, I ſhall have an action. —— Br. Nuſance, pl. 1. cites S. C. —— S. C. cited by Mountague Ch. J. 2 Roll. Rep. 4. And that for a common nuſance none ſhall have a particular action, cites 33 H. 6. 26. —S. P. 9 Rep. 113. a. accordingly per cur. Arg.

1 Salk. 16. pl. 7. Trin. 11 W. 3. B. R. in the caſe of Iveſon v. Moore, ſays all the court agreed, that where an action ariſes from a publick nuſance, there muſt be a ſpecial damage, becauſe he that did the nuſance is puniſhable at the ſuit of the publick; and to allow all private perſons their actions, without ſpecial damage, would create an endleſs multiplicity of ſuits.

[1. IF a man be *diſturbed* from going *in a common highway*, or if a *ditch* be *made acroſs the way, ſo that he cannot paſs*, yet *he ſhall not have* an action upon the *caſe* for this for the multiplicity of ſuits; for if he may, every man may have ſuch action; and the law has provided another proper *remedy* for this common nuſance, viz. a *preſentment in the leet or turn.* Co. Lit. 56. where is cited Trin. 41 Eliz. B. R. between FINEUX AND HOVENDON reſolved.]

Cro. J. 446. pl. 25. Mich. 15 Jac. B. R. Fowler v. Sanders, S. P. adjudged, and ſeems to be S. C. —— 2 Roll. Rep. 49. cites Fuller v. Saunders, S. C. adjudged. —— S. C. cited Cro. J. 491. —— See tit. Nuſance (B) pl. 1. S. C.

[2. If a man *puts logs of wood ſparſim in a highway, and ſuffers them to continue there for* two months, or other ſuch *long time*, though a man may with great care, and in the day, paſs ſafely, yet if I ride in the way, not perceiving the logs, and my horſe ſtumbles upon the logs, whereby he falls and throws me, by which means I receive any damage, (ſcilicet, ſeveral wounds, as the caſe was) I may have an action upon the caſe againſt him for this *ſpecial damage* received, though this laying of logs in the way be a common nuſance. Hill. 15 Jac. B. R. adjudged between . . . . . .]

If a man lays *logs of timber in the highway adjoining to his houſe*, by which the cart of one was overthrown, this is not nuſance; but the plaintiff ſhall recover in action on the caſe. 2 Roll. Rep. 49. cites it ſo reſolved in the caſe of Fuller v. Sanders, in B. R. about 14 Jac.

For *general* nuſance every particular man ſhall not have *action*, unleſs he has *ſpecial prejudice*; but every man may *abate it*.

But for *particular* nuſance a man may have his action, and by this means abate the nuſance, and recover damages, or may abate it. Jo. 222. per 3 juſtices, Paſch. 6 Car. B. R. in caſe of James v. Hayward.

[3. So

[3. So if a man *makes a ditch overthwart a common highway*, whereby my *horſe falls into* the ditch, or if I have any other particular or *ſpecial damage*, I may have an action upon the caſe for it. Co. Litt. 56. where is cited Trin. 41 Eliz. B. R. between FINEUX AND HOVENDEN, reſolved.]

Cro. E. 664. pl. 14. S. C. & S. P. admitted per cur.——Mo. 180. pl. 321. Paſch. 26 Eliz. S. P. admitted per cur.——Br. Action ſur le Caſe, pl. 6. cites 26 H. 8. 26, 27. S. P. accordingly.——Br. Nuſance, pl. 1. cites S. C.——Vaugh. 341. S. P. by Vaughan Ch. J. accordingly, Arg. and S. C. cited in marg.

Where the party grieved has received ſome *ſpecial damage* by it, *or can have no other remedy*, an action lies. Admitted. Carth. 193. Trin. 3 W. & M. B. R. in caſe of Pain v. Partrich.

[4. If A. ſeiſed of a waſte adjacent to a highway, *digs a pit in the waſte within* 36 *foot of the ſaid way*, and the *mare of B. eſcapes into* * *the ſaid waſte, and falls into the ſaid pit, and there dies*, yet B. ſhall not have any action againſt A. becauſe the making of the pit in the waſte, and not in the highway, was not any wrong to B. but it was the default of B. himſelf that his mare eſcaped into the waſte. Paſch. 5 Jac. B. R. between BLITHE AND TOPHAM, adjudged.]

*[555]

Cro. J. 158. pl. 11. S. C. adjudged upon the declaration, and not upon the verdict, that the bill ſhould abate; for when the mare was ſtraying, and he ſhews not any right why his mare ſhould be in the ſaid common, it was no wrong to him, and though his mare fell in he has no remedy, and ſo it is damnum abſque injuria. ——S. P. Arg. Vent. 295.

[5. If a man *digs a ditch in the highway*, into which *my ſervant* falls, and *breaks his thigh*, by which I loſe his ſervice for a long time, I ſhall have an action upon the caſe againſt him for this loſs of ſervice. Hill. 12 Jac. B. R in EVERARD AND HOPKIN'S CASE, per curiam.]

2 Bulſt. 334. S. P. by Croke, and agreed per tot. cur. in the S. C. obiter.—— S. P. agreed by Coke, Crooke, and Doderidge. Roll. Rep. 124. pl. 6. in S. C.——(B. c) pl. 5. S. C. but not S. P.

In caſe for digging a pit in the highway, *per quod J. S. for whoſe life the plaintiff had a leaſe, fell therein and was drowned*, it was doubtful if this action lies. Cited by Windham J. Keb. 847. Hill. 16 & 17 Car. 2. B. R. in pl. 44.

[6. If A. be owner of an inn in D. and B. has a houſe next adjoining thereto, and B. in a room in his houſe next to the inn *erects a furnace, in which he melts ſtinking tallow and ſtinking greaves, by reaſon of the ill ſmell whereof the gueſts of the inn forbear to come thither*, to the damage of the inn-keeper, A. the inn-keeper ſhall have an action upon the caſe againſt B. for this nuſance. Mich. 14 Car. B. R. between MORLY, inn-keeper of the George in Baſingſtoke, AND PRAGNEL, adjudged per cur. this being moved in arreſt of judgment; and in truth, upon the evidence, it appeared that the defendant was a chandler, and he melted it for the uſe of his trade. But there it was proved that *his tallow and greaves was not like the tallow and greaves of other chandlers;* for this is a nuſance to the whole town, and ſo preſented at the leet; and the reaſon of the nuſance was, becauſe he kept the greaves ſo long before he melted it, that it ſtunk, and had ſuch an ill ſmell. But this queſtion whether it lay againſt a chandler * came not in queſtion in the king's bench, becauſe *it did not appear in the declaration that he was a chandler.* Intratur 14 Car. Rot. 549. Trin. 8 Hen. 4. Rot. 57. Willielmus Milburn recuperet per juratam per billam ſuam in qua queritur verſus Johannem

Cro. C. 510. pl. 3. S. C. adjudged for the plaintiff. ——See tit. Nuſance (G) pl. 18. and the notes there.

* Fol. 89.

Johannem Cutting, cook, de eo quod ipſe Johannes apud Weſtmonaſterium † *vendebat dicto Willielm unum caponem piſtum corruptibilem & recalefactum*, qui capo aſſatus per 4 dies in hoſpitio domini regis, & iterum calefactus, & piſtus extitit, *de quo poſtquam edit, vomitum horribilem fecit, ita quod infirmabatur per 2 ſeptimanas*, recuperat inquam 20s. pro damnis. (And I have been informed that it appears upon the record at large, that the juſtices increaſed the damages.)]

† See (P. b) pl. 2. S. P. An action lies againſt a *glover*, becauſe he *with a lime-pit ſo corrupted the water, that the tenants departed*. Arg. Hutt. 136. cites 13 H. 7. 26.

See tit. Nuſance (G) per totum. *Caſe*, for that he was poſſeſſed of a houſe and garden for 20 years, and the *defendant being a butcher* had a *ſlaughter houſe and yard* next adjoining to the plaintiff's garden; that the defendant exalted his yard, and made *a ditch whereby he conveyed the filth* and offal *into the plaintiff's garden*. Upon not guilty pleaded, it was found for the plaintiff; but judgment was arreſted for a variance between the writ and the declaration.

[7. In an action upon the caſe, if the plaintiff declares that whereas he was poſſeſſed of a cloſe called D. and the defendant poſſeſſed of another cloſe called S. next adjoining to the plaintiff's cloſe, the defendant malicioufly intending to deprive the plaintiff of the profit of his cloſe, maintained a *houſe* for ſeveral years before erected upon his cloſe; and for one year before the action brought *uſed* this houſe *for a ſmelting-houſe for lead*, and the chimney of the ſaid houſe ſo exaltavit, and for the ſaid year ſo continuavit, that by the exaltation and continuation thereof the ſmoke aſcended out of the ſaid chimney per vim ventorium upon the cloſe of the defendant afflatur & diſſipatur *ſo that* by ſuch uſe ‡ of the ſaid ſmelting-houſe and chimney, and continuation thereof, *all the graſs and wood of the plaintiff in his* ſaid *cloſe growing and being, ſo ſuffocata, corrupta, & putrida fuerunt*, with the fume (ſcilicet ſmoke) of the ſaid chimney, out of the ſaid chimney coming, *that* by reaſon thereof the *plaintiff* had *loſt all the graſs and wood of his ſaid cloſe* there growing, *and alſo* had loſt 2 *horſes and* 1 *cow*, that were *depaſturing in the ſaid cloſe*; though this is a lawful trade, and for the benefit of the commonwealth, and neceſſary, yet the action lies; for he *ought to uſe it in waſte places and great commons, remote from incloſures*, ſo that no loſs or damage might ariſe thereby to the proprietors of lands adjoining thereto; though I objected that in ſuch waſte places other men have common for cattle, that may be prejudiced thereby alſo. Mich. 15 Car. B. R. between POYNTON AND GILL, adjudged per Jones & Barkly, no other of the judges being preſent, this matter being moved in arreſt of judgment, after a verdict for the plaintiff. Intratur Hill. 14 Car. Rot. 648.]

Cro. E. 829. Paſch. 43 Eliz. C. B. Norton v. Palmer.

An action on the caſe for *erecting a tan fat*, with averment of corrupting the air and water, to the annoyance of the plaintiff; and after verdict adjudged for the plaintiff. Hutt. 136. Arg. cites 5 Jac. Smith v. Mopham.

‡ [556]

See tit. Commoner (A) &c. So in caſe for a ſtranger's *digging clay* in the land where the plaintiff

[8. If a copyholder by the cuſtom of a manor has uſed to have common for all his cattle, levant and couchant, upon his cuſtomary tenement in a certain place parcel of the manor, and a *ſtranger digs turfs there, and carries them away, per quod his common is impaired*, an action upon the *caſe lies, declaring that* the *defendant dug ſo many turfs there, and them with his horſes and carts herbam tunc & ibidem creſcentem pedibus ambulando & conculcando*

from

from the place aforeſaid *minus rite ceperit & abcarriavit per quod querens communiam ſuam prædictam pro averiis ſuis*, &c. *in tam amplo & beneficiali modo, prout preantea habuit*, &c. *habere non potuit*; this is a good declaration, though the commoner cannot have any damage for the taking and carrying away of the turf, yet the coming upon the land with his horſes and carts to carry them, is a prejudice to the common, and there *per quod his common is impaired, is the cauſe of the action*, and the *carrying and taking* them *is a means of the impairing* thereof. Mich. 9 Car. B. R. between TERRY AND GOODIER, adjudged, this being moved in arreſt of judgment upon ſuch a declaration, the *damages* being *intire*. Intratur Trin. 9 Car. Rot. 49.]

had common, and carrying away the ſame over the common, per quod he could not uſe it in tam amplo modo, &c. adjudged for the plaintiff in C. B. and affirmed in B. R. by

3 juſtices; but Haughton e contra. Godb. 343. pl. 437. Trin. 21 Jac. B. R. Bullen v. Sheen. ——— 2 Roll. Rep. 308. Shean v. Bullen, S. C. adjornatur. ——— Ibid. 344. adjudged in B. R. by 3 juſtices; and ſays that Ley Ch. J. and Doderidge took a *difference between treſpaſs and treſpaſs on the caſe*; and the reporter ſays, nota the reaſon of the judgment was upon the concluſion of the plea, viz. per quod non potuit, &c. ——— Palm. 366. S. C. adjudged, and affirmed accordingly.

In caſe the plaintiff counted that he was ſeiſed of the manor of C. and preſcribed for common for 400 ſheep in L. as pertaining to his manor, and the defendants with their ſheep eat the graſs there growing, per quod he could not enjoy his common there in tam amplo modo, &c. and upon not guilty the plaintiff had verdict, judgment, and execution. 9 Rep. 113. a. Coke Ch. J. cites Trin. 41 Eliz. Holland v. Lovel. ——— 2 Brownl. 148. S. C. cited per eundem, and ſays that inaſmuch as the plaintiff may take them damage feaſant, it proves that he has wrong, and therefore may diſtrain damage feaſant; and for the ſame reaſon, if the beaſts are gone before, he may have caſe; for otherwiſe one that has many beaſts may deſtroy all the common in a night, and not be puniſhed, and ſo differs from a nuſance which is publick, and may be puniſhed in a leet. ——— Jenk. 144. pl. 96. at the end, S. P.

So caſe lies for a copyholder, having right of common, againſt a ſtranger for putting beaſts into the common, and depaſturing there, per quod in tam amplo modo, &c. 9 Rep. 111. b. Trin. 10 Jac. Mary's caſe, alias, Crogate v. Marys. ——— 2 Brownl. 55. S. C. and by 3 juſtices the action lies; but Foſter e contra, becauſe then every commoner might have action, and ſo would be infinite.

* The lord may have action for any treſpaſs done on the common, more or leſs, as being immediate to him; but the commoner ſhall have it only where it is ſuch, per quod proficuum communiæ ſuæ, &c. amiſit; or that he cannot have his common in tam amplo modo, as before. 9 Rep. 113. a. reſolved in Mary's caſe, alias, Crogate v. Marys.

* [557]

[9. If *J. S. hath lands adjoining to the lands of J. D. in which ſeveral* tenants *hath common* of paſture, and *J. S. ſtores his lands with coneys, without* any lawful grant or preſcription, whereby the coneys go into the lands of J. D. and eat the graſs there, whereby the commoners cannot have ſufficient common for their cattle, yet *a commoner cannot have an action* upon the caſe *againſt J. S.* for this matter, becauſe † when the coneys go out of his lands he is not the owner of them, but the poſſeſſory property of them is in J. D. who is the owner of the ſoil where the commoner hath right of common, and where the coneys are, and the *commoners may* ‡ *kill them*. Mich. 10 Car. B. R. between HINSLEY AND WILKINSON, adjudged per curiam, contra Barkly, in a writ of error upon a judgment in banco, and the judgment reverſed accordingly. Intratur Hill. 8 Car. Rot. 302. But after this was adjourned to Paſch. 11 Car.]

Fol. 90.

See tit. Commoner (A) pl. 4. Eversley v. Wilkinſon, S. C. contra. ——— Cro. C. 387. pl. 20. S. C. and ruled by all the juſtices in B. R. præter Berkley, who doubted thereof, that the judgment in C. B. be reverſed; and Crooke J. ſaid he had conferred with 3 judges of C. B. that they did not remember ſuch caſe there, but that it paſſed ſub ſilentio. ——— Jo. 356. pl. 5. S. C. and judgment in C. B. reverſed.

So where they come into the lands of a neighbour he may kill them; but action on the caſe does not lie. 5 Rep. 104. b. Mich. 39 & 40 Eliz. C. B. Boulton's caſe. ——— Mo. 420. pl. 580. Anon. but ſeems to be S. C. held not actionable; for when they are out of the conigree they are not his

his conies.——Ibid. 453. pl. 621. Boulſton v. Hardy, S. C. held by all the juſtices not to be actionable.——Cro. E. 547. pl. 21. S. C. adjudged accordingly.——S. C. cited 2 Bulſt. 116. Arg.

† Mo. 421. pl. 580. Mich. 37 & 38 Eliz. Anon. S. P.

‡ See tit. Commoner (A)

10. The declaration in action for ſtopping a way was, that he *hath a way, and the defendant obſtructed it ſo that the plaintiff cannot have it;* and therefore *repugnant* (habet & habere non poteſt) by ſeveral, and ill. Quære. Br. Action ſur le Caſe, pl. 12. cites 33 H. 6. 26.

Br. Nuſance, pl. 1. cites 26 H. 8. 27, 28. but the year is miſtaken, and likewiſe the print in the beginning of the pl.

11. A man who *has a particular hurt or damage* in any caſe, ſhall have *action upon the caſe againſt* him who does a common nuſance; as *by ſtopping the king's highway*, and the like, *as if he cannot go to his houſe*, or *to his paſture, by reaſon thereof; or that he and his horſe in the night fell into the ditch*, and ſuch like; per Fitzherbert clearly. 27 H. 8. 26. b. 27.

——Mo. 180. pl. 321. S. P. Paſch. 26 Eliz. Anon.——S. P. per Fitzherbert J. But per Baldwin Ch. J. contra, that the ſtopping the king's highway ſhall be puniſhed by the leet, and every man grieved ſhall not have an action of it. And there Fitzherbert ſaid, that *where one man has more damage than another*, he ſhall have action on the caſe. Br. Action ſur le Caſe, pl. 6. cites 27 H. 8. 26, 27.

But where a *common way is not repaired, ſo that I mire my horſe*, I ſhall not have action againſt him who ought to repair it; for that is the people, and ſhall be reformed by preſentment. Quod nota per Heydon. Br. Action ſur le Caſe, pl. 93. cites 5 E. 4. 3.——S. C. cited Mo. 180. pl. 321. Anon.

12. Caſe, for *ſtopping water inceſſanter decurrent' by his land, by which his land was drowned, and his graſs rotted.* Exception was taken, becauſe it is *not alleged that the water had ſo run time out of mind.* But per Gawdy J. if the water had run there but for one year, yet if defendant diverts it ſo as it drowns the plaintiff's land, the action will lie well enough. 4 Le. 193. pl. 305. Paſch. 30 Eliz. C. B. Smith v. Babb.

Cro. E. 664. pl. 14. in caſe of Fineux v. Hovenden, cites S. C. as adjudged, and for the ſame reaſon.——

13. The inhabitants of Southwark had by cuſtom a *common watering-place* for their cattle, and the defendant ſtopped it up. Adjudged that any inhabitant of S. might have an action; for otherwiſe they would be without remedy, ſuch a nuſance not being * preſentable in the leet or tourn. Co. Litt. 56. a. cites Weſtbury v. Powell.

Infra (O. c) pl. 3. S. C. but ſeems miſplaced there, as not anſwering the head.

* [558]

Keb. 847. pl. 44. Hill. 16 & 17 Car. 2. B. R. the S. C. and Hyde and Windham ſaid the court will not, after a verdict, intend any other way, and that this is

14. Plaintiff declared *that there was a highway leading from A. to B. and that he had a cloſe in A. ſowed* with corn, viz. &c. and ſhews what, &c. *and that he lived in B. and that this way was the moſt convenient*, & maxime propinqua via *for carrying his corn from his cloſe to A. to his houſe in B.* and that he had ſo many load of corn ready to be carried, &c. *and the defendant ſtopt the way, ſo that he could not carry his corn*, &c. *and in the mean time rain fell and ſpoiled his corn.* After verdict for the plaintiff judgment was given for him in C. B. ſub ſilentio; and upon error brought in B. R. error was aſſigned that the action would not lie; but adjudged that it would. Cited by Holt Ch. J. Arg. Ld.

Ld. Raym. Rep. 494. as entered Mich. 14 or Hill. 14 & 15 Car. 2. B. R. Rot. 271. Maynell v. Saltmarſh. ſufficient ſpecial damage; and judgment was affirmed.

15. In a ſpecial action on the caſe for *keeping a paſſage ſtopt up, ſo that the plaintiff could not come and cleanſe his gutter*, &c. It was moved in arreſt of judgment, that there ought to have been a requeſt to open it. Per cur. it is aided by the verdict; but by Twiſden J. the *defendant might have demurred.* Judgment for the plaintiff. 1 Mod. 27. pl. 71. Mich. 21 Car. 2. B. R. Tomlin v. Fuller. 2 Keb. 575. pl. 93. S. C. & S. P. agreed accordingly, per cur.—Vent. 48. S. C. is of a way to his meſſuage thrpugh another's freehold, and the way is ſtopt, and then the houſe is aliened, the alienee can bring no action for this nuſance before requeſt.

16. Caſe, &c. for a nuſance in *building a ſmith's forge near the plaintiff's houſe* in S. *and for making ſuch a noiſe with hammers that the plaintiff could not ſleep, by which he was annoyed, and loſt the benefit and eaſement of his houſe.* The defendant *pleaded* in bar, *that he had uſed the trade of a blackſmith 20 years and upwards in S.* and that he was apprentice to that trade, *that the plaintiff adviſed him to dwell in the houſe, and follow his trade there*, and accordingly he did dwell there, and ſet up a forge in an old room, and worked there with his ſervants at ſeaſonable times; *and traverſed that he newly built a ſmith's forge, aliter than as aforeſaid.* And upon demurrer to this plea, the opinion of the court was that the action lies; and they held that the plea did not anſwer the declaration, and that the traverſe was idle. But by conſent he had licence to amend his plea. 1 Lutw. 69. Hill. 3 & 4 Jac. 2. Bradley v. Gill.

17. Action on the caſe will not lie for diſturbing or *hindering a paſſage over a common ferry* (which is a common highway) unleſs he alleges ſome particular damage done to himſelf; but it muſt be by preſentment in the leet, or indictment. 3 Mod. 289. Trin. 2 W. & M. in B. R. Pain v. Patrick. Show. 243. Mich. 2 W. & M. S. C. adjornatur.——Ibid. 255. Paſch. 3 W. & M. S. C. accordingly. And judgment for the defendant.——1 Salk. 12. pl. 1. S. C. and S. P. accordingly.——Comb. 180. S. C. & S. P. held accordingly. And judgment for the defendant.——Carth. 191. S. C. & S. P. and judgment accordingly.——S. C. cited by Holt Ch. J. as adjudged accordingly. Ld. Raym. Rep. 493, 494.

18. If a *highway* is *ſo ſtopt*, that a man *is delayed in his journey* a little while, and by reaſon thereof he is damnified, or *ſome important affair neglected*; this is *not ſuch a ſpecial damage* as action on the caſe lies for, *but* a particular damage to maintain this action *ought to be direct, and not conſequential*, as the *loſs of his horſe, or ſome corporal hurt* in falling into a trench in the highway. Reſolved Trin. 3 W. & M. in B. R. Carth. 194. in caſe of Pain v. Partridge. [559]

19. Caſe, &c. for *ſtopping up a highway leading to the plaintiff's colliery*, with intent to deprive him of the profit thereof, *per quod* he loſt the profit, &c. and that *his coals were ſpoiled for want of buyers.* The plaintiff had a verdict, but on a motion in arreſt of judgment, Turton and Gould held that the action did lie, but Rookby * S. P. *and who they were by name.* But if it had been laid, that the coals which

the plaintiff had ready for ſale, *were ſpoiled, or loſt or damnified, becauſe he could not carry them off*, in ſuch caſe Holt Ch. J. who was againſt the action, admitted, that the action had been maintainable.

Rookby and Holt held that it did not lie, it being for a *publick nuſance*; that no man can have an action without a particular injury done, or a particular right claimed. Now in this caſe the plaintiff had no particular right to the highway, for that was common to all people, nor a particular injury done to him, becauſe ſtopping a highway is a publick injury; but if he had ſuch an injury by any *ſpecial damage*, it is not ſufficiently *ſet forth in his declaration*, by alleging in general that his coals were ſpoiled for want of buyers; for he ought to ſhew *ſpecially, that* * *cuſtomers were coming to buy them*, and were hindered. 1 Salk. 15. pl. 7. Trin. 11 W. 3. B. R. Iveſon v. Moor.

Carth. 453. S. C. but the court divided, and the caſe adjourned before all the judges. ——— Comb. 480. S. C. adjornatur. ——— 12 Mod. 262. Hill. 11 W. 3. S. C. the court divided. But at the end of the caſe, the reporter ſays, that in the caſe of Philips v. Ryand, Paſch. 11 Geo. 1. the Ch. J. ſaid it was reverſed by the opinion of all the judges in the exchequer chamber. ——— Ld. Raym. Rep. 486. S. C. with the pleadings, and the court was divided. But the reporter ſays, that afterwards, by conſent of Holt, this caſe was argued before all the juſtices of C. B. and barons of the exchequer, at Serjeant's-Inn; and they all were of opinion for the plaintiff, that the action well lay.

(N. b. 2) Actions for Nuſances. Againſt whom, Leſſor, Leſſee, Feoffee, &c. At what Time.

A diverſity was remembred, when the continuance occaſions a new nuſance, as in caſe of a *pent-houſe*, where every new dropping of the rain is a new nuſance, *and where* the nuſance *at firſt doſo has done all the miſchief* it can; in the firſt caſe action will lie againſt the aſſignee, but not in the other. Arg. 12 Mod. 636. in caſe of Roſwell v. Prior.

1. IT is not any offence for a feoffee, &c. to keep up a nuſance erected before his time; as where the action on the caſe was laid for *keeping and maintaining a bank on the brook*, by reaſon whereof the brook ſurrounded his land. But the plaintiff is to have his remedy to abate it by a quod permittat, and not bring his action ſur caſe, as here; and therefore this differs from 4 Aſſ. pl. 3. and judgment for defendant. Cro. E. 520. pl. 46. Mich. 38 & 39 Eliz. C. B. Beſwick v. Cumden.

Action lies *againſt leſſee for the continuing* a nuſance erected by the leſſor, by which the land of the plaintiff was overflowed. Cro. J. 555. Mich. 17 Jac. B. R. Brent v. Haddon.

2. If I have a *way over B.'s land*, and B. ſtops it, and after leaſes it for years, it ſeems that action on the caſe lies againſt leſſee; per Haughton, quod fuit conceſſum per Coke and Doderidge. Roll. Rep. 222. Trin. 13 Jac. B. R. in pl. 27.

3. If a man *abates the nuſance*, he cannot bring an action afterwards for the nuſance; but it is a good plea that the plaintiff himſelf, either before the writ purchaſed, or pending the writ abated the nuſance. 9 Rep. 55. a. Mich. 8 Jac. C. B. in Batten's caſe.

[560]

Ld. Raym. Rep. 370. S. C. adjudged accordingly.

4. After a *recovery*, a man can never have a new action for the *erection* of the ſame nuſance, but for the *continuance* he may. 1 Salk. 10. pl. 3. Mich. 10 W. 3. B. R. Johnſon v. Long.

5. An action lies *againſt* the *leſſor* for a *nuſance continued by his leſſee*, it being erected by him. 12 Mod. 636. in caſe of Roſwell v. Prior, cites 2 Cro. 373. in point.

2 Salk. 460. pl. 6. S. C. accordingly; for per cur. in this caſe the leſſor transferred the thing, with the original wrong, and his demiſe affirms the continuance of it. Beſides, he has rent as a conſideration for the continuance; and therefore ought to anſwer the damage it occaſions.——In the caſe of Rippon v. Bowles, Cro. J. 373. Trin. 13 Jac. B. R. it was inſiſted, that if the plaintiff had any remedy, it ſhould be by quod permittat againſt the tenant of the freehold; and to that opinion Coke Ch. J. inclined, though the other juſtices doubted.

For more of Nuſance, ſee tit. **Chimin, Common, Nuſance, Stopping Lights.**

(O. b) [Caſe.] Againſt whom it lies. [*A third Perſon.*]

[1. IF I *deliver goods to A. who delivers them to B. to keep to the* * *uſe of A.* and B. *waſtes them*, I may have an action upon the caſe againſt B. though I did not deliver them to him. 14 Ed. 4. 13.]

* This ſhould be *(to my uſe)* according to Year-book, and ſhould be 12 E. 4. 13. a. pl. 9. and Brook, Action ſur le Caſe, pl. 96. cites S. C. and is accordingly.

[2. If I *deliver my horſe to a ſmith to ſhoe*, and *he delivers him to another* ſmith, *who pricks him*, I may have action upon the caſe againſt him, though I did not deliver the horſe to him. Contra 12 Ed. 4. 13. per Brian.]

S. P. by all the juſtices, except Brian, 12 E. 4. 13. a. pl. 9.—— Fitzh. Action ſur le Caſe, pl. 19. cites S. C. accordingly by all the juſtices, but Brian e contra.

(P. b) Diſceit in Nature of Caſe. In what Caſes it lies upon a Warranty in Law. [*And Pleadings.*]

[1. IF *a vintner ſells wine* (knowing it to be *corrupt*) to another, *as ſound*, good, and not corrupt, without any expreſs warranty, yet an action of diſceit lies againſt him; for this was a warranty in law. 9 Hen. 6. 53. b.]

S. C. cited 2 Roll. Rep. 5. Arg.—— S. P. and it is no *plea*, *that at the time of the ſale the wine was ſufficient and able*, but *ſhall ſay further, and not corrupted*; per cur. Br. Action ſur le Caſe, pl. 8. cites S. C.——Treipaſs upon the caſe, inaſmuch as the defendant *ſold to the plaintiff a tun of wine, knowing it to be corrupted*; the *defendant ſaid that the plaintiff had taſted it, and accepted it, and the other ſaid that he did not accept but upon condition that it ſhould be good* when it was carried to his houſe. The *defendant ſaid that the plaintiff accepted it for good, and traverſed the condition*; and the other e contra. Br. Action ſur le Caſe, pl. 35. cites 7 H. 4. 15.—— And *ſo quære* if ſale of a thing corrupted is not material, where it is not warranted, and where the buyer taſtes it. Ibid.

† F. N. B. (c) ſays, but note, it behoves that he warrants it to be good; for if he ſells it without warranty, it is at the buyer's peril; and his taſte ought to be his judge in ſuch caſe.——S. C. cited Arg. Cro. J. 470.——Bridgm. 127. Arg. cites F. N. B. 94. (c) as above; and alſo cites 7 H. 4. 14. that the defendant there pleaded he gave the plaintiff a taſte of the wine, and that he *agreed it was good wine*; and adjudged that the action would not lie.——[But the Year-book 14. b. 15. pl. 19. is according to Brook, and not reported to be adjudged.]

† [561]

Br. Action ſur le Caſe, pl. 8. cites S. C.—— Cro. J. 197. pl 23. cites S. C. and 7 H. 4. 15. and 11 E. 4. 6. becauſe it is againſt the commonwealth.——S. C. cited 2 Roll. Rep. 5, 6. Arg. and agreed, becauſe none ſhall ſell any corrupt victuals.—S. P. by Frowike; for no man can juſtify the ſelling corrupt victuals. Keilw. 91. a. pl. 16. Hill. 22 H. 7. Anon.—— F. N. B. 94. (c) in the new notes there (c) ſays, note a *diverſity* between *ſelling corrupt wines to merchandize*; for there an action on the caſe lies not without warranty. Otherwiſe if it be *to a tavern or victualler, if it prejudices any*; and cites 19 H. 6. 19. 40. accordingly.——D. 75. a. marg. pl. 23. cites it as Popham's opinion, Trin. 3 Jac. that if I ſell corrupt victuals for good, knowing them to be corrupt, and affirm them to be ſo, caſe will lie for the deceit; but though they are corrupt, and I do not know it, though I affirm them to be good, yet no action lies, unleſs I warrant them to be good.

[2. So if I come to a tavern to eat, and the *taverner* gives and *ſells me meat and drink corrupted*, whereby I am made very ſick, action lies againſt him without any expreſs warranty; for there is a warranty in law. 9 Hen. 6. 53.]

S. P. Br. Action ſur le Caſe, pl. 8. cites S. C.—— If he ſells ſtuff which he knows to be falſe and corrupt, action lies without any warranty. Br. Garranty, pl. 93. cites S. C.——S. P. by Frowike, Keilw. 91. a. pl. 16. Hill. 22 H. 7. Anon. but if he does not know it, action lies not.

[3. If a man (it ſeems it is intended of a merchant) *ſells a piece of woollen cloth*, knowing it to be *not well fulled*, an action of diſceit lies for this, becauſe it is a warranty in law. 9 Hen. 6. 53.]

Contra per Paſton. Br. Diſceit, pl. 2. cites S. C.—— F. N. B. 94. (C) that no action lies.——Bridgm. 127. Arg. cites S. C.

[4. If a man *ſells a horſe* to me without warranting of him to be ſound, if he be *diſtempered* in his body, yet no action lies againſt him. Contra 20 Hen. 6. 35.]

* Br. Action ſur le Caſe, pl. 85. cites S. C.—— S. C. cited 4 Rep. 18. b. per cur. in pl. 14. that the defendant offered them to ſale to the plaintiff, and action lies.——S. C. cited Cro. J. 197. in pl. 23. and Tanfield Ch. B. anſwered that the ſaid book is not adjudged, but the party admits it, and takes iſſue; yet if it were allowed to be law, it is becauſe he had there poſſeſſion by tort, and ſo had colour in ſhew to be owner, and he was deceived by buying of him, who had only a tortious poſſeſſion; and though he had not any right, yet *every one took notice of him as owner*, and he himſelf knew that he was not right owner, which is the reaſon that the action is maintainable.

[5. If a man *takes goods wrongfully from J. S.* and *ſells them* to me for money, *as his own* goods, and after *J. S.* [* *the owner*] *takes them* from me, I ſhall have an action upon the caſe againſt my vendor. 42 Aſſiſarum 8. adjudged.]

Cro. J. 474. pl. 6. Furnis v. Leiceſter S. C. adjudged for the plaintiff. —See (D. c) pl. 1.—— See (P. b. 2) pl. 9.

[6. If there be a communication between A. and B. for the buying of certain ſheep, and thereupon B. the *vendor*, *ſays they are his own* ſheep, *where* in truth *they are the ſheep of another*, but thereupon A. buys them of B. though B. made not any expreſs warranty of the ſheep, yet an action upon the caſe in nature of diſceit lies againſt B. Paſch. 16 Jac. B. R. between LYSTER AND FURNACE, adjudged.]

Fol. 91.

S. P. and being found at the trial in which it was neceſſary that the

[7. *So* if the *vendor affirms that* the goods are the *goods of a ſtranger*, *his friend*, *and that he had an authority from him to ſell them* to him, and thereupon B. buys them, *where in truth they are the goods of another*, yet if he ſold them fraudulently and falſely, upon this pretence of authority, though he did not warrant them, and though it is *not averred that he ſold them, knowing them to be the goods of a ſtranger*, yet B. ſhall have an action upon the caſe for

for this deceit. Mich. 1650. adjudged between WARNER AND TALLARD. Intratur Trin. 1650. Rot. 1338. this matter being moved in arreſt of judgment.]

fraud be given in evidence, it was adjudged actionable; cited by Twiſden J. Keb. 523. in pl. 9.

[8. In an action upon the caſe by A. againſt B. if the plaintiff declares, that whereas the defendant craftily and ſubtlely intending to deceive and cozen the plaintiff, offering to ſell one gelding to the plaintiff, *affirmed* to the plaintiff, *that he had brought up that gelding of a colt, and that the ſaid gelding was then his own*, upon which affirmation of the ſaid defendant, the plaintiff being ſeduced, and giving credit thereunto, afterwards, that is to ſay, upon the ſame day and year, and at the place aforeſaid, did buy the ſaid gelding for 5 hogſheads of cyder, to the value of 25l. *where indeed the defendant did not breed up the ſaid gelding* of a colt, *neither was the ſaid gelding the gelding of the defendant*, but was the gelding *of J. S. who* afterwards *did take away the ſaid gelding from him*, whereby the defendant did cheat and cozen him of his 5 hogſheads of cyder; the action lies upon this declaration, though there was not any warranty upon the ſale; for this was an apparent deceit, contrary to his own knowledge; and though it is not averred that he ſold him * at the ſame time when he affirmed he bred him up of a colt, but that he afterwards, the ſame day and place, bought him, giving credit thereunto; this ſhall be intended immediately after the ſpeaking of the words, for all the words could not be ſpoke together. Paſch. 1652. between HARDING AND FREEMAN, adjudged after a verdict for the plaintiff.]

Sty. 310. S. C. the declaration was, that defendant falſo & fraudulenter affirmed the horſe to be his own; but the court ſtayed the judgment, for they ſaid here is no direct affirmation, but only an intendment that ſcienter fecit, yet afterwards judgment was given for the plaintiff.—S. C. cited by Twiſden J. as adjudged for the plaintiff. Keb. 525. in pl. 9.

* See (Y. b)

[9. If I *retain* a man of the law to be of my *counſel to buy* me ſuch a manor, if he *does his endeavour*, though he procures it not, yet no action lies againſt him. 11 Hen. 6. 18.

(Z. b) pl. 7. S. C.—S. P. but *contra if he promiſes to purchaſe it*, by the beſt opinion. Br. Action ſur le Caſe, pl. 108. cites S. C.—F. N. B. 94. (D) in the new notes there (b) S. P. cites 11 H. 6. 24. 55. that though he warrants his client that he ſhall have the manor, but fails therein, yet if he does his endeavour, caſe does not lie; for perhaps he could not have the manor, viz. it was impoſſible.—S. P. Br. Action ſur le Caſe, pl. 108. cites S. C.

[10. [*But*] if he *becomes of counſel of my adverſary* after *in this matter* againſt me, an action upon the caſe lies againſt him. 11 Hen. 6. 18.]

[11. [*So*] if I retain him *to be of my counſel at Guildhall* in London at a certain day, if *he does not come at the day*, by which my *cauſe miſcarries*, an action of diſceit lies againſt him. 20 Hen. 6. 34.]

(P) pl. 6. S. C.

[12. [*But*] if a man *ſhews his evidence to* a man of the law, though he after *becomes of counſel to another, and diſcovers the counſel of the ſaid evidences*, yet no action lies againſt him, becauſe he *was not retained* with him. 11 Hen. 6. 18.]

Br. Action ſur le Caſe, pl. 108. S. C. and S. P. accordingly.

But contra if he be retained to ſee the evidences, and after he diſcovers it to the other party.

(Z. b) pl. 6. S. C but not S. P. exactly.— In treſpaſs on the caſe, for that the defendant aſſumed to cure his horſe, but did tam negligenter & improvide, &c. quod * equus interiit. It was held firſt, if one who is not a common farrier kills a horſe by medicines, caſe will not lie without doubt, without a ſpecial promiſe. And 2dly, Newton and Aſcough held, that though he was a common farrier, yet there being no ſuch ſpecial promiſe, caſe will not lie, and ſo the aſſumpſit is traverſable. F. N. B. (D) in the new notes there (b) cites S. C. and 17 E. 4. 4. but ſays, ſee contra 48 E. 3. 6. 17 E. 4. 4. and ſee 11 R. 2. Action ſur le Caſe 37. 39. 21 H. 6. 55.

[13. If a *common* marſhal [*farrier*] *kills my horſe with bad medicines*, an action upon the caſe lies againſt him, without any expreſs aſſumpſit to cure him. 19 Hen. 6. 49. But otherwiſe it is of one that is not a common farrier. 19 Hen. 6. 49.]

Treſpaſs upon the caſe againſt him who *took upon him to cure the plaintiff of a wound, and did not do it*, but by his negligence impaired the plaintiff, and becauſe he *did not allege in his writ at what place the aſſumpſit was*, therefore the writ was abated, notwithſtanding he alleged it in his count. Br. Action ſur le Caſe, pl. 24. cites 48 E. 3. 6.

[14. If a *man applies medicines* to my hand, and *through his negligence my hand is mayhemed*, yet action upon the caſe does not lie, *without an aſſumpſit to cure it*. 19 Hen. 6. 49. it ſeems to be intended of one that was not a common ſurgeon.]

(Z. b) pl. 4. S. C. — The count in this caſe was, that the defendant *fixed a nail in the foot of his horſe, in a certain place, by which he loſt the profit of his horſe aforeſaid for a long time*, and it was *not vi & armis nor injuſte*, and yet the writ awarded good. Br. Action ſur le Caſe, pl. 22. cites S. C. — * S. P. Br. Action ſur le Caſe, pl. 24. (bis) per Ham. — F. N. B. 94. (D) S. P. for it is the duty of every artificer to exerciſe his art rightly and truly as he ought. — 2 Bulſt. 333. Arg. cites S. C. — At common law, before the ſtatute of 5 Eliz. any man might uſe what trade he pleaſed, without having been bred up to it; but if he did any thing amiſs in ſuch trade, the party grieved might have action againſt him; as in the caſe here of a ſmith's cloying a horſe in the ſhoeing him, &c. Arg. And the court ſeems to have been of the ſame opinion. Saund. 312. Trin. 21 Car. 2. — S. P. by Hobart Ch. J. Hob. 211. Paſch. 14 Jac. in pl. 268.

[15. If a * *ſmith pricks my horſe*, an action upon the caſe lies againſt him. 46 Edw. 3. 19. adjudged.]

See (P) pl. 5. S. C. — † Fol. 92. S. P. Br. Action ſur le Caſe, pl. 24. (bis). *But if he does all that he can, and did not warrant him*, and the horſe is impaired, action upon the caſe does not lie, note the diverſity. Per Caund. — 2 Bulſt. 333. Arg. cites S. C. — So though he be not a common farrier. See (Z. b) pl. 6.

[16. If a *farrier takes upon him to cure my horſe*, being gravelled in the feet, and after tam negligenter & improvide takes care of the horſe, that he † dies, an *action lies* againſt him *upon* this *negligence and damage*. Trin. 36 Eliz. B. R. between POWTUARY AND WALTON.]

17. Action upon the caſe, inaſmuch as the *defendant bargained and ſold ſuch land to the plaintiff, and after he enfeoffed W. N.* to which the *defendant ſaid, ne enfeoffa pas W. N.* And a good plea per Townſend and Brian. Br. Action ſur le Caſe, pl. 87. cites 2 H. 7. 12. & 13.

Sid. 146. pl. 3. Leakins v. Cliſſel S. C. and though the declaration did not ſay fraudulenter, yet it ſhould be intended after verdict, and ſhould be aided by ſaying ſciens; and judgment for the plaintiff. — There was no averment of defendant's knowing, that the rent was leſs. Keb. 510. pl. 80. Leakins v. Clizard S. C. adjornatur. — Keb. 518. pl. 106. S. C. and per cur. it cannot be ſaid fraudulent, unleſs it were ſciens, &c. & adjornatur. — Ibid. 522. pl. 5. Trin. 15 Car. 2. B. R. the S. C. adjudged for the plaintiff. — S. P. adjudged, after long conſideration

18. Caſe lies for *falſely affirming to a purchaſer of houſes that the rent is more than they were actually let for*; and after 2 motions, the plaintiff had judgment. Lev. 102. Paſch. 15 Car. 2. B. R. Ekins v. Treſham.

conſideration of the record of Eakins v. Treſham, for the plaintiff; though it ſeems that the defendant had only the equity of redemption of the houſes. 2 Ld. Raym. Rep. 1118. Hill. 3 Ann. Lyſney v. Selby.

19. *But* action will not lie for *falſely and fraudulently affirming that a thing is of greater value than it really is*; for value conſiſts in judgment. Per cur. Lev. 102. Paſch. 15 Car. 2. B. R. in caſe of Ekins v. Treſham.

Same diverſity taken Sid. 146. per cur. ——— S. P. But if the defendant had warranted the thing to be of ſuch value to be ſold, and thereupon the plaintiff had given and diſburſed his money, it would have been otherwiſe; for the warranty by the defendant is matter to induce confidence and truſt in the plaintiff; but upon a naked aſſertion to give credit was the plaintiff's folly. Yelv. 20. Mich. 44 & 45 Eliz. B. R. Harvey v. Young.

(P. b. 2) Diſceit in Nature of Caſe. Warranty in Law. Pleadings. [564]

1. J. S. *executor de ſon tort, ſold a term in reverſion to A. and then took out adminiſtration and ſold it to B.* and ſo the firſt ſale void, becauſe being a term in reverſion, no entry could be made. Per cur. A. may have caſe in nature of diſceit againſt J. S. alleging he knew he had no right, yet aſſerting that he was lawfully poſſeſſed, &c. ſold it for ſo much to him, &c. But Tho. Gawdy ſaid, the *plaintiff muſt allege that defendant ſciens*, &c. ut ſupra, tamen *obtulit vendere*, &c. *aſſerens*, &c. for that without ſuch offer there is not any deceit; becauſe if the plaintiff made the firſt motion to buy, and thereupon the defendant agreed to ſell, there caveat emptor, unleſs there be ſpecial parlance between them of making aſſumpſit. Mo. 126. pl. 273. Paſch. 25 Eliz. B. R. Kendrick v. Burges.

2. In diſceit the plaintiff declares, that the *defendant ſciens that he had no right to the advowſon of D. took upon himſelf to be owner thereof, and ſold the profits thereof to the plaintiff pro quadam pecuniæ ſumma.* It was moved in arreſt, that the plaintiff did *not aver ubi revera the defendant had no title.* Sed non allocatur. Goldſb. 123. pl. 8. Hill. 43 Eliz. Ruſwell v. Vaughan.

Mo. 467. pl. 666. Anon. but S. C. accordingly. And adjudged for the plaintiff. ——Cro. J. 196. pl. 23. 5 Jac. in the Roſwell v. Vaughan, in caſe in nature of diſceit. Adjudged for the defendant, Mich. exchequer.

3. The defendant *ſold* the plaintiff *two oxen, and warranted them to be ſound abſque infirmitate*, whereas they were not ſo, and was *found not guilty as to one, and guilty as to the other.* It was moved in ſtay of judgment, that the warrant was joint, and now being found guilty as to one only, it is not the ſame warranty. But the court held it well enough, for the action is not founded upon the contract, but upon the deceit. And judgment for the plaintiff. Cro. E. 884. pl. 22. Paſch. 44 Eliz. C. B. Gravenor v. Mete.

4. Action upon the caſe, for that the defendant *bargained to ſell the plaintiff a mare, the defendant adtunc & ibidem knowing the mare to be lame with ſpavins, ſplints*, &c. *equam prædictam ſanam & abſque*

* This word (&) ſeems to be put in by

mistake of the printer, otherwiſe there could be no reaſon for the laſt objection, which is for the want thereof in the declaration.

& abſque aliqua infirmitate warrantizavit, * & eandem equam præd' 31 Maii 19 Jac. pro 20l. apud L. &c. eidem the plaintiff, *falſo & fraudulenter adtunc & ibidem vendidit*; and ſo falſely deceived the plaintiff therein. It was the opinion of the juſtices, that the declaration was not good, becauſe he doth *not ſay warrantizando vendidit*; for if the warranty was not at the time of the ſale, the action is not maintainable. It was alſo objected, that the declaration *wanted the word (&)* after (warrantizavit), and ſo was uncertain and inſenſible. And two judges being of that opinion, and the Ch. J. ſaying nothing, the plaintiff declared de novo. Cro. J. 630. pl. 3. Hill. 16 Jac. B. R. Pope v. Lewyns.

5. In an action upon the caſe, for falſely and fraudulently *ſelling an horſe to the plaintiff, as the proper horſe of the defendant, ubi revera it was the horſe of Sir J. L.* becauſe the plaintiff could not prove that the defendant knew it not to be his own horſe (for the *declaration muſt be that he did it fraudulently, or knowing it to be not his own horſe*), for the defendant bought the horſe in Smithfield, but not legally tolled, the plaintiff was nonſuit. All. 91. Mich. 24 Car. B. R. Sprigwell v. Allen.

[565]

6. In caſe for *ſelling and warranting a horſe*, &c. *which was none of his*, it hath been commonly ruled good to ſay, that knowing the horſe, &c. to be another's, or quod fraudulenter vendidit, Arg. And the court agreed both ways ſufficient, and that the * *fraudulenter ſupplied the ſcienter*; but the *beſt way is* to ſay, that *knowing it was none of his*. Keb. 309. Trin. 14 Car. 2. B. R. in pl. 24.

* In caſe in nature of diſceit for affirming the rent of houſes ſold to be more than it was, the declaration did not ſay *fraudulenter*, yet it ſhall be intended after a verdict for the plaintiff, and ſhall be *aided by the ſciens*. Sid. 146. pl. 3. Trin. 15 Car. 2. B. R. Leakens v. Cliffel.

7. Caſe, &c. for that the plaintiff *retained the defendant, a taylor, to make him a coat well and artificially*; but he maliciouſly intending to damnify the plaintiff, *made it tam inepte, negligenter, & inartificialiter; that it was of no value* or uſe to him, ad damnum 20l. The defendant demurred, becauſe he did *not allege that he delivered him any materials for ſpoiling, whereof action might lie*; ſo that there does not appear to be any damage. Nor does he ſhew how, or in what manner, he ſpoiled the coat, or what defect there was in it, which ought to be ſet forth certainly. And adjudged againſt the plaintiff. Vent. 268. Paſch. 27 Car. 2. B. R. Beſt v. Yates.

8. Caſe for *ſelling goods of one S.* to the plaintiff *with warranty*. It was moved in arreſt, that there was no ſcienter; and that this action being only on the deceit, there muſt be a ſcienter; but where there is a warranty, the evidence would be of compoſition for the goods, or taking them away. Sed non allocatur; for this action *lies* on the warranty, *without ſcienter*, he *averring that the goods were another's*. It was moved alſo, that it is *not averred that the defendant was ever poſſeſſed*, but that he ſold the goods which were S.'s. But per cur. the *falſo & deceptive vendidit* is ſufficient,

cient, unleſs the contrary appears. And judgment for the plaintiff. 3 Keb. 807. pl. 18. Mich. 29 Car. 2. B. R Northcote v. Maynard.

9. Caſe, &c. for that there was a *diſcourſe* between him and the defendant *concerning the ſale of two oxen, then in the defendant's poſſeſſion;* and that the *defendant adtunc & ibidem did falſely affirm them to be his own; and that the plaintiff ratione inde did buy them at ſo much*, when in truth they were the oxen of another man. After a verdict for the plaintiff, it was moved that it is not alleged that he affirmed them to be his own, ſciens they were the oxen of another, or that he ſold them fraudulenter & deceptive, or that there was any warranty. Sed per curiam, it might have been good [ill] upon a demurrer, but after verdict it is well enough. 3 Mod. 261. Mich. 1 W. & M. in B. R. Croſſe v. Garnett.

Show. 68. S. C. adjudged for the plaintiff. ——Comb. 142. S. C. adjudged accordingly. Carth. 90. S. C. And the court were clear of opinion (upon conſideration of this declaration) that the action would lie upon a bare affirmation ut ſupra; and that this caſe differed from the books cited, becauſe here the plaintiff had no means to know to whom the property of theſe oxen did belong, but only by the poſſeſſion. And judgment for the plaintiff.

(Q. b) Caſe in Nature of Diſceit againſt [*Judges and Sheriffs, and other*] Officers [*&c.*]

[566] See Return (N)

[1. A Man ſhall *not* have an action upon the caſe againſt a *judge* of record, *for giving a falſe judgment.* 9 H. 6. 60. b.]

Br. Judges pl. 2. cites S. C.—— S. P. Br. Action ſur le Caſe, pl. 9. cites 6 H. 6. 60. but it ſhould be 9 H. 6. 60.

[2. *As* it does not lie againſt a *ſheriff* for *quaſhing an eſſoign in his court with the conſent of the ſuitors*, though it was erroneouſly done, for the party might have falſe judgment for it. 26 Aſſ. 45. * *But if* the ſheriff quaſh the eſſoign erroneouſly, *without the aſſent* of the ſuitors, an action lies againſt him for this, becauſe no falſe judgment lies for it. 26 Aſſ. 45. adjudged.]

If ſheriff quaſh an eſſoign in his county where it lies well, *bill lies againſt him* for ſo doing; for the ſuitors are the judges, and not the ſheriff. Quod nota per judicium, that the bill lies. Br. Bill, pl. 43. cites S. C.——If he quaſhes it without aſſent of the ſuitors, a bill lies againſt him in the exchequer. Br. Falſe Judgment, pl. 18. cites S. C.

* S. P. Br. Action ſur le Caſe, pl. 79. cites S. C.

[3. If the *bailiffs in ancient demeſne hold plea after the record* is *removed in bank*, by which the tenant loſes his land there by recovery, he may have an action upon the caſe againſt them. 14 Ed. 3. Action upon the Caſe 39. Adjudged.]

If a *replevin* be *removed out of the liberty by pone into* C. B. and *afterwards (pending the plea there) the bailiff of the liberty awards a return in the liberty to the defendant, by which he takath the cattle, and impounds* them; whereupon *ſome of them die for want of food*, the party grieved ſhall have an action upon the caſe againſt the bailiff of the liberty, who awarded that return to hold plea after the matter removed into C. B. F. N. B. 93. (E)

A *plaint affirmed in an inferior court was removed by corpus cum cauſa delivered to the under-ſteward, who notwithſtanding gave judgment, and awarded execution*; for which an action was brought againſt him, and the party recovered. 3 Le. 99. pl. 143. Mich. 26 Eliz. C. B. Iplet v. Williams.

S. P. for he and the ſheriff are officers of record, but not juſtices of record. Br. Action ſur le Caſe, pl. 9. cites 6 H. 6. 60. but it ſhould be 9 H. 6. 60.——Br. Judges, pl. 2. cites 9 H. 6. 60. S. C.——S. C. cited Palm. 143. Arg.——2 Vent. 26. S. C. cited by Wylde J.——4 Inſt. 226. S. P.

[4. If an *eſcheator returns a falſe office*, contrary to that which was found by the jury, in prejudice of the party, an action upon the caſe lies againſt him, for *he is not a judge*, but an officer in this. 9 Hen. 6. 60. Adjudged.]

[5. If a *ſheriff returns upon an exigent 3 or 4 exactus's, and that there were not more counties*, where in truth there was a 5th county, the plaintiff ſhall have an action upon the caſe againſt him. 9 Hen. 6. 60. b.]

S. C. cited by Powell J. 2 Lutw. 1561. in the appendix.

[6. If a ſheriff *hath a court by preſcription, and* hath *uſed to execute prōceſs himſelf*, no action lies againſt him, becauſe he does it as *judge*. Mich. 8 Jac. B. per curiam.]

An action was brought in an inferior court, where the *ſheriff was judge*, and the plaintiff recovered, and the ſheriff *took inſufficient bail of the defendant*, yet no action lies againſt the ſheriff, becauſe the taking the bail was done as judge, and not as ſheriff. Judgment againſt the plaintiff. Hutt. 120. Paſch. 8 Car. Metcalf v. Hodgſon.——S. C. cited by Powell J. 2 Lutw. 1561.

S. P. Br. Action ſur le Caſe, pl. 53. cites 16 H. 6. 38. but it ſhould be 19 H. 6. 38.——Br. Retorne de Brief, pl. 49. cites S. C.

[7. If a ſheriff *upon a venire facias returns 12 jurors*, where *one hath nothing whereupon iſſues may be levied*, the *ſucceſſor* ſheriff,* *when a diſtringas iſſues* to him, is bound by this return, ſo that he *cannot return a nihil*; and therefore he may have a writ of diſceit againſt the predeceſſor ſheriff, and ſhall recover *damages*, having regard to what he loſes by the return of iſſues that cannot be levied. 19 Hen. 6. 38. b.]

* [567]

S.P.Br.Action ſur le Caſe, pl. 51. cites 8 H. 6. 11. it appearing upon examination of the ſummoner veiors and pernors.——The court adjudged according to the return, and put the party to his remedy againſt the ſheriff. Mo. 349. pl. 467. Trin. 35 Eliz. Corbet v. Marſh.——It ſeems admitted by all the juſtices, that if the tenant was not ſummoned, a writ of diſceit lies againſt the ſheriff. Cro. E. 398. pl. 2. Trin. 37 Eliz. B. R. Collet v. Marſh, S. C.——Goldſb. 129. pl. 22. S. C. adjudged that if the return be falſe, caſe lies againſt the ſheriff.

[8. If the ſheriff *returns the tenant ſummoned* in a real action, where he was not, *by which he loſes by default*, an action lies againſt him for this. 26 Aſſ. 48.]

S. P. becauſe he cannot have writ of diſceit; per June Ch. Baron, before all the juſtices of England in the exchequer-chamber. Br. Action ſur le Caſe, pl. 73. cites S. C.——(M. c) pl. 11. S. C.

† S. P. Br. Action ſur le Caſe, pl. 51. cites 8 H. 6. 1.

[9. So it lies againſt the ſheriff, *though the ſummoners and veyors are dead*, &c. † for he is in this action to recover all in *damages*, and not the land. 1 Hen. 6. 1. b. But quære.]

Mo. 835. pl. 1126. Pole v. Godfrey, S. C. adjudged.—— Roll. Rep. 63. pl. 9. S. C. held that the action will

[10. If a *ſumner* of the eccleſiaſtical court, *upon a præmonition* directed to him by the eccleſiaſtical court, *to warn J. S.* to pay certain coſts awarded againſt him by the court, *returns* to the court *that he hath warned* the ſaid J. S. *whereby* the ſaid *J. S. is excommunicated*, where in truth he never warned him, J. S. may have an action upon the caſe againſt him for this falſe return, though he be an eccleſiaſtical officer; for the excommunication is a great

a great damage to him as well temporal as ſpiritual. Mich. 12 Jac. B. R. between POWLE AND GODFREY, adjudged; for during this he cannot have any action, and is liable to an excommunicato capiendo.]

lies.——2 Bulſt. 264. S. C. adjudged for the plaintiff. ——12 Rep. 127. Anon. but ſeems to be S. C. and S. P. reſolved accordingly.——Cro. J. 351. pl. 4. S. C. adjudged for the plaintiff.

On a fi. fa. to the *ſheriffs* of L. they *returned nulla bona, but that clericus eſt beneficiatus in Ely*, whereupon *writ iſſues to the biſhop of E. and he returns* quod *nulla habet bona eccleſiaſtica*; an action upon the caſe lies againſt the biſhop for this falſe return, if the party has in truth a ſpiritual living there. Sid. 276. pl. 3. Hill. 17 & 18 Car. 2. Pickard v. Payton.——Keb. 947. pl. 10. S. C. ſays the reaſon of the biſhop's making ſuch return was, becauſe in truth the defendant had leaſed his parſonage, and that if the leaſing had been after the firſt fi. fa. and before the biſhop's return, an action on the caſe would have lain againſt the biſhop for his falſe return; but as this caſe is, the action does not lie.

[11. If the *ſheriff takes an obligation according to* the ſtatute of 23 *H.* 6. for appearance, and the *party does not appear*, yet no action upon the caſe lies againſt the ſheriff; for he let him to bail by the command of the ſtatute. Trin. 13 Jac. B. Carter, per curiam.]

Caſe, &c. in nature of a diſceit for *taking falſe and inſufficient bail, with an intention to defraud the plaintiff of his juſt debt.* The defendant *pleaded that he had taken ſufficient ſureties of honeſt men within his bailiwick.* The plaintiff demurred, becauſe the defendant did *not ſet forth the place where he took the bail*, and for that he *did not make* any *anſwer to the deceit alleged*; but adjudged that the place where is not iſſuable, and the intention to deceive the plaintiff is not traverſeable. Sid. 96. pl. 24. Mich. 14 Car. 2. B. R. Bentley v. Hoare.——Lev. 86. S. C. accordingly per cur.

[12. If an *attorney*, by deceit between him and the ſheriff, *puts a writ of ſeiſin upon the file of* the ſheriff's writs, *whereby* I *am ouſted of the poſſeſſion of my land*, ſuppoſing a judgment againſt * me where there was not any, a writ of diſceit lies againſt the attorney. 17 Ed. 3. 51. b.]

Fol. 93.

A *non proſ.* was *entered* againſt a plaintiff, and his *attorney*, *knowing it*, *cauſed judgment to be entered* againſt the then defendant, now plaintiff, by reaſon whereof he *was impriſoned*, though afterwards the judgment was evacuated; for which he now brought an action againſt the attorney, and adjudged well brought. Hutt. 125. Mich. 10 Car. Knight v. Copping.

But where, after a verdict againſt the plaintiff, the defendant's attorney *entered judgment before the rules were out*, ſo that the *plaintiff was prevented moving in arreſt*, and thereupon the ſaid plaintiff now brought an action againſt the attorney, [after the judgment, as it ſeems, was ſet aſide.] But Twiſden J. thinking it hard to ſue the attorney after the judgment ſet aſide, and conſequently the *plaintiff not damnified*, reſpited the giving judgment for a while. Raym. 194. Mich. 22 Car. 2. B. R. Goodyear v. Barks.——2 Keb. 688. pl. 15. and 716. pl. 104. S. C. Exception was taken to the declaration, becauſe it only ſaid contra officii ſui debitum, and did not aver that any rule was given, or that by the courſe of the court it ought to be, nor for what time the rule was, that the time may appear to be out; and the court agreed that all theſe ought to be expreſſed; ſed adjornatur.

* [568]

[13. If a *venire facias* comes to the ſheriff in a quare impedit, and the *ſheriff ſends to the bailiff of* the city of *C. to return the pannel*, *who does it* accordingly, whereas he had no warrant to do it, *not being bailiff of the franchiſe*, for which the *pannel is quaſhed*, the plaintiff for this default in the ſheriff, and for his damages, ſhall have an action upon the caſe againſt the ſheriff. 38 Aſſ. 13. Adjudged.]

S. P. notwithſtanding that the *defendant pleaded it was done by the advice of the plaintiff's friends in his behalf.*

——Br. Action ſur le Caſe, pl. 20. cites S. C. —— Br. Bille, pl. 21. cites S. C. And though the ſheriff pleaded that it was ſent to his under-ſheriff in his abſence, and that the return was made in favour of the plaintiff by aſſent and advice of the plaintiff's ſervants, and that the plaintiff did not challenge the pannel; that defendant for this return had been amerced, and that if the plaintiff had recovered, he had not recovered more than 40 s. yet damages were taxed to 20 marks, and the ſheriff in

in miſericordia; but if the plaintiff had quaſhed the pannel, the ſheriff had been excuſed; but now it appears the plaintiff was damaged. ——Br. Retorn de Briefs, pl. 77. cites S. C.

In *aſſiſe* the *ſheriff returned the pannel*, and *A. bailiff of fee*, came *and ſhewed indenture, by which he had returned certain names to the ſheriff, and* the *ſheriff had returned other names in blemiſhment of his bailiwick*, and prayed that the inqueſt be not taken; & non allocatur; and the ſame if bailiff of franchiſe was in ſuch caſe; but he ſhall have action againſt the ſheriff. Br. Retorn de Briefs, pl. 73. cites 30 Aſſ. 5.

Caſe lies againſt the ſheriff for making a return of a baily, who was not baily at the time of the return, or who had not executed the writ. Agreed per cur. Mo. 432. Hill. 38 Eliz. in pl. 606. —— See (R. b) pl. 2.

Bill of diſceit againſt the ſheriff, *for embezzling of an exigent*, upon ill plea pleaded by the ſheriff, it was awarded that the ſheriff ſhall recover 10 *l. for damages*, taxed by the court. Nota. Br. Damages, pl. 113. cites 41 Aſſ. 12.

[14. If the ſheriff *embezzles an exigent delivered to him* at my ſuit, an action upon the caſe lies tam pro me quam pro domino rege. 41 Aſſ. 12. adjudged.]

Br. Action ſur le Caſe, pl. 121. S. C. and ſaid that he ſent the writ by A. B. his ſervant, who was robbed of the writ by the way by one of thoſe named in the exigent, and held no plea. ——S. P. becauſe the ſheriff ought to have kept it in his own cuſtody; and the plaintiff recovered 10 l. damages, and defendant was awarded to priſon to make fine to the king, and agree with the party. Br. Bille, pl. 22. cites S. C. ——Br. Barre, pl. 67. (68) cites S. C.

[15. So it lies againſt him, *though the ſheriff delivered the writ to one of his coroners, and he was robbed by another of the perſons* who was named in the exigent, if he was *before in the cuſtody of the ſheriff*, and he [the ſheriff] ſuffers him to go at large; for this was his own default. 41 Aſſ. 12. adjudged.]

Cro. E. 175. pl. 1. S. C. adjudged for the plaintiff. —Le. 146. pl. 203. S. C. adjudged accordingly ——(R. b) pl. 4. S. C.

[16. In a real action, if the demandant delivers a writ of ſummons to the ſheriff, and the *ſheriff ſummons* the tenant accordingly, and after *does not return the writ*, an action upon the caſe lies againſt him. Hill. 32 Eliz. B. R. between MARSH AND ASTRY, admitted.]

* If the *ſheriff upon writ of ſecond deliverance makes deliverance to the plaintiff of the diſtreſs, and will not return the writ, ſo that the defendant may compel the plaintiff to come and count, in order that he may avow*, the defendant ſhall have remedy againſt the ſheriff, and this it ſeems by action upon the caſe. Br. Action ſur le Caſe, pl. 48. cites 21 E. 3. 43.

If the *ſheriff arreſts a man* by capias, *and does not return the writ*, the plaintiff ſhall have remedy againſt the ſheriff. Quære if by action upon the caſe. Br. Action ſur le Caſe, pl. 54. cites 21 H. 6. 5. ——But it ſeems by treſpaſs vi & armis. Ibid. cites P. 21 H. 7. 22, 23.

* [569]

Cro. E. 852. pl. 8. S. C. The ſheriff returned languidus in priſona, but held not material; and adjudged as here, and for the ſame reaſon, for the defendant. ——Noy 39. Bolls v. Laſſels, S. C. according to Cro. E. and adjudged accordingly, and that the return was good, though no ſuch return was ever ſeen before, and though he might have returned that he let him at large upon bail. ——S. C. cited Arg. Mod. 244. and Ibid. 245. allowed by the court, præter Scroggs, who delivered no opinion.

[17. If a *capias* be directed to the *ſheriff*, who *takes the party, and* takes *a bond* of him *for his appearance* according to the ſtatute of 23 H. 6. *and* at the day of the return of the writ *returns cepi corpus*, but the *defendant does not appear* at the day, yet no action upon the caſe lies againſt the ſheriff, becauſe there is not any falſity in the ſheriff; for he bailed him by the command of the ſtatute, and he is to be amerced by the court if the defendant does not appear. Mich. 43, 44 Eliz. B. R. between BOWLES AND LASSELS, adjudged.]

See (P. c) pl. 9. —— Cro. C. 291. pl. 1. S. C.

[18. If a *ſumner of the eccleſiaſtical court falſely and maliciouſly colore officii ſui* of a ſumner, to the intent to defame J. S. with the fame of incontinency with A. and to put him to expence in the

the eccleſiaſtical court, *cites J. S. to appear there for incontinency* with A. upon which *J. S. appears, and is* there *charged* by the judge with it, *and upon his anſwer diſcharged, by which he is put to expence*, J. S. may have an action upon the caſe againſt the ſumner, upon ſuch a declaration, though he be an officer of the eccleſiaſtical court, for inaſmuch as it is alleged that he cited him *falſely and maliciouſly, colore officii*, it *ſhall be intended* that he did it *without proceſs*. Hill. 8 Car. B. R. between CARLIAN AND MILL, this being moved in arreſt of judgment. Intratur Hill. 7 ..... Rot. 1147.]

adjudged per tot. cur. for the plaintiff; but no mention is there of its being intended without proceſs. —— Jo. 312. pl. 1. S. C. adjudged accordingly. —— S. C. cited by Holt Ch. J. Paſch. 10 W. 3. 5 Mod. 409. in delivering the reſolution of the court.

[19 Hill. 17 Edw. 3. B. R. Rot. 69. action brought by John Bokeland, knight of the county of Wilts, againſt the *ſheriff* of the ſame county, *for not levying* 10*l.* 4*s.* *for his expences in attending in parliament*, &c. Simile ibidem Rot. 138.]

[20. If a *diſtringas* iſſues to the ſheriff to diſtrain the defendant in an action by all his lands and chattles, &c. and the ſheriff *returns too ſmall iſſues*, though an averment lies by the ſtatute of *Weſtm.* 2. *cap.* 43. yet the plaintiff may well have an action upon the caſe againſt the ſheriff, becauſe it appears by the words of the ſtatute, that *this is a falſe return*, and the words are *quod diſtringeret by all his lands and chattles, ita quod de exitibus eorum*, &c. ſo that *if he does not return all the iſſues, he does not do as he is commanded*; alſo if this action does not lie, the plaintiff had not any remedy at the common law, which was greatly miſchievous; and the ſtatute ordains that the king ſhall have the iſſues, but * does not reſtrain the plaintiff from any remedy that he had at the common law. † 8 H. 6. 12. b. vide 10 Hen. 7. 11. b. Quære. Nota that Trin. 3 Car. Miſtreſs DOROTHY BENNET of London, widow, upon good advice, brought ſuch an action AGAINST THE SHERIFFS OF LONDON, ſcilicet, for returning too ſmall iſſues againſt the mayor and commonalty of London.]

† Br. Averment, pl. 12. cites S. C. per June. —— Br. Damages, pl. 69. cites S. C. by June, and that he ſhall recover his damages againſt him, quod nullus negavit. —— See tit. Return (P) pag. 206, 207, 208.

* Fol. 94.

[21. If the ſheriff *takes an inquiſition upon an elegit, and* upon requeſt *refuſes to deliver poſſeſſion* to the plaintiff, *and yet* after, at the day of the return of the writ, *returns that he delivered poſſeſſion* to the plaintiff at the day of the inquiſition taken, an action upon the caſe lies againſt him for this falſe return, though the plaintiff might enter after the inquiſition, without any delivery; for peradventure the poſſeſſion is kept by a ſtrong hand, ſo that he cannot enter without the aid of the ſheriff. Hill. 8 Car. B. R. between LISTER AND BROMLEY, adjudged, this being moved in arreſt of judgment. Intratur Mich. 8 Rot. 68.]

[570] Cro. C. 286. pl. 34. S. C. but S. P. does not appear. —— J. 307. pl. 20. S. C. but S. P. does not appear. —— See tit. Return (O) pl. 47. —— In caſe the plaintiff declared that he recovered in debt againſt A. and delivered a *cap. utlag. to the* defendant, being *ſheriff*, &c. *who*, as the plaintiff alleged, *was often in company of the ſaid A.* within his bailiwick afterwards, and yet returned non eſt inventus. Judgment was given for the plaintiff. Noy 22. Parkinton v. Powell.

Caſe againſt a ſheriff, to whom a fi. fa. iſſued, for that he falſo & malitioſe returned quod *fieri fecit ad* 40*l.* *and that he had no more, ubi revera he had to the value of the debt.* Verdict and judgment for the plaintiff. 2 Show. 314. pl. 327. Mich. 35 Car. 2. B. R. Atkins v. Tankard.

Goods

Goods taken on a fi. fa. were *appriſed at* 26 *l. and* afterwards *ſold for* 10 *l.* and the *ſheriff returned fieri feci* 10 *l.* Per Holt Ch. J. an action on the caſe lies againſt him. Comb. 255. Paſch. 6 W. & M. in B. R. Taylor v. Batten.

Br. Record, pl. 5. cites S. C.

22. Where a man brought action upon the caſe *againſt the clerk of the juries*, becauſe he brought præcipe quod reddat againſt R. C. and rehearſed the proceſs and the plea, and the iſſue till octabis Hillar. quo die defend' pro tali ſumma, &c. *aſſumpſit ſuper ſe to inroll the jury*, *[*and the niſi prius*] *and did not*, by which the jury paſſed for him, and by this means his judgment was loſt. Br. Action ſur le Caſe, pl. 13. cites 34 H. 6. 4.

Br. Return de Briefs, pl. 56. cites S. C.

23. If a ſheriff returns a man *ſummoned or attached*, and no time is expreſſed, and yet it ought to be by 2 months in præmunire, and by 15 days in another caſe; but if it be *not ſerved* by ſuch time *according to the law, by which the party is damnified*, he ſhall have diſceit againſt the ſheriff for the falſe return, which is by action upon the caſe, as it ſeems, viz. diſceit upon the caſe. Br. Action ſur le Caſe, pl. 67. cites 39 E. 3. 7.

24. In ſcire facias upon a recovery by default in writ of inquiry of waſte, if the defendant was *not ſummoned, attached, nor diſtrained*, in the firſt action he may have diſceit againſt the ſheriff, &c. Br. Scire Facias, pl. 49. cites 48 E. 3. 18.

25. *Debt upon a leaſe for years, rendering rent payable annually at D.* the *defendant ſaid that he has been always ready to pay*, and yet is, *and tendered the money to the court*; the *plaintiff pleaded eſtoppel that the ſheriff returned the defendant ſummoned, and after returned him attached, and after returned diſtring. nihil*, by which *capias iſſued till the pluries, when he came in ward of the ſheriff, and day given over; at which day he made default, and diſtreſs iſſued, and returned that he had nothing, and capias iſſued again returnable*, &c. *at which day he came and pleaded*; judgment *if againſt this record* he ſhall ſay tout temps priſt. And per Hill and Hank clearly he ſhall not be eſtopped; for *it may be that he was never ſummoned, attached, or diſtrained, notwithſtanding the return.* But Thirn contra; and that if it be ſo, the defendant ſhall have action of diſceit againſt the ſheriff. Br. Tout Temps Priſt, pl. 12. cites 11 H. 4. 61.

26. Where the citizens of N. have charter *that they ſhall not be impanelled in any jury extra civitatem ſuam*, and one of them is impanelled, if he *ſhewed his charter to the ſheriff*, before, &c. *and notwithſtanding he returns him*, there he may have *action upon the caſe* againſt the ſheriff. Br. Exemption, pl. 1. cites 18 H. 8. 5.

[571] Cro. E. 460. (bis) pl. 8. Langton v. Gardiner, S. C. the plaintiff demurred,

27 Caſe, &c. againſt the ſheriff for *returning a cepi corpus upon a latitat, & habeo corpus paratum, when in truth he had not the party, whereby the plaintiff had loſt his ſuit.* Upon a demurrer the plaintiff had judgment, becauſe by this *demurrer* the ſheriff *confeſſed the falſe return, and the plaintiff's loſs*; but if he *pleaded the ſtatute* 23 *H.* 6. *and ſet forth the bail-bond*, it ſeemed to Popham that

that had been a good bar to this action. Mo. 428. pl. 596. Hill. 38 Eliz. Laughton v. Gardiner.

and the defendant ſhewed to the court that he had taken bond of the party to appear; and by the 23 H. 6. was compellable to bail him, and ſo ought not to be charged. But per cur. it not being pleaded, the court cannot intend it, nor take conuſance of it. And therefore adjudged for the plaintiff. ——— S. C. cited, and S. P. reſolved accordingly, and the ſtatute of H. 6. is out of the caſe; for it being a private ſtatute, the court can take no notice of it by ſuggeſtion, without pleading. But if the defendant had pleaded it ſpecially, or had pleaded not guilty, he might have taken advantage of the ſtatute, and ouſted the plaintiff of his action. And judgment for the plaintiff cauſa qua ſupra. Sid. 439. pl. 6. Hill. 21 & 22 Car. 2. B. R. Parker v. Welby. ——— Vent. 85. S. C. per cur. accordingly; for as it is it ſhall be intended that the plaintiff let him go without bail; and upon pleading not guilty he might have given the ſtatute in evidence. — Mod. 57. pl. 1. S. C. Trin. 22 Car. 2. B. R. And Keeling ſaid that they have relied here upon the falſe return, and the general demurrer he took to be well enough; and Moreton and Rainsford accorded, and therefore judgment was given againſt the plaintiff. ———2 Saund. 154, 155. Trin. 22 Car. 2. B. R. Benſon v. Welby, the court ſeemed of diver opinions as to the declaration, viz. ſome that it was for the falſe return only, and that the precedent matter was only inducement; others thought the declaration was for the eſcape only, and ſo the other matter but only ſurpluſage. A third opinion was, that the action was brought for the eſcape, and for the falſe return likewiſe; but the court agreed not in this matter. But the whole court reſolved that judgment be given for the plaintiff, becauſe the ſtatute is a private ſtatute, and ought to be pleaded. And the reporter ſays, that in the caſe of Parker v. Welby, the ſame judgment was given in the ſame term. ——See 2 Keb. 591. 626. 630. 632. 657. 670. And adjudged for the plaintiff. Both the caſes are exactly the ſame.

28. If upon a *mandamus* to *a* mayor, &c. *to reſtore a perſon diſfranchiſed* to his place, or to ſignify cauſe, &c. the mayor, &c. *returns a good cauſe*, &c. *but the matter is falſe*, an action lies upon the ſpecial matter againſt the certifiers. 11 Rep. 99. a. b. Trin. 13 Jac. B. R. Reſolved in Bagg's caſe.

29. C. ſued K. in the Stannary court, and the defendant pleaded to the juriſdiction. And by Jones J. abſentibus aliis, if the *judge refuſes a plea which by the law he ought to accept*, an action on the caſe lies againſt him. 2 Roll. Rep. 498. Hill. 22 Jac. B. R. Curriton v. Killigrew.

30. An *officer pro hac vice only, diſtrained the cattle of B. by virtue of a diſtringas out of an inferior court, and* he, *without taking ſufficient ſureties for appearance at the next court, delivered back the cattle.* B. did not appear. Adjudged that this was ſuch a diſceit for which an action on the caſe lies, though he was not a known officer there, but only pro hac vice for this purpoſe. Lat. 159. Trin 2 Car. Wilde v. Dowſe.

31. Caſe *againſt the cuſtos brevium & cuſtos rotulorum of B. R. for that the plaintiff had obtained judgment againſt J. S. which by negligence was razed, and (capiatur) made (miſericordia).* It was proved at the trial, that all the attornies of the court have liberty without controul to ſee the records, and that frequently there are ſeveral of them together there, ſo that it is almoſt impoſſible to obſerve them all; and therefore the defendant not anſwerable. But Mallet and Windham held, that though no neglect appears in the defendant, yet having taken upon him to keep the records, he is to anſwer for all miſuſages; and therefore chargeable in this action. But Twiſden contra, becauſe he cannot by any induſtry prevent it. But by reaſon of a variance in the declaration

Sid. 77. pl. 12. S. C. but no opinion of the court appears, [though Nelſ. Abr. 51. pl. 25. cites it as adjudged there, that the maſter of the office ſhall not be anſwerable.]

ration the plaintiff was nonſuited. Lev. 64. Paſch. 14 Car. 2. B. R. Herbert v. Paget.

——Raym. 53. S. C. that upon evidence of abundance of perſons there ſpecified, having liberty to go into the office and view the records, the jury found for the defendant.——Keb. 288. pl. 100. S. C. adjornatur.——Keb. 346. pl. 27. S. C. and there being ſuch an uncontroulable liberty of coming into the office, there muſt ſome ſpecial negligence appear. And thereupon the plaintiff was nonſuited.

* 32. If a *juſtice of peace refuſes to take the oath of the party robbed*, he may have an action on the caſe againſt him; for he cannot indict him, and this is his only remedy. Sid. 209. Trin. 16 Car. 2. B. R. in pl. 3. per Twiſden J.

33. Where an officer *does any thing againſt the duty of his place* and office, *and a damage thereby accrues to the party*, an action lies; per Wylde J. 2 Vent. 26. Mich. 23 Car. 2. C. B. in caſe of Turner v. Sterling.

34. If the ſheriff upon a writ *de coronatore eligendo will not return him as a coroner who was choſen by the major part*, an action on the caſe lies; per Archer J. who mentions it as a caſe put at the bar; and ſays he agrees to it, though he knows no authority for it in point. 2 Vent. 26. Mich. 23 Car. 2. B. R.

2 Lev. 50. Starling v. Turner, S. C. accordingly in B. R. the mayor had failed to do his duty, and the plaintiff alleged that thereby he loſt the office, which after verdict is ſufficient. And the reporter adds a nota, that in neither of the courts was any queſtion made whether ſuch action would lie ſimply for denying the poll and returning another; but this ſeemed to be admitted by both courts.——Freem. Rep. 17. pl. 15. Turner v. Sterling, S. C. in C. B. and ſays judgment was affirmed in B. R.——2 Vent. 25. S. C. in C. B. adjudged for the plaintiff by 3 J. contra Vaughan, with the reaſons.

35. Caſe, &c. againſt the lord mayor of London, for refuſing a poll to the plaintiff, who was competitor for the office of bridge-maſter, and who then inſiſted that he had the majority, which the other denying, the plaintiff deſired a poll, &c. The plaintiff had a verdict and judgment in C. B. And in error it was inſiſted that it was uncertain whether the plaintiff would have been elected; and that he cannot bring an action for a poſſibility of damages; and that this was no more, it not being decided who had the moſt votes. But judgment was affirmed, becauſe the defendant had deprived him of the means by which it might appear whether he had the moſt votes, or not Vent. 206. Paſch. 24 Car. 2. B. R. Sir Sam. Sterling v. Turner.

The plaintiff was a *ſerjeant at law, and recorder of Colcheſter*, and the defendants reſolving to turn him out, procured *articles of miſdemeanor* to be *drawn againſt him*, and then all who had liberty to vote proceeded to vote for and againſt him, and a *poll was granted* to decide the controverſy, it not appearing upon the view who had the majority of votes; but before the plaintiff had taken all the names, and *whilſt he was taking of the poll, the defendants took away the paper, and would not ſuffer him to proceed*. The jury gave him 300 l. damages, on a trial at bar. 2 Mod. 228. Paſch. 29 Car. 2. C. B. Shaw v. Colcheſter Burgeſſes.

36. Action will not lie for the plaintiff in an outlawry againſt the ſheriffs *for neglecting to ſeize the goods of the outlaw upon a capias utlagatum*; for that is the king's loſs. And though it was pretended that ſeizing might have inforced the defendant to appear to the plaintiff's action, the court thought it ſo remote as not to be conſidered as a ground to ſupport an action. 2 Vent. 90. Mich. 1 W. & M. in C. B. Dawſon v. London Sheriffs.

37. *But*

37. *But* if it had been ſhewn, that they had neglected *to take his body when they might have taken it*, there might have been more reaſon to ſupport this action. 2 Vent. 90. Mich. 1 W. & M. in C. B. Dawſon v. Sheriffs of London.

If a bailiff of a franchiſe has a warrant on a fieri facias delivered to him, and neglects to execute it, ſo as the party is prejudiced by it, and he brings an action againſt the bailiff, and concludes to his negligence in not executing the writ, the action will be maintainable. Mo. 431. pl. 606. Hill. 38 Eliz. Palmer v. Porter. ——If a miniſter of juſtice has a warrant to attach the goods of another, if he can do it, and does not do it, caſe lies againſt him; per Coke Ch. J. 3 Bulſt. 212. Trin. 14 Jac.——So if one ſues a writ, and ſhews the ſheriff the party to be arreſted, and delivers him the writ, requiring him to make the arreſt, caſe lies againſt him for not doing it. Cro. E. 873. Hill. 44 Eliz. C. B. by Walmſley J. Arg. in pl. 10.

(R. b) Againſt whom it lies. [*Principal or Under Officer.*]

[573]

See tit. Eſcape.

[1. IF the *deputy of the ſheriff ſubſtracts a writ* which is to be returned, a writ of *diſceit lies* for this *againſt the ſheriff himſelf*, and not againſt the deputy. 19 H. 6. 71. b. (it ſeems that this is not law, becauſe the deputy may be puniſhed for matter of falſity.)]

Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72. where it was inſiſted that the ſuit ought to be againſt the ſheriff himſelf (whereas the ſuit was by bill of diſceit againſt the ſheriff's deputy and an attorney;) but non allocatur; for the defendants did the deceit, and not the ſheriff. —— S. P. admitted Arg. and takes a difference between a falſity or deceit and a non-feaſance, that in the firſt caſe it lies againſt the under-ſheriff, though not in the laſt. Le. 146. in pl. 203.—— S. C. cited Arg. Cro. E. 175. in pl. 1.——S. C. cited by Coke Ch. J. Roll. Rep. 78. in pl. 20.

[2. If the *under-ſheriff*, when a venire facias comes to the ſheriff *in the abſence of the ſheriff, ſends to the bailiff of C. to return the pannel*, whereas *there is* * *not any ſuch bailiff of C. that hath any warrant* to return it, *and yet he returns the pannel*, for which cauſe it is quaſhed, the plaintiff ſhall have an action upon the caſe for this default againſt the ſheriff himſelf. 38 Aſſ. 13. adjudged.]

See (Q. b) pl. 13. S. C. and the notes there. ——* See (F. c) pl. 2.

[3. If a *bailiff errant, or ſpecial, arreſts* a man *upon a capias ad ſatisfaciendum, and* after the *priſoner reſcues himſelf*, he at whoſe ſuit he was arreſted cannot have an action upon the caſe upon the eſcape againſt the bailiff, but muſt have it againſt the ſheriff; for the *baily is but a ſervant* to the ſheriff. Mich. 37 Eliz. B. R. between ATTERTON AND HARWARD, agreed.]

See (B. c) pl. 1. 3. S. C. (C. c) pl. 1. S. C.—— Cro. E. 349. pl. 26. S. C. but S. P. does not appear.——

A ſervant or deputy quatenus ſuch cannot be charged for *neglect*, but the principal only ſhall be charged for it; but for a *miſ feaſance* an action will lie againſt a ſervant or deputy, but not quatenus a ſervant, but a wrongdoer; as if a bailiff, who has a warrant from the ſheriff to execute a writ, ſuffers his priſoner to eſcape, the ſheriff ſhall be charged for it, and not the bailiff; but if the bailiff *turns the priſoner looſe*, the action may be brought againſt the bailiff himſelf; for then he is a kind of a wrongdoer or reſcuer, and it will lie againſt any other that will reſcue in like manner; per Holt Ch. J. Paſch. 13 W. 3. in his argument in the caſe of Lane v. Cotton.

[4. If the *demandant*, in a writ of entry ſur diſſeiſin, *delivers a writ of ſummons to the under-ſheriff* of the county, *and* after *he ſummons the tenant* upon the land accordingly, *and* notwithſtanding *does not return the writ*, an action upon the caſe may be brought againſt the under-ſheriff, if the plaintiff pleaſes; for peradventure

See (Q. b) pl. 16. S. C. —Cro. E. 175. pl. 1. S. C. adjudged for the

plaintiff; for this is for a tort done by the under-ſheriff himſelf,

peradventure the ſheriff had no notice thereof, and it may be that the under-ſheriff took the fees for executing the writ, Hill. 32 Eliz. B. R. between MARSH AND ASTREY, adjudged.]

and therefore may be puniſhed; and it is alleged that he falſo & malitioſe intending to delay the plaintiff of the execution of his writ did not return it, ſo that it is an embezzling of the writ for which he is puniſhable; and it was charged in this action that he had taken the fees to return it.—— Le. 146. pl. 203. S. C. adjudged for the plaintiff.

Roll. Rep. 78. pl. 20. S. C. adjudged for the plaintiff. But Coke Ch. J. agreed that the under-ſheriff

[5. If a *warrant upon a fieri fac'* to levy a debt at the ſuit of J. S. be *directed to an under-bailiff of a liberty, and he* by force thereof *levies* the debt, *and after conceals the writ*, and makes not any certificate thereof, an action upon the caſe lies againſt the under-bailiff, becauſe he has done a *perſonal tort*. Mich. 12 Jac. B. R. between BELL AND CATESBY, adjudged.]

ſhall not be charged for not returning a writ, where there is no perſonal tort ſuppoſed in him.

[574] 6. It is good action upon the caſe by bill *againſt the deputy of a ſheriff for embezzling of a writ of habeas corpora*, and that it lies *as well againſt him who excites the other to do it as againſt the doer*; for in treſpaſs there is no acceſſory, and the matter ſhall be given in evidence. Br. Diſceit, pl. 52. cites 19 H. 6. 29.

7. If a *clerk in an office miſenters* any thing, he himſelf ſhall be puniſhed, and not the maſter of the office; becauſe he takes a fee for it. Arg. Le. 146. in pl. 203.

8. Caſe againſt a gaoler, for that a *plaint being before the bailiffs of B. they directed a warrant to the under-bailiff to take the party, ita quod habeant corpus ejus coram ballivis ad proximam curiam ibid. tenend. and they arreſted and committed him to priſon ſub cuſtodia of the defendant.* It was moved in arreſt of judgment that this action did not lie, for the priſoner was not committed to him by any lawful authority; for the under-bailiffs had authority to take him, ita quod, &c. but not to commit him to any other, and whoſoever they commit him to are but as their ſervants, and the houſe in which, is as their houſe, and action lies againſt them if they have him not on the day, and againſt nobody elſe. Cro. E. 743. pl. 20. Hill. 42 Eliz. C. B. Baldry and Johnſon.

9. If a *certificate* made *of a cuſtom in London is falſe*, the *party ſhall have action* on the caſe, not againſt the recorder, but *againſt the mayor and aldermen*; for it is their certificate by their recorder. Per Hobart Ch. J. Hob. 87. pl. 114. Trin. 12 Jac. in caſe of Day v. Savage.

10. Caſe for *refuſal of ſufficient bail* lies againſt the ſheriff, but not againſt the officer. Per North Ch. J. But it was ſaid Arg. that for not carrying the party before the ſheriff to put in bail, caſe lies againſt the bailiff. 2 Mod. 32. Paſch. 27 Car. 2. C. B. Smith v. Hall.

(S. b) [Diſceit.] Againſt whom it lies upon a *Warranty in Law.* Againſt the *Maſter.*

Fol. 95.

See tit. Maſter and Servant (B).

[1. IF a *ſervant* that is my merchant [agent] *ſells a falſe* [*an unſound*] *horſe or other merchandize in a fair*, to a man, no action lies againſt the maſter for the deceit; for he *did not command his ſervant to ſell to any man particularly.* 9 Hen. 6. 53. b.]

So if my ſervant ſells *falſe ſtuffs.* Br. Action ſur le Caſe, pl. 8. cites S. C.——

S. C. Arg. Poph. 143.——2 Roll. Rep. 6. Arg. cites S. C. as ſo held by Rolfe and Martin.—— S. C. cited by Mountague Ch. J. Bridgm. 128.

[2. *But if the ſervant by command* and covin of the maſter, *ſells it to any particular perſon*, if it be unſound [or corrupt] an action lies againſt the maſter, for this is his ſale. * 8 Hen. 6. 53. b.]

S. P. Br. Action ſur le Caſe, pl. 8. cites 9 H. 6. 53.

and mentions as to ſelling in general, without expreſſing any command or covin to ſell it to any particular perſon.

* This ſhould be 9 H. 6. 53. b.

[3. If the *ſervant of a taverner ſells wine* to another, which is *corrupted*, an action upon the caſe lies againſt the maſter, though he did not command the ſervant to ſell it to this particular perſon. 9 H. 6. 53. b.]

Br. Action ſur le Caſe, pl. 8. cites S. C. but S. P. as to the ſervant's ſelling the wine does not appear.

[575]

4. Caſe for that the defendant *having counterfeit jewels, and knowing them to be ſo, ſent his ſervant* J. S. *with them to Barbary, to make ſale* of the jewels, *where he applied to the plaintiff to ſell them for him, which he did to the king of Barbary for* 800*l. and delivered the money to J. S. who brought it over and delivered it to the defendant.* The jewels afterwards *being diſcovered to be counterfeit, and not worth more than* 100*l. the plaintiff was impriſoned till he repaid the king the* 800*l.* It was argued after verdict, that the deceit done to the plaintiff is found to be done by the ſervant, and the jury found that the maſter did not command the ſervant to conceal their being counterfeit, and then by his general power to ſell, the maſter ſhall not be charged if the ſervant exceeds his power; and for that and other reaſons there aſſigned, he conceived the action not maintainable; and to that opinion the court inclined, and principally for the reaſon abovementioned. Cro. J. 468. 470. pl. 14. Hill. 15 Jac. B. R. Southern v. How.

Popham 143. S. C. and Mountague Ch. J. ſaid that the plaintiff is no party who ſhall have the action, but the king of Barbary. —Bridgm. 125. S. C. that Trin. 16 Jac. after argument, Mountague, Doderidge, and Haughton, abſente Crooke, agreed that that the action would not lie, and that Mich. 16 Jac. judgment was given by all the court, quod querens nil capiat per billam.——2 Roll. Rep. 5. S. C. adjornatur.——Ibid. 26. S. C. adjornatur, but that Mich. following judgment was given for the defendant.——Nelſ. Abr. 38. pl. 16. cites Paſch. 143. as adjudged that the action lay againſt the maſter, and ſo at pag. 1166. pl. 2. cites 2 Cro. 468. as adjudged that it lies. But ſee ſupra and the reports themſelves.

5. *But* if a *goldſmith makes plate wherein he mingles droſs* ſo as it is not according to the ſtandard, and *ſends his ſervant to a fair*

to ſell it, who ſells it for good plate according to the ſtandard, an action on the caſe lies againſt the maſter; per Doderidge J. to which Mountague Ch. agreed, becauſe it fails in the price in ſilver. And ſo made a difference between the ſelling of plate and the ſelling of jewels (as in the principal caſe), which are ſold by their valuation and fail in their value. Cro. J. 471. Hill. 15 Jac. B. R. in pl. 14.

(T. b) [Diſceit.] [*Upon Warranty in Law.*] Againſt the *Servant.*

[1. IF the *ſervant of a taverner ſells wine* that is *corrupted, knowing it to be ſo*, action of diſceit does not lie againſt the ſervant; for he did it but as a ſervant. Contra 9 Hen. 6. 53. b.]

(U. b) Diſceit. Againſt whom it lies upon an *Expreſs Warranty.* [*Servant.*]

Cro. J. 425. pl. 10. S. C. but S. P. does not appear.

[1. IF my *ſervant leaſes* my lands to another for years, *reſerving a rent to me, and* to perſuade the leſſee to accept thereof he *promiſes that he ſhall enjoy* the land *during the term without incumbrances*, if the land be incumbered, &c. the leſſee may have an action upon the caſe againſt my ſervant, becauſe he made an expreſs warranty. Trin. 15 Jac. B. R. between BROKING AND CAME, per curiam.]

[576] If a *ſervant ſells oaks*, or an *apprentice ſells wares* of the maſter, *with warranty*, the warranty is void; for it is the ſale of the maſter, and the warranty of the ſervant, and ſo not good. 2 Roll. Rep. per Doderidge & Haughton, cites 11 E. 4.

2. Diſceit upon a *warranty of cloths* upon a ſale of them, *to be of the length of* 30 *yards*, where they were only 22 yards. The *defendant ſaid that the property was in J. N.* and he as his ſervant, and by his command, ſold them; abſque hoc that he ſold modo & forma. And per Littleton, though it was the ſale of the maſter, by which the maſter may have action of debt, yet it is the warranty of the ſervant, who is defendant, and action lies againſt him; for it may be that the plaintiff would not have bought them, but by truſting to the warranty of the defendant. But by Choke and Bryan, diſceit lies not where it is the ſale of one by the warranty of another: but Brooke ſays quære; for he ſays it ſeems that action on the caſe ſur aſſumpſit, pro tali ſumma, will lie. Fairfax agreed that if they failed of the length, diſceit lies; for this does *not appear by the view*, but by meaſuring. Br. Diſceit, pl. 29. cites 11 E. 4. 6.

(X. b) [Diſceit.] In what Caſe it lies upon a Warranty in Law. *Againſt an Attorney.*

[1. IF my attorney in a plea of land *makes default, by which I loſe the land,* I ſhall have a writ of *diſceit* againſt him, and ſhall recover all in damages. 21 Edw. * 4. 45. b. 61. but quære if he did not loſe it by colluſion.]

* It ſeems that this ſhould be (a): and ſee 21 E. 3. 45. b. pl. 63. & 61. pl. 8.

[2. [*But*] if the *tenant makes an attorney in bank*, and after *conuſance* of this plea *is demanded by a franchiſe*, and granted, *he remains attorney for him in the franchiſe*, yet if he *makes default* there, by which the land is loſt, no writ of diſceit lies againſt him, becauſe he is *not bound to go there.* 21 Ed. 3. 46.]

Br. Error, pl. 64. cites S. C.—— Br. Attorney, pl. 35. cites S. C. & S. P.—— See tit. Attorney, (L) pl. 1. S. C.

[3. *So* an attorney in a plea is *not bound to go to the niſi prius*, and therefore if he makes default at the niſi prius, no writ of diſceit lies againſt him. 21 Ed. 3. 46.]

Br. Attorney, pl. 35. cites S. C.

4. If an *attorney pleads falſely or faintly*, action of diſceit lies; but the party by this cannot remove him; per Aſhton, which was clearly denied. Br. Diſceit, pl. 41. cites 8 H. 6. 8.

A client gives his attorney a *warrant to plead the general iſſue*, and he *ſuffers judgment by nihil dicit.* It was ſaid that this was not any cauſe of action, unleſs it was by covin, and muſt be alleged in the declaration, or otherwiſe he cannot recover. It was afterwards agreed that the covin was not traverſable by plea, but only in evidence at the bar. Win. 90. Trin. 22 Jac. C. B. Adams v. Ward.

5. An attorney who is informed to plead matter, which he cannot plead by conſcience, may plead quod *non eſt veraciter informatus*, &c. and in writ of diſceit this ſuffices againſt his client. Br. Attorney, pl. 76. cites 20 E. 4. 9.

6. Diſceit, for that the *plaintiff being ſued by A. on a bond*, the *defendant without warrant appeared as attorney, and pleaded non ſum informatus.* The defendant *pleaded that A. ſued the plaintiff and J. S. joint obligors, and that J. S. retained him for them both, & pro defectu informationis he pleaded as above.* Upon demurrer the court were of opinion that the fraud and covin are traverſable. D. 361. b. pl. 13. Hill. 20 Eliz. Manſer v. Franklin. [577]

7. An *infant being ſued on a bond entered into by him and another, the plaintiff in the ſuit procured an attorney, without any warrant from the infant, to appear for him, who pleaded non ſum informatus*, and the *infant was taken in execution.* It was ſaid by the court, that his remedy was by writ of diſceit againſt the attorney, and not by audita querela. Cro. J. 694. pl. 7. Mich. 22 Jac. C. B. Allely v. Colley.

8. If a man be retained as an *attorney to ſue for a debt which he knows to be releaſed, and was himſelf a witneſs* to the releaſe, yet an action will not lie againſt him, becauſe what he does is only as ſervant to another, and in the way of his calling and profeſſion;

ſeſſion; per tot. cur. Mod. 209. Hill. 27 & 28 Car. 2. C. B. in pl. 41.

Fol. 96.

(Y. b) [Diſceit.] In what Caſe it lies *upon* an *Expreſs Warranty*. In reſpect of the Warranty, and the Time of the making.

(Z) pl. 1. S. C. but not S. — See (Z. b) pl. 3. S. C.

[1. IF a man, *knowing his horſe to be* lame and *foundered, offers him to me to buy, and warrants him* to be ſound, &c. and I truſting thereto buy him, by which I am deceived, though here the warranty was before the ſale, yet inaſmuch as this *was the cauſe of the buying*, an action upon the caſe lies thereupon. Paſch. 3 Jac. B. R. between GOLDSMITH AND PRESTON, admitted.]

2. If one ſells a horſe to another, and *after at another day warrants him to be good and ſound*, it is a void warranty; for it ought to be at the time of the ſelling. Godb. 31. in pl. 40. per Windham, cites 5 H. 7.

Br. Garranty, pl. 57. S. P. cites 5 H. 7. 18. and ibid. pl. 58. S. P. cites 5 H. 7. 43.

3. If A. *ſells cloths to B. and warrants them of ſuch a length*, and they are not, *the warranty ought to be in writing, if made at another time after the bargain*; for to have an action of diſceit the warranty muſt be made upon, and at the time of, the bargain. F. N. B. 98. (K).

[All the editions of Brooke are printed 5 H. 7. 43. but there are not ſo many pages in that year; but it ſhould be (41) and is at 41. b. pl. 7.]

4. Q. Eliz. was ſeiſed in fee of the vicarage of S. whereto the tithes in S. did belong, whereof the defendant upon the 9 June *did affirm himſelf to be lawful incumbent, and had right to the tithes from the death of T. V. the incumbent.* And after upon 16 June the plaintiff treating with the defendant about his buying the ſaid tithes till Mich. following, the defendant adtunc *knowing that he had not right thereto, he not having been inſtituted*, &c. yet falſo & deceptive ſold them to the plaintiff for 30l. and alleges in facto, that E. T. was alſo preſented, &c. and took the tithes, &c. The *action does not lie for ſelling a thing in which he has no property, unleſs he makes a warranty at the ſame time that the plaintiff ſhould enjoy them*, whereas this affirmation of his being vicar, and having a right to ſell, was 7 days before the ſale. Adjudged for the defendant. Cro. J. 196. pl. 23. Mich. 5 Jac. B. R. Roſwell v. Vaughan.

[578]

2 Show. 284. pl. 279. Mew v. Ruſſel, S. C. Saunders Ch. J. ſaid the adtunc proves it to be all at the ſame time,

4. Caſe, for that the plaintiff *had bargained and bought of the defendant* 16 hogſheads of wine, &c. The defendant *in conſideratione inde adtunc & ibidem, warranted the wine to be good* and merchandizable. It was objected that this warranty was after the contract, and ſo not good; and cited the caſe of Pope v. Lewins. But the court ſeemed to think it too nice, and adtunc & ibidem ſhall be intended all at an inſtant, and that it would be well enough if (in conſideratione inde) had been out. Afterwards the plaintiff had his judgment, by the opinion of Raymond and Withins,

Withins, Jones hæſitante. Skin. 104. pl. 2. Paſch. 35 Car. 2. B. R. Moor v. Ruſſel. and would be well enough if all the court thought it well enough.

the (in conſideratione inde) had been out. And upon moving it at the next term, thought it well enough. And judgment for the plaintiff.

5. Plaintiff declared that defendant on ſuch a day and place ſold him a horſe, and then and there warranted him to be ſound, &c. Whereupon he paid him ſo much, and averred that the horſe was not ſound. It was moved that this warranty, as ſet forth, might be after the ſale, whereas it ought to be part of the contract, and therefore it ſhould be warrantizando vendidit. Sed non allocatur; for the payment was afterwards, and by that the bargain was completed which till then was imperfect. 1 Salk. 211. pl. 4. Trin. 5 Ann. B. R. Butterfield v. Burroughs.

(Z. b) In what Caſe it lies, upon an Expreſs Warranty.

[1. IF a man *ſells* a tun of *wine, and warrants it to be ſound,* and not corrupted, if it be corrupted, an action upon the caſe lies. 11 Hen. 6. 18.] S. P. Br. Action ſur le Caſe, pl. 8. cites 9 H. 6. 53. by Babb. and Marten.——F. N. B. 94. (C) S. P. and S. C. cited in marg.

[2. *So* if a man ſells *a horſe,* and warrants him to be clear [found] of his limbs, if he be not, an action upon the caſe lies. 11 Hen. 6. 18.] F. N. B. 94. (C) S. P. and S. C. cited in marg.

[3. [*So*] if a man ſells a horſe, and warrants him to be ſound, &c. whereas he *knows him to be* lame and *foundered,* an action upon the caſe lies. Paſch. 3 Jac. B. R. between GOLDSMITH AND PRESTON admitted.] (Z) pl. 1. S. C. but not S. P. ——(Y. b) pl. 1. S.C. & S.P. accordingly.

[4. If a *ſmith promiſes to ſhoe my horſe* well and commodiouſly, if he *pricks him,* an action upon the caſe lies. 14 Hen. 6. 18. b. it ſeems it lies without this warranty.] See (P. b) pl. 15.—— Action lies againſt him without any warranty; for it is the duty of every artificer to exerciſe his art rightly and truly as he ought. F. N. B. 94. (D) Marg. cites 24 H. 6. 10. and 46 E. 3. 19.——Poph. 143. Arg. cites F. N. 94. (C)

[5. *So* if he *does not ſhoe him,* by which I travel without, and my horſe is damnified for want of ſhoes, an action upon the caſe lies againſt him. 14 Hen. 6. 18. b.] Action lies againſt him for denying to ſhoe him. Agreed per tot. cur. Kelw. 50. a. pl. 4. Paſch. 18 H. 7.——S. C. cited by Holt Ch. J. 12 Mod. 484. as actionable, becauſe he has made profeſſion of a trade which is for the public good, and has thereby * expoſed and veſted an intereſt of himſelf in all the king's ſubjects that will employ him in the way of his trade.

* [579]

[6. If a farrier, though he be *not a common farrier, aſſumes to cure my horſe of a malady,* if he kills the horſe through negligent adminiſtration See (P. b) pl. 13. and the notes there.

adminiſtration of his medicines, an action upon the caſe lies againſt him. 19 Hen. 6. 49.]

Contra if he promiſed to purchaſe it; by the beſt opinion. Br. Action ſur le Caſe, pl. 108. cites S. C. —— F. N. B. 94. (D) in the new notes there (b) S. P. and if he does his endeavour caſe does not lie; for perhaps it was impoſſible to get it; cited 11 H. 6. 24. 55. —— (P. b) pl. 9. S. C.

[7. If one retains a man of the law to be of his counſel, to get a certain manor, and the *counſellor warrants* him *to gain the manor*, yet no action lies againſt the counſellor, if he does not obtain it; for this *reſts merely in covenant, and* therefore the warranty *ought to have been by deed.* 11 Hen. 6. 18. (It ſeems this is intended without conſideration.)]

[8. *So* if a man warrants *to purchaſe a manor, and does not*, no action lies without a deed, becauſe it founds in covenant. 11 Hen. 16. 18. b. (It ſeems it is intended without conſideration.)]

[9. If a man *ſells* certain packs of *wool*, with warranty that they are good and merchantable, if they are *full of moths*, an action upon the caſe lies. 19 Hen. 6. 49. b.]

* Orig. is (eveigne out Rabul.)

[10. *So* if a man ſells certain *bales of green*, and warrants them to be merchantable, whereas he *knows them to be* * *damaged*, an action upon the caſe lies againſt him. 20 Hen. 6. 35. adjudged.]

See (P. b) pl. 18. S. C. —S.P. And the ferry wages are certain. Br. Action ſur le Caſe, pl. 78. cites S. C.

[11. If a man undertakes to carry my pack-horſe over Humber, in a veſſel ſafe and ſound, if he *ſurcharges his boat* with other horſes, *by which* ſurcharging *my horſe is loſt*, an action upon the caſe lies againſt him. 22 Aſſ. 41. adjudged. (It ſeems that it is *intended that he was a common carrier* of ſuch things over the river.)]

Roll. Rep. 275. pl. 50. S. C. but does not mention the warranting, but only the affirming it to be 800 lb. weight, and without ſaying that it was no more. The court was divided 2 againſt 2 whether the action lay or not. Et adjornatur.

[12. If a man *carries a bale of wood to a carrier*, and *warrants it* to him *to be only of the weight of* 800*l.* and prays him to carry it to ſuch a place, and that he ſhould have 2s. for the carriage of every hundred weight, *whereas it was in truth of the weight of* 2000*lb.* but the carrier giving * credit to the promiſe aforeſaid, carries it to the place appointed; but by the ſaid deceit in the weight, his waggon in which he carried it was ſo overloaded, *that by their exceſſive labour he loſes* 3 *of his horſes* that drawed the waggon, an action upon the caſe lies againſt him upon this warranty, though he might have weighed it preſently upon the receipt; for he might take it upon the other's promiſe, without weighing of it. Mich. 13 Jac. B. R. between BAYLY AND MERRIL, for the weight is not diſcernible by the view.]

* Fol. 97.

[13. *But* the action does *not* lie in this caſe, *if he had only affirmed* to the carrier *that it was but* 800 *weight*; for this is not any warranty. Dubitatur Mich. 13 Jac. B. R. between BAYLY AND MERRIL.]

—— Cro. J. 386. pl. 18. S. C. ſtated according to Roll. Rep. and as to what was urged of the plaintiff's negligence in not weighing it, viz. that perhaps the plaintiff was a ſtranger there where he undertook the carriage, and had no weights to weigh it. It was anſwered, that it was groſs negligence to undertake a weight ſo far exceeding the affirmation without weighing; wherefore judgment was ſtayed. —— 3 Bulſt. 94. S. C. ſays the whole court (abſente Coke Ch. J.) held the action lay not, becauſe

becauſe the default was in the plaintiff himſelf by not weighing it; but being ordered to ſtay till moved again, and the plaintiff perceiving the opinion of the court to be againſt him, never moved the court again; and ſo no judgment was pronounced either way; neither does this report take any notice of any warranty.

* A goldſmith *had a ſtone, which he affirmed to be a bezoar ſtone, and ſold it to the plaintiff for* 100*l.* whereas it was not a bezoar ſtone. Adjudged that the bare affirmation, without warranting it to be ſo, would not maintain an action; per all the juſtices and barons in the exchequer-chamber, præter Anderſon. Cro. J. 4. pl. 3. Paſch. 1 Jac. Chandler v. Lopus.

In caſe for *ſelling* the plaintiff *falſe bills of public faith, knowing them to be falſe*, and yet *affirming them to be true*, with an intent to deceive, judgment was given for the plaintiff. Sty. 348. Mich. 1652. B. R. Fowke v. Boyle.

[14. If A. *ſells a horſe* to B. *and warrants him* to be *ſound* of wind and limb; *and clean of his legs*, whereas he well *knows that he is ſhoulder-pitched, and has ſplints* upon his legs, an action lies againſt him upon this warranty; for *theſe imperfections are not ſubject to the view without ſome ſkill.* Trin. 18 Jac. B. R. between DORRINGTON AND EDWARDS, adjudged, this being moved in arreſt of judgment.] 2 Roll. Rep. 188. S. C. adjudged for the plaintiff; but ſays that no reaſon was given, only that Mountague Ch. J. ſaid,

here was an apparent fraud; for the plaintiff would have rid the horſe, and the defendant ſaid, I will warrant him to be ſound.

Caſe, &c. for that the defendant, *on ſuch a day and place, ſold him an horſe, and then and there warranted him to be ſound wind and limb*, whereupon he paid ſo much money; and *averred the horſe had but one eye.* Upon non warrantizavit pleaded, the plaintiff had a verdict; and it was objected in arreſt of judgment, firſt, that a warranty extends only to ſecret infirmities, but the want of an eye was apparent; but reſolved that *this muſt be intended ſecret, ſince the jury found that the defendant did warrant.* 1 Salk. 211. pl. 4. Trin. 5 Ann. B. R. Butterfield v. Burroughs.

15. If one ſells a *horſe that is blind*, and warrants him to be ſound, no action lies, becauſe I may ſee whether he be blind or not; but otherwiſe where he *has a diſeaſe in his eye which I cannot diſcern.* Bridgm. 128. cites 13 H. 4. 1. If a man ſells a horſe with one eye, and warrants that he hath

2 eyes, it is a void warranty, becauſe it is apparent to the vendee. Br. Diſceit, pl. 29. cites 11 E. 4. 6.

(A. c) What ſhall be a *good* Warranty.

[1. IF a man *ſells* certain ſheep to another, and *warrants that they are ſound at the time of the ſale, and* that they *ſhall continue* ſound *by the ſpace of one year after*, this is a good warranty, upon which an action upon the caſe lies, though it be the act of God if they continue ſound; for this is not impoſſible. Trin. 39 Eliz. B. R. between KING AND BRAYNE, per 2 juſtices.] Ow. 60. S. C. accordingly by Clench and Fenner.

[2. *So* if a man warrants ſuch a *ſhip to return ſafe* from ſuch a place; for it is uſual between merchants to inſure them in ſuch manner. Trin. 39 Eliz. B. R.] S. P. by Clench and Fenner, obiter. Ow. 60. in the caſe above.

[3. *So* if one warrants that *ſuch a man will live a year*; for this is the common uſage of the inſurers among merchants and others. Trin. 39 Eliz. B. R.]

[4. If A. *promiſes* B. for a ſum of money, for the paſture of certain ſheep in certain lands for a certain time, *to preſerve the ſheep* in the ſaid land, for the time aforeſaid, *ſound and free from*

rot; in this caſe, if *the ſheep were at the time of the promiſe* altogether unſound, infirm, *rotten, and corrupted, though they die after of this* rottenneſs within the time aforeſaid, yet this is not any breach of the promiſe if he keeps them during the ſaid time; for the effect of the promiſe is only to keep them in the ſaid lands, and that the land * ſhould not infect them with the rot; for if they were before the promiſe utterly rotten, it was not poſſible for him to reſtore them to their ſoundneſs, nor did he promiſe ſo to do; but only upon a preſumption, that if they were ſound then, they ſhould not be infected with the rot during the time that they ſhould depaſture with him. Trin. 1651. MATREVERS AND ALAND, adjudged upon a demurrer. Intratur Paſch. 1651. Rot. 57.]

5. If a man *ſells ſeeds* to me, *and warrants* to me that they are good, where they are not, or *that they are ſeeds of ſuch a country*, which is falſe, diſceit lies; for I cannot know them but by him. *But* if he warrants *that the ſeeds ſhall grow*, it is a falſe warranty; for it is as it pleaſe God. Br. Diſceit, pl. 29. cites 11 E. 4. 6.

6. *So* warranty *that a horſe ſhall carry a man* 30 *leagues a day*, it is void; for he *cannot warrant a thing to come*. Ibid.

7. *And* per Fairfax, if a man *ſells cloths* of a *murrey colour, and warrants that they are blue*, it is a void warranty; for it is apparent by the view. But per Brian, if the *vendee be blind*, in ſuch caſe diſceit lies. Ibid.

(B. c) *Diſceit*, in Nature of an Action upon the Caſe, *who may have it*. The *Maſter*.

Cro. E. 349. pl. 26. S. C. & S. P. admitted, Arg. * Fol. 98. and ſaid to have been adjudged in the caſe of Hill v. Holt.

[1. IF a *bailiff errant takes J. S. in execution* upon a cap. ad ſatisfaciend' at the ſuit of J. D. and after *J. S. eſcapes by a reſcue of himſelf*, the ſheriff may have an action upon the caſe againſt him for this eſcape; for he is thereby *chargeable over* for this to J. D. and this eſcape made to his bailiff * was an eſcape to himſelf. Mich. 37 Eliz. B. R. between ATTERTON AND HARWARD, adjudged.]

S. P. per cur. Cro. E. 26. Paſch. 26 Eliz. C. B. in pl. 8. See (F. c) pl. 3. S. P.

[2. *But if* ſuch a priſoner, *taken by a bailiff of a franchiſe, eſcapes* from the bailiff, the ſheriff ſhall not have an action upon the caſe againſt him, becauſe he is *not chargeable over*, but the bailiff only is chargeable.]

(R. b) pl. 3. S. C. but not S. P. (G. c) pl. 12.

[3. If a *bailiff errant takes J. S. in execution* at the ſuit of J. D. and after he *eſcapes by a reſcue of himſelf*, the *ſheriff*, if he will, *may have* an action upon the *caſe againſt the bailiff* for his eſcape, becauſe

cauſe when he takes upon him to be his bailiff, it is an *aſſumpſit in law* to keep the priſoners ſafely, and not to ſuffer them to eſcape. Dubitatur Mich. 37 Eliz. B. R. between ATTERTON AND HARWARD.] S. C. but not exactly S. P.

[4. If my *ſervant* be *cozened* of my money, I may have an action upon the caſe for this deceit againſt the cozener. Paſch. 8 Jac. in the exchequer-chamber, PAUL TRACEY'S CASE, per curiam.] Cro. J. 223. pl. 3. Tracy v. Veal, S. C. in 7 Jac. B. R. and it was

for getting the maſter's money from his ſervant by a counterfeit letter, as from the maſter to his ſervant to pay it; and adjudged the action lay for the maſter; for the abuſe and loſs was only to him; and the judgment affirmed in error.—See Noy 105. Paſch. 1 Jac. Hawley v. Richmond.

[582]

[5. If a *ſurgeon*, in conſideration of a ſum of money, *promiſes to cure my ſervant of a hurt* which he has in his leg, *and* after *applies unwholeſome medicines* thereto, *of purpoſe* to make the wound worſe, *by which I loſe the ſervice* of my ſervant for a long time, the maſter may well have an action upon the caſe againſt the ſurgeon for the loſs of the ſervice of his ſervant. Hill. 12 Jac. B. R. between EVERARD AND HOPKINS, per curiam.] (N. b) pl. 5. S. C. but S. P. does not appear. --Roll. Rep. 124. pl. 6. S. C. but upon exceptions taken to the pleadings, adjornatur.——3 Bulſt. 332. S. C. ſays the whole court inclined of opinion for the plaintiff, that the action was well brought; but the pleading not being good, no judgment was given, but was adjourned, and not moved again, but ended by agreement as was thought.——Jenk. 315. pl. 1. Tracy's caſe, S. C. but ſtates it that C. the ſervant brought an action upon this matter, and that it was adjudged for him, and affirmed in error, although in the name of the ſervant.

(C. c) [*In what Caſes an Action upon the Caſe lies for or againſt*] the Servant.

[1. IF a *bailiff* itinerant, or ſpecial, *arreſts J. S.* upon a cap. ad ſatisficiend. at the ſuit of J. D. *and J. S. eſcapes by the reſcue of himſelf, and* after *J. D. recovers* in an action upon the caſe for the eſcape *againſt the ſheriff, who* after in ſuch action *recovers againſt the bailiff*, upon an aſſumpſit to ſave him harmleſs from eſcapes, the *bailiff may* after *have* an action upon the *caſe againſt J. S.* that eſcaped, becauſe he is chargeable over. Dubitatur Mich. 37 Eliz. B. R. between ATTERTON AND HARWOOD.] See (R. b) pl. 3. (B. c) pl. 2. & infra, pl. 2. S. C. but not exactly S. P.—— Cro. E. 349. pl. 26. S. C. ſays the ſheriff directed his warrant to the plaintiff, as his bailiff to ſerve it, and that the plaintiff aſſumed to

[2. *So* in the caſe above, *if the ſheriff recovers againſt the bailiff* in an action upon the caſe for the eſcape, (as he may as it ſeems upon an aſſumpſit in law) the *bailiff may* well after *have* an action upon the *caſe againſt J. S.* who eſcaped, becauſe he is charged over for it. Dubitatur Mich. 37 Eliz. B. R. between ATTERTON AND HARWOOD.]

ſave him harmleſs againſt all eſcapes; and it was moved in arreſt, that though the ſheriff may have action againſt the priſoner who eſcapes, yet the bailiff ſhall not, and that of that opinion was the court, for the bailiff [who it ſeems was ſpecial] was not chargeable to the ſheriff by law, but by his aſſumpſit, and this being his voluntary act, ſhall be no cauſe to charge the defendant who eſcaped, but ſhall only make himſelf chargeable; but they agreed that if the baily had been chargeable by law, without ſuch promiſe, an action would lie againſt the defendant, who cauſed him to be charged.

[3. If *the bailiff of a franchiſe makes a falſe return* to the ſheriff, and the *ſheriff returns it* to the court accordingly, an action upon the (F. c) pl. 1. S. P. and ſeems to in-

tend S. C.-- Mo. 431. pl. 606. Palmer v. Porter, ſeems to be S. C. and S. P. held accordingly.——Cro. E. 512. pl. 37. Palmer v. Potter & al. S. C. but S. P. does not appear.

the *caſe lies againſt the bailiff*, and *not againſt the ſheriff*; for no default is in him. Trin. 39 Eliz. B. R. between PALMER AND MARSH, per curiam.]

[583] (D. c) At what Time it lies.

(P. b) pl. 6. S. C. but S. P. does not appear. —Cro. J. 474. pl. 6. Furnis v. Leiceſter S. C. adjudged (abſente Mountague) for the plaintiff.

[1. A. *Sells ſheep* to B. as his own goods, *ſaying that they are his own* goods, *whereas they belong to D., B. may have* an *action* againſt him for this diſceit *before D. hath ſeiſed the ſheep*, or interrupted him, becauſe they are *things tranſitory*, and therefore the action lies before interruption; for if he ſhould ſtay till D. interrupted him, he may be dead before, or other diſadvantage may happen. Paſch. 16 Jac. B. R. between LISTER AND FURNACE, adjudged.]

After the delivery of the thing ſold, and before he has paid for it, becauſe the ſeller may have action of debt for the money when he will. Br. Garranties, pl. 59. cites S. C.

2. If a man *ſells* a thing *with warranty*, and the buyer is therein deceived, he may have writ of diſceit, though he *has not yet paid for the thing*. Per Huſſey and tot. cur. Br. Diſceit, pl. 24. cites 9 H. 7. 21.

Godb. 125. pl. 145. Yarram v. Bradſhaw S. C. adjudged for the plaintiff.

3. On a ca. ſa. directed to the plaintiffs, *ſheriffs* of Norwich, they *made a warrant to* 3 *ſerjeants to take B. in execution*, which *they did, and let him eſcape*, for which an action upon the *caſe was brought by them againſt the ſerjeants*. It was moved in arreſt of judgment, that they only ſay they are chargeable, but not charged or damnified, and *perhaps no ſuit may ever be brought againſt them*. But adjudged for the plaintiff; for *if they ſtay till they are ſued, the party that eſcaped may die or fly the country in the mean time*. Cro. Eliz. 53. pl. 3. Hill. 29 Eliz. B. R. Sheriffs of Norwich v. Bradſhaw.

Fol. 99.

(E. c) Action upon the Caſe in Nature of Diſceit againſt Officers. In what Caſe it lies. Upon an Eſcape.

* Mo. 852. pl. 1162. May v. the Sheriffs of London S. C. held per tot. cur. reſcous is no plea, but it will excuſe the contempt to the king.——Roll. Rep. 388. pl. 9. May v. Probie S. C. adjornatur.——Ibid. 440. pl. 5. S. C. the court inclined for the moſt part, that the action

[1. IF a man be *arreſted upon mean proceſs* at the ſuit of J. S. and he *eſcapes*, J. S. ſhall have a ſpecial action upon the *caſe againſt the ſheriff* for this eſcape. My Reports, 14 Jac. * MAY AGAINST PROBY AND LUMLY, † adjudged per admittance, 16 Edw. 4. 3. by all the juſtices.]

action would lie, but after upon deliberation, it was adjudged that it would not; becauſe the ſheriff is not bound to take the poſſe comitatus to ſerve every meſne proceſs, nor is it convenient ſo to do, but he may if he will; beſides the party may have action againſt the reſcuers; but upon writs of execution a return of reſcous is no excuſe; nor where the party taken on meſne proceſs has been once in priſon. ——— 3 Bulſt. 198. S. C. adjudged that the action did not lie. ——— Cro. J. 419. pl. 10. S. C. adjudged for the defendant; and as to the caſe of Waldoe v. Lambert adjudged to the contrary, the court upon view of the precedent, conceived that the plea was ill by reaſon of the traverſe of the place, and ſo it might be adjudged for the plaintiff for that point. ——— Reſolved the plea is good, though he did not plead that he returned the reſcous. 3 Lev. 46. Trin. 33 Car. 2. C. B. Ld. Gorges v. Gore.

* † Br. Eſcape, pl. 37. cites 16 E. 4. 2. 3. that it was ſaid by all the juſtices, that if a ſheriff ſerves a capias, and another reſcues him, and the ſheriff returns the reſcue, the ſheriff is hereby diſcharged; and Catelby agreed it, when it is on meſne proceſs, becauſe the plaintiff may proceed by alias & pluries, and ſo to exigent; but e contra after condemnation.

* [584]

[2. If a man brings an *action againſt J. S. before the mayor, bailiffs, and ſteward of a town*, where the *bailiffs are the jaylors* of the town, and *J. S. is committed to the bailiffs* upon the mean proceſs *for want of bail*, and *they ſuffer him to go at large before judgment* and execution, *and after* the *plaintiff recovers* againſt him, the plaintiff may have a ſpecial action upon the caſe againſt the bailiffs for the eſcape; for by this he is deprived of the ſpeedy means to have him in execution after judgment, the which he might have had if he had not been ſuffered to go at large. Hill. 4 Jac. B. R. the bailiffs of Newcaſtle. Per curiam.]

Caſe for that he *affirmed a plaint of debt in the court of B. againſt J. S.* and thereupon *cauſed J. S. to be arreſted*, and the *defendant conſpiring to delay the plaintiff* in his ſaid ſuit, and in peril of his ſaid debt, *had let J. S. go at large, without taking bail.* Per 3 juſtices, contra Periam, this action lies; for the not taking of bail is not the cauſe of the action, but the conſpiracy. Le. 189. pl. 269. Mich. 31 & 32 Eliz. C. B. Cockthall v. the Mayor, &c. of Bolton.

(F. c) Againſt whom it lies. Againſt Officers. Where againſt the Maſter.

[1. IF the *ſheriff returns mandavi ballivo libertatis*, &c. *qui mihi reſponſum dedit*, &c. if the matter of the return be *falſe*, no action lies againſt the ſheriff, but only againſt the bailiff; for the ſheriff ought to accept of the return of the bailiff, if it be ſufficient in law, and not examine the truth of it. Trin. 30 Eliz. B. R. per curiam.]

See (C. c) pl. 3. S. P. and ſeems to be S. C.

[2. If upon a *fieri facias againſt an adminiſtrator*, the *ſheriff makes a warrant to the bailiff of a franchiſe* to execute it, and *after the bailiff is removed, and another bailiff elected*, and after the *old bailiff returns in his own name* to the ſheriff, *that the adminiſtrator has not any goods præterquam*, &c. the *which is falſe*, and after the *ſheriff makes a return accordingly* to the court, yet no action upon the caſe lies; for this falſe return lies againſt the old bailiff, for the return ought to have been in the name of the new bailiff, and ſo the ſheriff has accepted of a *return* as *of a* * *meer ſtranger*, which *is void*, and he ought to take conuſance of the right miniſters of the law, and therefore the *old bailiff is not puniſhable* for his falſe return, *but the ſheriff*. Trin. 39 Eliz. B. R. between PALMER

Mo. 431. pl. 606. Palmer v. Porter S. C. adjudged againſt the plaintiff, but the court held that if the plaintiff had brought action againſt the old bailiff, and *concluded to his negli-*

gence in not executing the writ, the action ſhould be maintainable. ——— Cro. E. 512. pl. 37. Palmer v. Potter S. C. adjudged for the defendant.

PALMER AND MARSH, adjudged that it does not lie againſt the bailiff.]

* See (R. b) pl. 2.

See (B. c) pl. 2. S. P. — Cro. E. 26. pl. 8. Paſch. 26 Eliz. C. B. in the Mayor and Burgeſſes of Windſor's caſe S. P. per cur.

[3. If a *writ of execution* comes to the ſheriff, and he makes his mandate to the *bailiff of a franchiſe*, who *takes him, and after ſuffers him to eſcape*, an action lies againſt the bailiff of the franchiſe, and not againſt the ſheriff. 5 Edw. 4. 1. b. 2. Brook, Eſcape 40.]

[585]

[4. Note, that if *execution* be *directed to a ſheriff to arreſt* any man, *or to make execution within a liberty, and* the ſheriff *directs his warrant to a bailiff of the liberty* to make execution of the proceſs, *who makes it, and after is a fugitive*, and not able to anſwer for it, *the lord of the franchiſe ſhall anſwer for it*, and ſhall be liable to anſwer for his bailiff; by all the juſtices. 2 Brownl. 50. Hill. 8 Jac. Anon.

See tit. Under-ſheriff (A) pl. 6.

5. Though by agreement between a bailiff of a franchiſe and his deputy, the *deputy is reſtrained to ſerve proceſs beyond ſuch a ſum*, yet if *he ſerves proceſs of a greater ſum without other warrant*, and after levies the money, the bailiff ſhall be chargeable. Litt. 33. Paſch. 2 Car. C. B. Anon.

(G. c) In what Caſes it lies.

Fol. 100.

Br. Eſtoppel, pl. 182. cites S. C. as to both points. — Br. Fines, Levies, &c. pl. 54. cites S. C. as to both points.

[1. IF a man *acknowledges a fine in my name, or confeſſes a judgment* in an action in my name *of my land*, this ſhall bind me perpetually; and in ſuch caſe I may have a writ of diſceit againſt him who acknowledges it. 19 Hen. 6. 44. *So* if a man acknowledges *a recognizance, ſtatute merchant, or ſtaple*. 19 Hen. 6. 44.]

——S. P. and ſo if he vouches and confeſſes any other matter of record, I have no remedy but by action of diſceit. Br. Diſceit, pl. 17. cites 9 H. 6. 44.

If a *ſtatute be acknowledged in my name* by a ſtranger, I ſhall have an action of diſceit againſt him, but I ſhall *not avoid the ſtatute*, or recognizance; but if it be acknowledged by one of the *ſame name*, I ſhall avoid it by plea. Cary's Rep. 30. cites 23 June 1602. 44 Eliz.

Action on the caſe will lie againſt one for *procuring one to confeſs a judgment* by fraud *to deprive the plaintiff of his execution* obtained on a prior judgment, whereas nothing was due to him to whom the judgment was confeſſed, and yet he took out execution, and ſeized all the goods. Adjudged and affirmed in parliament. Carth. 3. Trin. 3 Jac. 2. B. R. Smith v. Tonſtall. ——— Comb. 51. S. C. but S. P. does not appear.

Br. Diſceit, pl. 17. cites S. C. — Br. Fines, Levies, &c. pl. 54. cites S. C.

[2. [*But*] if a man makes an *obligation* in my name, he [I] ſhall not have a writ of diſceit againſt him, becauſe I may avoid the deed by the plea of non eſt factum. 19 Hen. 6. 44.]

[3. If

[3. If a man *razes the name of the obligor* out of an obligation, *and* inſtead thereof *puts in the name of J. S.* and after ſues him upon this obligation, J. S. may have an action againſt him for this. Trin. 43 Eliz. B. R. per Gawdy.]

[4. If *A. be excommunicated, and the letters* of excommunication *are brought to the parſon* of the pariſh *to be read* and publiſhed *in the church againſt A. and the parſon* having malice to B. puts out the name of A. and *puts in the name of B. and* then *pronounces B. excommunicated*, B. may have an action upon the caſe againſt the parſon; for this is not only an injurious vexation, but alſo ſcandalous to B. Trin. 43 Eliz. B. R. HARRIS's caſe adjudged, per curiam.]

(D. a) pl. 15. to the like purpoſe. ——Cro. E. 838. pl. 13. Kenton v. Wallinger, S.C. adjudged for the plaintiff. ——S. P. Arg. Skin. 124. in pl. 2.

[5. If a man caſts a *protection* for himſelf *quia moratur*, by which the parol is put without day, *whereas he was all the time within the realm* about his own buſineſs, and not at the place, a writ of †diſceit lies againſt him. * 20 Hen. 6. 10. 33 Edw. 1. Liber Parliamentorum 103. b.]

* Br. Diſceit, pl. 1. cites S. C. —Caſting a protection without cauſe, is actionable; per Fenner and Clinch J. only in court. Arg. Cro E. 629. Mich. 40 & 41 Eliz. B. R. in pl. 22. ——S. P. per cur. Cro. E. 794. Mich. 42 & 43 Eliz. C. B. in pl. 38. ——F. N. B. 97. (B) S. P. ——S. P. and ſame book cited by Doderidge J. Palm. 183. Mich. 18 Jac.

† [586]

[6. *So* if a man caſts a protection *quia profecturus*, and *never goes*, an action lies. 20 Hen. 6. 10. 18 Edw. 3. 12. b. Trin. 7 Hen. 5. B. R. Rot. 70. adjudged.]

S. C. cited Arg. Cro. E. 714. in pl. 37.

[7. *But if*, in going towards the parts beyond ſea, he is *ſeiſed with a malady*, ſo that he cannot go nor ride, and before this the protection is allowed, no action lies againſt him. 18 Edw. 3. 13.]

[8. [*But*] if a man caſts a protection *quia moratur' in York*, if he *abides in York a week in every month*, and for the reſt of the time abides in another place in the ſame county about his own buſineſs, it ſeems that diſceit lies againſt him. Quære 29 Edw. 3. 17. b.]

Br. Diſceit, pl. 1. cites 20 H. 6. 10. where S. P. is admitted. —Br. Decies Tantum, pl. 2. cites S. C. & S. P. admitted.

9. If A. entices B. to play with him at dice, at a play called paſſage, whereupon B. plays with him; and when it comes to the turn of B. to play, A. delivers in true dice with which he ſhould play; and when it comes to the turn of A. himſelf to play, he puts in and *plays with falſe dice*, ſcilicet, ſuch dice as he knows will run 5 or 6 upon every die, whereby B. loſes 10l. an action upon the caſe lies for this diſceit by B. againſt A. Hill. 8 Car. B. R. between NORTWELL AND OAKE adjudged, though it was moved in arreſt that the declaration was repugnant, becauſe it was laid that he played with falſe dice, ſcilicet, that he quaſdam aleas falſas & falſo titulatas quas numeros de ſex & quinq; ſuper quamlibet aleam quolibet jactu attingere ſciviſſet falſo & fraudulenter projecit & luſus fuit. Yet the court gave judgment

Cro. E. 90. pl. 15. Hill. 30 Eliz. B. R. like point adjudged for the plaintiff. —F. N. B. 95. (D) S. P. And though the defendant does not entice the plaintiff to play, yet if the defendant plays

with falſe dice, &c. by which he gets the plaintiff's money, it ſeems the action is maintainable, becauſe the enticement is not the cauſe of the action, but the caſting of the falſe dice, by which he gains the money, &c. ——— So in caſe for cheating at cards, the plaintiff had judgment. Mo. 776. pl. 1075. Mich. 3 Jac. Baxter v. Woodward.

judgment for the plaintiff, I being of counſel for the plaintiff. Mich. 8 Car. Rot.]

Cro. C. 325. pl. 7. S. C. adjudged for the plaintiff. ——S.P. by baron Altham. Arg. Lane 67. Trin. 7 Jac.

[10. If *a* man *takes my cattle* with force and arms, *and chaſes them into the cloſe and emblements of J. S. per quod I am ſubject to the action of J. S.* I may have an action upon the caſe for this againſt him, and ſuch * a declaration is good in an action upon the caſe, for the per quod is the ground of the action. Mich. 9 Car. B. R. between TIFFIN AND WINKEFIELD adjudged, this being moved in arreſt of judgment. Intratur Trin. 9 Car. Rot. 451.]

* Fol. 101.

And ſo it is if a man takes my goods, and lays them upon the land of A. either treſpaſs or caſe lies againſt the taker; per Tanfield Ch. B. Ibid. 68.

All. 3. Mich. 22 Car. B. R. Newman v. Zachary, S. C. accordingly.

[11. If *I deliver my ſheep to J. S.* who is *a common ſhepherd* for the inhabitants of a village, *and afterwards they ſtray and return again, and* then *I ſell them, and after J. S.* maliciouſly intending not only to deceive me of the ſaid ſheep falſely and fraudulently, but alſo to induce a ſcandal upon me as to the ſaid ſheep, and to damnify me, *affirms that theſe ſheep are not my ſheep, but ſtrays, and procures the bailiff of the manor to ſeiſe* and carry away the ſaid ſheep as ſtrays, (they not being proclaimed and marked as

[587]

ſtrays, according to law) per quod I am not only falſely and fraudulently deceived and defrauded of the ſaid ſheep, and the profit that might have been taken thereby, but I am alſo brought into great infamy and trouble, I may have an action upon the caſe againſt J. S. upon this matter; for he did it *contrary to the truſt repoſed in him*, and this puts me to trouble and expence, and was done by him falſely and maliciouſly. Mich. 22 Car. B. R. between NEWBON AND NEWBON adjudged, it being moved in arreſt of judgment that the action does not lie. Intratur Trin. 22 Car. Rot. 207.]

Præcipe *quod reddat* at common law *of land*, which is *ancient demeſne of the king*, and the *tenant* ſuffers it to be recovered, and *will not plead ancient demeſne*, the king ſhall have action of diſceit. Br. Diſceit, pl. 37. cites 11 H. 4. 86.

[12. If a man *recovers againſt my tenant* in a præcipe in capite, to the intent *to ouſt me of my court and ſeigniory*, a writ of diſceit lies againſt him. 17 Edw. 3. 31. b. 36. b.]

[13. *And in* this writ I *ſhall recover according to my damage*, ſcilicet, for the deceit, becauſe this is a prejudice to me, for now he holds by eſtoppel of the king, and I ſhall not have the ward of his heir againſt the king, unleſs by petition; *but* I ſhall *not* recover damages *to the value of the ſeigniory*, becauſe this is not loſt, though there be a tenure by eſtoppel of the king. 17 Edw. 3. 31. b. 37.]

See (P) pl. 13

[14. If my *feoffee, upon condition to re-infeoff* me, *acknowledges a ſtatute, and after re-infeoffs* me, and after the conuſee ſues execution

ecution againſt me, I may have a writ of diſceit againſt the feoffee, for he [I] infeoffed him to be re-infeoffed diſcharged. 28 Edw. 3. 91.]

[15. If it be *agreed* between you and me, *that you ſhall make an eſtate to me in certain lands*, if you make a *feoffment* thereof *to another*, I ſhall have an action upon the caſe for the deceit. 3 H. 7. 14.]

So if the defendant *undertakes for* 10*l. to labour J. S. to make a leaſe for certain years to the plaintiff*, and the defendant *laboured J. S. to make a leaſe to himſelf in diſceit of the plaintiff*, the action well lies by the opinion of the court; and the ſame law in other caſes upon an aſſumpſit and non-feaſance. Br. Action ſur le Caſe, pl. 88. cites S. C.

[16. If a man having a term for years, *offers to ſell* it to another, *and ſays that a ſtranger would give him* 20*l. for this term*, by the means of which ſpeech the other buys it, *where in truth he was never offered* 20*l.* for the term, though he be deceived in the value, yet no action upon the caſe lies. Mich. 40 & 41 Eliz. B. R. adjudged.]

S. P. exactly per cur. Sid. 146. pl. 3. Trin. 15 Car. 2. B. R.

17. Diſceit, for *ſelling to the plaintiff certain goods as his goods*, whereas in truth they were the goods of a ſtranger. But becauſe it was *not alleged that the defendant ſciens them to be the goods of a ſtranger*, ſold them, Periam and Windham held, that the action did not lie, but Anderſon e contra. And afterwards adjudged againſt the plaintiff. Cro. E. 44. pl. 5. Mich. 27 & 28 Eliz. C. B. Dale's caſe.

18. Libel, &c. for tithes. The *defendant ſuggeſted a cuſtom, that the parſon ſhould have for his tithes the tenth land ſowed with any manner of grain, to be reckoned at the firſt land next the church*, &c. The *parſon ſhewed, that the defendant by fraud ſowed every tenth land very ill, and did not dung and manure it as he did the other* 9 *parts, which uſually yielded* 8 *cocks each, but the* 10*th yielded only* 3. Wray held this cuſtom againſt common reaſon, and therefore void; but if it were good, the parſon might have an action on the caſe for the fraud. Le. 99. pl. 127. Paſch. 30 Eliz. B. R. Stebbs v. Goodlack.

Mo. 913. pl. 1290. S. C. and S. P. per cur. accordingly.

19. Caſe, for that he *had* 100*l. delivered to him to pay J. S.* and that the *defendant falſo & fraudulenter affirmed to him that he was J. S. and thereupon he delivered the* 100*l. to him*, when in truth he was not the ſaid J. S. Adjudged that the action would lie upon this deceit. Mo. 538. pl. 705. Paſch. 39 Eliz. B. R. Thompſon v. Gardner.

[588]

20. *Fraud without damage*, or *damage without fraud*, gives no cauſe of action; but where theſe 2 do concur and *meet together*, an action lies. Per Croke J. 3 Bulſt. 95. Mich. 13 Jac. in caſe of Baily v. Merrill.

21. A. ſold houſes to B. and *affirmed the annual rent to be* 20*l. where it was but* 14*l.* Action lies for B. for this deceit; but otherwiſe if he had affirmed *that they were worth* 20*l. a year*. Sid. 146. pl. 3. Trin. 15 Car. 2. B. R. Leakins v. Cliſſell.

Lev. 102. Ekins v. Trecham, S. C.

22. Caſe, &c. for that the defendant had *agreed with the plaintiff to carry the defendant's timber from*, &c. *to the defendant's houſe*, *and*

2 Lev. 196. Virtue v. Bird, S. C.

The plaintiff gave notice of the day he would carry in the timber, and then deſired the defendant to appoint a place where he ſhould lay it.

and there deliver it at ſuch a place as the defendant ſhould appoint; and that ſuch a day, &c. he did carry it, &c. and was ready to deliver it, but the *defendant delayed to appoint a place for the ſpace of ſix hours, ſo that his horſes being hot, &c. and ſtanding in the open air, died ſoon after.* It was moved in arreſt of judgment, that it was his folly to let his horſes ſtand there, and the action not maintainable; and per tot. cur. judgment was ſtayed. Vent. 310. Paſch. 29 Car. 2. B. R. Vertue v. Bird.

Judgment was ſtayed, becauſe the action lay not; for he might have taken his horſes out and walked them about, or put them into a ſtable; and ſince on his coming there the defendant appointed no place, he might have unloaded the timber in any convenient place, and gone home, and ſo the injury received was by his own fault. ——— 3 Keb. 766. pl. 2. S. C. and judgment ſtayed.

23. Action ſur le *caſe* was brought, wherein the plaintiff *declared* that whereas *ſhe was a virgin* of good name and fame, and ſought to for marriage by J. S. that the *defendant, pretending himſelf to be a ſingle perſon,* made love to her, and *married her,* when in truth he was *married to another woman,* &c. whereby ſhe became of leſs credit, and loſt, &c. After a verdict for the plaintiff, it was moved, that an action did not lie in this caſe; but the court was of a contrary opinion, wherefore judgment, niſi. Skin. 119. pl. 14. Trin. 35 Car. 2. B. R. Anon.

24. Action lies *againſt one poſſeſſed of goods ſelling them as his own,* though they were not, and that without any expreſs warranty. Show. 68. Mich. 1 W. & M. Croſs v. Gardiner.

25. A. *ſells goods* to B. to which he has no title, if A. *knows he has no good title* to them, action lies againſt him for the deceit, if the *owner recovers them* againſt B. but *ſecus* if A. does not know but his title to them is good. 12 Mod. 245. Mich. 10 W. 3. Turner v. Brent.

[589] (H. c.) Where it lies upon legal Proceeding in Courts. [*Vexation.*]

Br. Diſceit, pl. 15. cites S. C.—— Br. Action ſur le Caſe, pl. 49. cites S.C.—Caſe, &c. for ſuing the plaintiff *in the name of H. without his privity, and* thereupon *impriſoned him, by reaſon whereof all his creditors came upon him, ſo that he loſt his credit.* After verdict for the plaintiff, it was inſiſted that the action did not lie, becauſe in truth there was a juſt debt owing to H. But adjudged that if H. himſelf had commenced the action, though it had brought all the creditors upon him, and he thereby had been undone, yet becauſe it was a lawful act, no action would lie; but where one ſues in another's name, and without his privity, that is maintenance, which is a tortious act, and therefore an action will lie. March 47, pl. 76. Trin. 15 Car. Thurſton v. Ummons.

[1. IF a man *ſues* an action of *debt* againſt me *in the name of J. S.* without the will of J. S. I ſhall have a good action upon the caſe againſt him for this vexation. 7 H. 6. 43. Admitted by iſſue, and ſo it is held, Fitzherbert, Action ſur le Caſe 3.]

Cro. E. 836. pl. 8. S. C. and the

[2. If *A. ſued B. for tithes in the eccleſiaſtical court,* where *B. pleaded payment, and had two witneſſes to prove it, and* therefore *A.* diſcontinued

diſcontinued his ſuit, and after *one of the witneſſes died*, whereupon A. knowing * this, and that one witneſs would not ſerve in the eccleſiaſtical court, *commences again his ſuit* againſt B. there for the ſame tithes, ſuppoſing that B. cannot prove payment there, yet no action lies by B. againſt A. for this vexation; for then every man that brings two actions for the ſame thing ſhould be puniſhed for the vexation. Trin. 43 Eliz. B. R. between BRAY AND PARTRIGE, adjudged.]

* Fol. 102. whole court held that the action did not lie; and they all agreed againſt the plaintiff; but adjornatur. —— Noy 23. S. C. but S. P. does not appear. —— Noy 37. S. C. & S. P. and per cur. the action does not lie.

[3. If *B. comes to anſwer a writ* which R. hath depending againſt him in bank, and *A. cauſes him to be arreſted* in London, and *he ſues a corpus cum cauſa*, by which he was removed and diſcharged, and *the day after he* goes into London for his evidences, and A. knowing the ſaid writ to be depending againſt him at the ſuit of R. arreſts him de novo, he may have an action upon the caſe againſt him for this vexation. 7 Hen. 6. 45. admitted.]

Br. Action ſur le Caſe, pl. 50. cites S. C. —— Fitz. Action ſur le Caſe, pl. 4. cites S. C. —— S. C. cited Arg. Show. 254. —— If a clerk informs the juſtices that action is pending here againſt J. S. who is arreſted in London, and the juſtices credit it, and grant writ of privilege, action upon the caſe does not lie, though it was a *falſe information*; for the *juſtices may know* it *by the record*, and ſo the default in the juſtices; contra here of the ſervant; per Fairfax. Br. Action ſur le Caſe, pl. 100. cites 21 E. 4. 22. —— *And after* the *defendant ſaid that it does not appear in the bill that the defendant was officer of the bank at the time of the writ obtained.* And it was held that the *defendant ſhall not allege diſcontinuance of the plaint in London before the ſuperſedeas comes*; for he is a ſtranger to the record. Ibid.

[4. If *A. recovers* debt or damages *againſt B.* and after *B. pays the ſum recovered to A. before any execution ſued out*, and thereupon *A. releaſes to B. all actions, executions*, &c. and after within the year *ſues out a capias* againſt B. *and takes him in execution*, B. ſhall not have any action upon the caſe againſt A. for this vexation in ſuing out of execution after a releaſe; but he is put to his *audita querela*, which *is the remedy* which the law has provided for it. Mich. 16 Jac. B. R. between BEMISH AND GILDERSLY, adjudged per curiam.]

Cro. J. 505. pl. 17. Bennus v. Guildley, S.C. & S.P. adjudged accordingly.

† [590]

[5. *So* in this caſe, if after the ſaid releaſe, and after the year, he ſues execution by a capias, and takes him in execution, which is † erroneous, being *after the year*, yet no action upon the caſe lies for this vexation; but he is put to his *writ of error* to help himſelf. Mich. 16 Jac. B. R. between BEMISHE AND HILDERSLEY, adjudged.]

Cro. J. 505. pl. 17. Bennus v. Guildley, S. C. but S. P. does not appear.

[6. If *A. ſues* an action againſt *B.* in which *J. S. and J. D. are mainpernors for B.* and after *A. recovers* againſt B. *and ſues a cap. ad ſatisfaciendum againſt him*, which was *returned nihil*; and after A. knowing that W. was not a mainpernor for the ſaid B. but that J. S. and J. D. were mainpernors, he in diſceit of the court *procured two ſcire facias's* to be awarded *againſt W. as mainpernor of B.* whereupon 2 *nihils* are returned, and thereupon a cap. ad ſatisfaciend', by which the ſaid *W. is taken in execution*, he ſhall have an action upon the caſe againſt A. though it was the act of the court to grant ſuch judicial proceſs; for they were procured *in diſceit of the court*, and to the damage of the party,

Cro. E. 628. pl. 22. S. C. adjudged for the plaintiff by 2 judges, (abſentibus aliis.)

and ſo the action lies for the tortious vexation. Mich. 40 & 41 Eliz. B. R. between BARON AND SLEIGH.]

Cro. E. 714. pl. 37. Skelhorn v. Harſon, S. C. but the jury found the defendant not guilty as to the procurement of the habeas corpus, and therefore this point was not adjudged.

[7. If A. brings an action againſt B. in London, where *C. and D. become mainpernors for B.* and after *C. in the name of B. falſo & deceptive procures an habeas corpus out of the exchequer* to remove the ſuit thither, *and* after *hires E. and F. whom he knew to be inſufficient to become mainpernors for the ſaid B.* and then a *procedendo is granted*, and after *A. recovers there* againſt B. and *B. goes beyond ſea*, ſo that he cannot have execution againſt him, and by reaſon of the ſaid fraud of C. the firſt mainpernors are diſcharged, ſo that A. cannot have execution againſt them; A. may have an action upon the caſe againſt C. for this diſceit. Hill. 41 Eliz. B. R. between SKALEHORNE AND HARRISON.]

Cro. E. 714. pl. 37. Skelhorn v. Harriſon, S. C. and Gawdy and Popham held that the action well lay for this falſity; and afterwards it was adjudged for the plaintiff. ——— Cro. J. 602. Mich. 18 Jac. B. R. in pl. 26. S. C. cited by Doderidge J. and he ſaid he knew it, and that the better opinion was that it was not maintainable, but that by this means the action was compounded, and no judgment given. —Palm. 143. Doderidge J. ſaid he was of counſel with the defendant in that caſe, and that the opinion of the court was once with him; but afterwards Fenner and others doubted. —— Palm. 276. S. C. cited, and that it was affirmed by counſel at the bar, that the opinion was that the action lay; but Doderidge J. ſaid he argued the caſe, and that it was not adjudged, but the plaintiff had good compoſition. ——— 2 Roll. Rep. 195. Doderidge J. cites Shalrowe's caſe, S. C. and ſays that upon the removal of the cauſe, one who was offered to be bail took his oath that he was rated at ſo much, and ſo being accepted as bail, the party brought action againſt him, and reſolved that it would not lie. ——Ibid. 197, 198. Doderidge J. cites Skalron and Harriſon's caſe, that the information of the ſufficiency of the bail being by the attorney the action was brought againſt him; that the court at firſt were of opinion for the defendant, and after differed; and becauſe Doderidge thought his client ought to pay the money upon the principal action, he perſuaded him to compound, which he did, ſo that the caſe never received a full reſolution.

[8. *So* in the ſaid caſe, *though C. did not procure* the habeas corpus *but another, but C. falſo & deceptive informed the clerks* of the court in the exchequer *that the ſecond bail was ſufficient*, where it was not, and ſo the firſt bail was diſcharged, and the plaintiff defrauded of his debt, an action upon the caſe lies. Paſch. 41 Eliz. B. R. between HARRISON AND SCALLERD, adjudged.]

* Fol. 103.

Hob. 205. pl. 259. S. C. adjornatur. —Hob. 266. pl. 352. S. C. adjudged for the plaintiff. But Hobart Ch. J. in delivering the opinion of the court held, that if the defendant had not known of the cattle firſt taken, he had not been liable nor ſubject to this action. ——— Noy 23. S. C. but no judgment.

[9. If *A. hath* a judgment and execution by *fieri facias* for a debt *againſt* * *B.* and the *ſheriff* upon the ſaid writ of fieri facias *returns* to the court, *that he had taken goods to the value, but* that *they remained* in his hands *for default of buyers*, whereupon he ſciens all this, fraudulently and to the intent to charge B. again, *ſues out another fieri facias* to the ſame ſheriff; whereupon the *ſheriff takes other goods of B. and* therewith *ſatisfies A.* his debt, B. may have an action upon the caſe, becauſe this is a vexation and damage done † by diſceit againſt his own knowledge, on purpoſe to vex B. though he executes his malice in an illegal proceeding. Trin. 17 Jac. B. between WATERER AND FREEMAN adjudged per curiam. Hobart's Reports 278. the ſame caſe.]

† [591]

10. Action upon the caſe was brought *againſt S. officer of B. R. that where the plaintiff affirmed a plaint of debt againſt B. in London, the ſaid S. purchaſed ſurperſedeas of privilege for B. ſuppoſing that he was his ſervant in the ſaid court, where he was not* his ſervant, *by which the plaint was diſcontinued, to the damage*, &c. and the defendant pleaded to iſſue, &c. and ſo it was *admitted clearly that the action well lies*. Br. Action ſur le Caſe, pl. 100. cites 21 E. 4. 22.

It was alleged in arreſt of judgment, that the action does not lie, for the *ſuperſedeas was the king's writ*. Et non allocatur; for it was *granted by falſe information of the party*; and the juſtices cannot know the ſervants of the officers but by information. Ibid.

11. Becauſe the defendant *procured J. S. to bring formedon againſt the plaintiff by colluſion*, by which he was travelled by the ſuit, and in bringing a writ of warranty of charters in defence of it, *to the damage of* 40*l.* and becauſe the defendant could not deny the colluſion, the plaintiff *recovered* 20*l. damages; quod nota, for vexation and colluſion only*. Br. Action ſur le Caſe, pl. 17. cites 43 E. 3. 20.

Br. Diſceit, pl. 9. cites S. C.—— S. C. cited by Hobart Ch. J. Hob. 267. in pl. 352.

12. In aſſiſe, if a *ſtranger of his own head puts in pledges*, per Cockin he ſhall be puniſhed for the diſceit. Br. Pledges, pl. 23. cites 8 H. 4. 7.

13. In *treſpaſs* they were *at iſſue*, and when the *inqueſt* was *ready to paſs, the defendant caſt ſuperſedeas of the chancery, becauſe he was ſervant of J. S. one of the clerks* of the chancery. And it was allowed, notwithſtanding it was when the inqueſt was to be taken, and after plea pleaded. And it was ſaid, that *if he be not ſervant, the party may have thereof action upon the deceit*, which is action upon the caſe, as it ſeems. Br. Privilege, pl. 54. cites 11 H. 6. 8.

14. Debt *againſt two as executors*, where the *one is not executor nor ever adminiſtred*, &c. and *he after confeſſed*, &c. and the *other made default*, the *plaintiff recovered*, the other has no remedy but action of diſceit, and this it ſeems upon the caſe, for he ſhall not have treſpaſs, for he *is party to the judgment*; per Littleton. Quod non negatur. Br. Action ſur le Caſe, pl. 66. cites 9 E. 4. 13.

The executor ſhall have diſceit. Br. Executors, pl. 9. cites S. C. and F. N. B. 98.——Br. Executors, pl. 89. cites S. C. and the ſame reaſon why he cannot have treſpaſs.——He ſhall recover as much in damages. F. N. B. 98. (H) and in the new notes there (d) cites S. C. and 21 E. 4. 24. 48 E. 3. 25. 11 H. 4. 84. 20 E. 4. 9. 51.

15. An *attorney appeared* for a man *without authority, and he imparls where the defendant is miſnamed, by which he loſes the advantage of this plea*, or other advantage, the party has no remedy but action upon the caſe againſt the attorney, notwithſtanding that no warrant of attorney be entered; for they will compel him to ſhew forth warrant; quod nota. Br. Action ſur le Caſe, pl. 65. cites 15 H. 7. 14.

16. 8 *Eliz.* 3. *cap.* 2. *ſ.* 4. *If any man ſhall maliciouſly (for vexation and trouble) cauſe or procure any perſon to be arreſted or attached, to anſwer in the courts of, &c. or in any of the ſaid courts,*

In action on this ſtatute the plaintiff declared that

the defendant cauſed him to be arreſted at the ſuit of A. B. C. and D. where B. C. and D. never conſented to it; and that this was for vexation, none of them having cauſe of action.

*at the ſuit of any perſon, whereas there is none ſuch, or without the conſent or agreement of the party at whoſe ſuit ſuch arreſt or attachment is procured, the party ſo cauſing or procuring the ſame, and thereof convict by indictment, preſentment, the * teſtimony of two or more witneſſes, or other due proof, ſhall ſuffer ſix months impriſonment without bail, and ſhall not be enlarged until he hath ſatisfied the party grieved his treble damages; and beſides, ſhall forfeit unto the party in whoſe name the action is brought (if he be known) 10l. to be recovered, as alſo the ſaid treble damages, by action of debt, bill, or plaint in any court againſt the party ſo offending, his executors or adminiſtrators, in which no eſſoign, &c. ſhall be allowed.*

Wray and Gawdy held this out of the ſtatute, but the other juſtices e contra; for one of the parties has colour, and may give ſufficient authority to arreſt him; and it cannot be ſaid to be maliciouſly done. But the ſtatute being miſrecited, it was for that cauſe principally adjudged, quod querens nil capiat, &c. Cro. E. 236. pl. 1. Trin. 33 Eliz. B. R. Vander Plunken v. Griffith.

In debt upon this ſtatute the *proof ſhall be in the ſame action*, and not in any other court. Cro. J. 188. pl. 11. Mich. 5 Jac. B. R. Aldred v. Matthew.

An action on this ſtatute was brought in C. B. but this was held per tot. cur. not to be within the ſtatute; and therefore judgment was given for the defendant. Lutw. 166. 169. Paſch. 3 Jac. 2. Read v. Jones.

Caſe *on the ſtatute 8 Eliz. cap. 2. for proſecuting a ſuit againſt the new plaintiff in the name of the defendant and J. S. without the knowledge of J. S. and in which the new defendant was nonſuited.* The jury found the proſecution malicious. It was argued whether the action lay, but adjornatur. 2 Sid. 162. Hill. 1659. B. R. Chamberlain v Preſcot. ——S. C. cited Raym. 135. by Twiſden J. [who was counſel for the plaintiff in the ſaid cauſe] as reſolved that the action lies for ſuch indictment; but that the judgment was afterwards reverſed in the exchequer chamber, but ſaid it ſeemed a hard caſe if the action ſhould not lie.——S. C. cited by Holt Ch. J. in delivering the opinion of the court, Paſch. 10 W. 3. 5 Mod. 409. And ſays it is true that the judgment was reverſed, but that it was not becauſe the action would not lie, but becauſe he was not indicted of any offence within the ſtatute, as appeared upon the fact, as ſet forth in the indictment. So that if he had been convicted he could have incurred no damage; for the court would have arreſted judgment. ——S. C. cited by Holt Ch. J. as from a MS. report of Bridgman Ch. J. which ſays, the reaſon of the reverſal was becauſe the indictment was for no offence at all; for, in fact, Preſcott arreſted Chamberlaine in his own name and the name of J. S. for a debt due to them jointly, which was lawful without the conſent of J. S. and if J. S. did not appear, if it were in a perſonal action, he might be nonſuit, or if in a real action he might be ſummoned and ſevered; and therefore it was held to be no offence. Ld. Raym. Rep. 380. Mich. 10 W. 3.——S. C. cited thus, viz A. was indebted to B. and C. and B. without the knowledge of C. takes out proceſs *in both their names* againſt A. who afterwards proſecuted B. upon the ſtatute for ſo doing, but B. was acquitted; and then he brought an action on the caſe againſt B. for this malicious proſecution. But adjudged that it would not lie, becauſe he might have demurred to the action on the ſtatute; for the caſe was not within the ſtatute, and ſo it *was his own fault* that he was put to charges by the trial. Carth. 417. in caſe of Savil v. Roberts.——S. C. cited by Parker Ch. J. in delivering the opinion of the court. 10 Mod. 217. Hill. 12 Ann. takes notice that the Ld. Ch. J. Holt, in his excellent argument upon the caſe of Savil v. Roberts, where he gives the reſolution of the court, ſeems unwilling to deny this caſe to be law, though he might.

S. P. by Noy. Arg. Godb. 406. in pl. 486.

17. If *A. is indicted of felony*, and *J. S. gives evidence againſt him*, whereas A. did *no felony*, nor *was* any felony *committed*, action on the caſe will lie againſt J. S. 2 Roll. Rep. 199. cited by Noy as adjudged 30 & 31 Eliz. B. R. German v. Maſon.

2 And. 47. pl. 34. S. C. adjudged accordingly.

† Ow. 158. S. C. adjudged accordingly. —— Cro. J. 601. pl. 26. S. C. cited,

19. Caſe, for that the defendant being *produced a witneſs* on the part of J. D. *ſwore falſely that the* thing in diſpute [† *a jewel*] *was not worth above* 180*l. whereas* in truth *it was worth* 500*l.* by reaſon whereof the jury gave but 200l. damages, and found againſt the defendant. It was moved in arreſt of judgment, that the action did not lie; for the law intends the oath of every man to be true, and there was not any puniſhment for any falſe oath of any witneſs by the common law; and if this action

ſhould

ſhould be allowed, he might be puniſhed twice, viz. by the ſtatute, and by action, and no precedent to be found for it; and therefore not maintainable. And 3 juſtices were of the ſame opinion, and that if this might be ſuffered every witneſs might be drawn in queſtion. Wherefore judgment was given for the defendant, againſt the opinion of Anderſon. Cro. E. 520. pl. 48. Mich. 38 & 39 Eliz. C. B. Damport v. Symſon.

and agreed to by Mountague Ch. J. Doderidge and Chamberlaine.—S. C. cited by Mountague Ch. J. 2 Roll. Rep. 198. and Ibid. Arg. 195.—S. C. cited Palm. 144. Arg. But Noy ſaid that the reaſon of that judgment was becauſe a jewel is of no certain value, but only as * perſons eſteem it; ſo that it was not a falſe oath when he valued it at 180 l. that being according to his eſtimation. Mountague Ch. J. accorded to this reaſon.

19. Caſe, for that B. brought *debt upon a bill of* 40*l.* *It appeared to the court that all was ſatisfied but* 28*s. and thereupon ordered, that if the plaintiff would not accept of the* 28*s. with damages*, then *the now plaintiff ſhould imparl till Oct. Mich.* and the *defendant knowing this, procured a nil dicit to be entered.* The defendant *demurred, for that he did not ſhew a tender of the* 28*s.* without which he was not to have the benefit of the order; *beſides*, that this action lies not in reſpect of the matter, *the entering the nil dicit being the act of the court.* But all the court held e contra. But the not alleging any tender is ill; for without that there is no breach of the order in the now defendant, and then his procuring the nihil dicit was lawful. Cro. E. 793. pl. 38. Mich. 42 & 43 Eliz. C. B. Perren v. Budd.

20. Upon a jury returned, a *ſtranger*, who was not one of the jury, *cauſed himſelf to be ſworn in the name of one who was of the jury.* All the court agreed that he might be indicted for that miſdemeanor. And by Reeve and Foſter juſtices, the parties may have an action upon the caſe againſt him. Mar. 81. pl. 132. Paſch. Term. 16 Car. Anon.

21. Caſe for *making a falſe affidavit in chancery*, by reaſon whereof he was damnified to ſuch a ſum. It was moved in arreſt of judgment, that the action would not lie, but that the plaintiff ought to take his remedy by indictment; for where a man is compelled to give evidence, if it is falſe he ſhall not be puniſhed by an action on the caſe. But judgment for the plaintiff niſi cauſa, per 3 J. but Haughton e contra. 2 Roll. Rep. 195. Mich. 18 Jac. B. R. Ayre v. Sedgwick.

S. C. moved again, and debated by the court, but not reſolved.—Cro. J. 601. pl. 26. Eyres v. Sedgewick, S. C. adjudged for the defendant by 3 juſtices, but Haughton e contra.—Palm. 142. S. C. and there Haughton held that the action does not lie. And judgment was given by all the four juſtices againſt the plaintiff.

If one make a *falſe affidavit, by which the party is arreſted by proceſs of contempt*, he may have an action on the caſe, and recover damages. 12 Rep. 128. ſays it was agreed.—3 Mod. 108. Paſch. 2 Jac. 2. B. R. Dawling v. Venman, caſe was brought for making a ſcandalous affidavit in chancery, viz. *Mr. D. is a rogue and a knave, and I will make it out before my lord chancellor; and I will have him in the pillory.* It was moved in arreſt, that the truth of an oath ſhall not be liable to a trial in an action on the caſe, becauſe the law intends every oath to be true; and that before the 3 & 11 H. 7. no puniſhment was at common law for a falſe oath made by any witneſs; and therefore no action will lie for a ſcandalous affidavit. Adjornatur.—Adjudged that no action will lie. 2 Show. 446. pl. 409. Dawling v. Wenman, S. C.

Caſe, &c. for that he being an officer in the cuſtoms, *made a falſe affidavit* of him *in chancery, concerning* ſome *miſbehaviour in his office, and* afterwards *petitioned the commiſſioners* of the cuſtoms againſt him; and *thereupon cauſed him to be turned out.* It was moved in arreſt of judgment, that an action would not lie for making a falſe oath, nor for the petition, becauſe it was done in a courſe of juſtice. But per curiam, the action is not founded on the oath, nor on the petition, which are only inducements

inducements to prove the malicious procuring them to be turned out. And the jury have found that it was falſely and maliciouſly done. Judgment for the plaintiff. 1 Lev. 119. Mich. 15 Car. 2. Cox v. Smith.

Sid. 424. pl. 4. Daw v. Swaine, S. C. adjudged for the plaintiff, becauſe he had ſpecial damages by ſuch falſe pariance.—Mod. 4. pl. 15. S. C. and the judges ſeemed to hold it actionable; but no judgment is mentioned.——

22. Caſe, &c. for that the defendant *having no cauſe of action for more than 40l. did falſely and maliciouſly bring an action, and cauſed the ſheriff to arreſt the plaintiff for 500l. and to hold him to ſuch bail as he could not find, and ſo laid in priſon ſuch a time.* The defendant *pleaded that he had cauſe of action to the value of 200l.* and *traverſed that he informed the ſheriff that he had cauſe of action for 500l.* After verdict it was moved, that it appears by the pleadings on both ſides, that the defendant had a good cauſe of action, and that it is not a crime to inlarge the ſum, becauſe he *might not know certainly what is due.* But per cur. the plaintiff having declared that it was done falſely and maliciouſly, and it being ſo *found by the jury*, and *that he was thereby forced to lie in priſon*, it was * adjudged for the plaintiff. Lev. 275. Mich. 21 Car. 2. B. R. Dowſe v. Swaine.

S. C. cited by Holt Ch. J. in delivering the opinion of the court, Paſch. 10 W. 3. 5 Mod. 409.—So in caſe for falſely procuring him to be arreſted for 500 l. and impriſoned for ſuch a time, ubi revera the then plaintiff had *not any cauſe of action vel ſaltem non tantam cauſam* actionis, it was moved in arreſt that it was not poſitively ſaid that he had no cauſe, but that he had no cauſe, or at leaſt not ſo much; and that it was not ſo much if it wanted 1s. But it being found to be maliciouſly done, judgment was ruled for the plaintiff. Lev. 275. Mich. 21 Car. 2. B. R. Stribler v. Johns and Waters.———2 Keb. 547. pl. 19. Stribling v. Anthony and Strange, S. C. adjornatur.———Ibid. 557. pl. 49. S. C. but ſtates it for *ſuing out a lattitat without date, returnable ſuch a return quinden' Martini, not ſaying what year*, and that poſtea ſuperinde the defendant was arreſted 20 Oct. and forced to ſpecial bail, where the plaintiff had none, or very ſmall cauſe of action. It was moved in arreſt of judgment, that this arreſt was void, and cannot be intended on the firſt writ; but it being after verdict, judgment was given for the plaintiff. And by Twiſden and Morton, on *action of a great ſum averred ea intentione that the defendant ſhould not find bail, is not ſufficient* cauſe of action, *unleſs* the defendant be *averred to be arreſted, and put to charge* by virtue thereof.

* [594]

† Ibid. Rainsford ſaid that the words (without cauſe) ſhall be underſtood without any libel, or legal proceedings againſt him.

‡ Sid. 463. pl. 7. S. C. ſtates it to be alleged fine aliqua cauſa, and alſo that it was done without giving the plaintiff any notice. Adjudged for the plaintiff.——Lev. 292. Hoſkins v. Matthews, S. C. it was moved in arreſt of judgment, becauſe it does not appear for what cauſe the ſuit was; but it is ſaid, and found to be falſely & ſine aliqua cauſa; and the action lies, and judgment for the plaintiff.———2 Keb. 636. pl. 59. S. C. adjornatur.———Ibid. 663. pl. 22. S. C. and the court held that caſe lies on a falſe proſecution ex officio clearly, as on adultery, and ſuch cauſes, which are proſecuted by promoters; and the defendant ſhould have pleaded that there was a juſt cauſe, or that the ſuit was inter partes, and not ex officio. And judgment for the plaintiff.

23. Caſe, &c. for maliciouſly *impleading* † [*ſine aliqua cauſa*] and *cauſing him to be excommunicated in the ſpiritual court*, and that he was *taken upon excom. cap. and impriſoned until he was abſolved.* It was moved in arreſt of judgment, that this action would not lie for ſuing in a ſpiritual court, though without cauſe; but adjudged that it would, for though in action between party and party there, in which defendant ſhall have his coſts, no action will lie if the court has juriſdiction, yet where there is a *citation ex officio*, and it is proſecuted maliciouſly ‡ without cauſe, the party ſhall have his action, becauſe, if acquitted in ſuch ſuit, he can have no coſts. Vent. 86. Trin. 22 Car. 2. B. R. Hocking v. Matthews.

25. Caſe will lie for a *malicious arreſt where there is no probable cauſe of action*; per Pemberton Serj. Arg. but that the principal caſe

caſe was much ſtronger, which was an action on the caſe, for cauſing him to be indicted falſo & malitioſe for taking away 100 bricks, and ſo put to great charges, and that the jury acquitted him, and ſaid that this was in nature of a conſpiracy; and the court agreed that the action would lie after an acquittal upon a greater or leſſer treſpaſs. 2 Mod. 51. Trin. 27 Car. 2. C. B. Norris v. Palmer.

26. Caſe, for that the *defendant ex malitia ſua, &c. ſine aliqua rationabili cauſa, procured him to be arreſted, and impriſoned until he gave a warrant of attorney to confeſs a judgment for* 20*l.* Upon a demurrer it was objected that an action would not lie againſt the defendant for proſecuting the king's writ in a proper court, becauſe it would deter the ſubjects from ſuch proſecutions, and a man may be miſtaken in his action; and it is *not ſaid that he, ſciens that he had no cauſe of action, ſued.* Charleton held ſtrongly that the action did not lie, becauſe the law had provided another remedy, viz. coſts. Jones Ch. J. and Street held that the action lies, for the cauſeleſs and malicious vexation premeditated and confeſſed by the demurrer. Levins doubted, becauſe it was not expreſsly laid ſciens, that he had no cauſe of action; but inclined that the action lies, becauſe the defendant compelled the plaintiff to give him judgment for 20l. whereby he is deprived of coſts. Sed adjornatur. 3 Lev. 210. Hill. 36 & 37 Car. 2. C. B. Webſter v. Haigh.

27. Caſe, for *proſecuting him in the ſheriff's court of London for rent of land in the country*, when he had *no cauſe of action ariſing within the juriſdiction.* It was moved in arreſt of judgment, that though the ſheriff's court had not an original juriſdiction in this caſe, yet when the plaintiff was in the city that court had a juriſdiction over his perſon; beſides he might have pleaded to the juriſdiction, or ſet forth in his declaration that he was held to unreaſonable bail, and that might have been ſome colour for an action. The judgment was ſtayed. 4 Mod. 13. Hill. 2 W. & M. Baugh v. Killingworth. [595]

28. If A. ſues an action againſt B. for mere vexation, B. in ſome caſes, upon *particular damage*, may have an action; but it is not enough to ſay that A. ſued him falſo & malitioſe, but *muſt ſhew the matter of the grievance ſpecially, ſo that it may appear to the court to be manifeſtly vexatious;* per Holt Ch. J. in delivering the opinion of the court. Ld. Raym. Rep. 380. Mich. 10 W. 3. in caſe of Savil v. Roberts.

29. Caſe, for *arreſting without cauſe* of action, will not lie, unleſs he be held to *exceſſive bail.* 12 Mod. 257. Mich. 10 W. 3. Neal v. Spencer.

(I. c) In what Caſes it lies.

[1. IF *A. is commorant in Middleſex*, and *B. knowing thereof*, falſo & malitioſe *lays an action againſt him in London, and* to the intent that his goods ſhould be forfeited, *makes a ſuggeſtion that A. is commorant in London, and ſo proſecutes* the ſuit *till A. is outlawed,* Lane 49. Shoftbey v. Waller and Bromley, S. C.

adjudged for the plaintiff. —— Noy. 23, 24. cites S. P. as adjudged in Sharplee's caſe, and ſeems to intend S. C.——S. P. and ſeems to be intended the S. C. cited Mod. 4. in pl. 15. by Morton J. by the name of Foxley's caſe.

outlawed, A. may have an action upon the caſe againſt B. for this vexation. Hill. 7 Jac. in ſcaccario, between SHOSBY, plaintiff, AND WALKER AND BROMLYE, defendants, adjudged. Quod vide Coke's Book of Entries, Action ſur le Caſe, 42.]

[2. Hill. 13 Edw. 3. B. R. 101. Thomas Ufflete, *receptor denariorum regis* pro vadiis ſolvendis ſoldiariis in exercitu regis in Scotia, &c. *implacitat* plurimos *pro captione ſive reſcuſſione equi per ipſum capti pro ſervitio regis ad portandum* 400*l. uſque Scotiam*, apud F. ad damnum 1000l. defendant pleads not guilty, ideo venit jurata.]

[3. Paſch. 1 Edw. 3. B. R. Rot. 59. Oto de Grandiſono cuſtos inſularum de Gernere & Jereſy, & aliarum inſularum adjacentium, recovered per juratam 1000l. againſt Johannem de Vivers, becauſe he with 200 others *impriſoned him for* 11 *days, quo minus officium ſuam exercere non potuit.*]

[4. If *tenant by ſtat. merchant cuts down timber trees*, it ſeems that the value of them may be recouped in a ſcire facias ad computandum; but he in the reverſion may have an action upon the caſe againſt him for the damage, over and above the value. 21 Edw. 3. 26. B.

[596] (I. c. 2) Where it lies. Upon legal Proceedings in Courts. Pleadings.

1. DIſceit on the caſe becauſe the *defendant forged a releaſe, by which the plaintiff loſt a ward in writ of ward brought by him againſt B.* and becauſe he *did not ſhew that judgment was given againſt him* in the writ of ward, *nor what delay he ſuffered* by the releaſe, therefore the writ was abated; quod nota. Br. Action ſur le Caſe, pl. 68. cites 39 E. 3. 13.

Br. Action ſur le Caſe, pl. 49. cites S. C.

2. Diſceit was brought againſt R. P. becauſe he *ſued writ of debt againſt the plaintiff in the name of M. and* 3 *capias's and exigent without the aſſent of M.* and he did not know of it, by which he (the plaintiff) was vexed to the coſts and damages, &c. And the *defendant ſaid*, as to the original, *that the ſaid M. retained him at K. to be of his counſel to ſue the writ*, by which he ſued it by the aſſent of the ſaid M. Priſt, judgment ſi actio; Mecheley ſaid, you ought to have *traverſed abſque hoc that you ſued without his aſſent;* But Hals J. ſaid no; for the iſſue is perfectly tendered, becauſe the *declaration is upon the negative* that he ſued the other not unknown to viz. * without the conſent of the ſaid M. which is a mere negative, and when a negative is alleged, it ſuffices for the other to anſwer accordingly by an affirmation, which makes a perfect iſſue; for *a negative of the one part or the other ought to be in every iſſue*, otherwiſe it is not a good iſſue, *unleſs in a ſpecial caſe*, and as *to the* 3 *capias's and exigent, he pleaded arbitrement*

* Nient Sache.

arbitrement at another place, which the plaintiff challenged; for he is not grieved by the original, but by the capias's and exigent, therefore the laſt plea is ſufficient for all. Hals ſaid no; you have alleged the whole, therefore he ought to anſwer to all. By which the *plaintiff replied*, as to the arbitrement, *no ſuch ſubmiſſion, and* as *to the firſt matter that he ſued the original, as the plaintiff has ſuppoſed, without the aſſent and will of M.* Priſt, and the other ut ſupra, e contra. But by the Book of Entries, he who pleaded the affirmation to the negative ſhall put himſelf upon the country; for this is an iſſue immediately. Br. Diſceit, pl. 15. cites 7 H. 6. 43.

3. In treſpaſs upon the caſe againſt one who was *attorney* for the plaintiff, and had *falſely acknowledged in court that the plaintiff was ſatisfied of a debt*, by which the plaintiff excluſus fuit of this debt, &c. It was held that he *ought to ſuppoſe by* the writ, by *expreſs words, that he was not ſatisfied of the debt*; for it ſhall not be intended by the words (excluſus fuit) that he was not ſatisfied. But Chaunt' for the defendant paſſed over degree. Thel. Dig. 99. Lib. 10. cap. 9. ſ. 17. cites Mich. 11 H. 6. 2.

4. Bill *of diſceit by L. againſt P. and W. attorney*, for that *P. was deputed by the ſheriff of D. to ſend writs ſerved by the ſheriff to C. B. and there came to the ſaid P. a writ of habeas corpora in placito terræ between L. and D. ſerved, to ſend in* 15 *Paſch. and the defendants imbezilled it at D. in the county of Middleſex ad damnum*, &c. And it was pleaded to the bill, becauſe *all the record had not been alleged certain.* Per Porter, *nul tiel record* is no plea in this action, but he ſhall anſwer to the tort by which the defendant was compelled to anſwer. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72.

5. *And* after he *pleaded* to the abatement thereof, *that P. was deputed, and W. the attorney had nothing to do, and therefore he ought to have ſeveral bills*, et non allocatur. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72.

6. *By which* he *ſaid that the bill was in retardationem recuperationis*, where it *ſhould be* in retardat' *ſectæ ſuæ*, & non allocatur; for *bill has no form, therefore, if it has ſubſtance it is ſufficient.* Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72. [597]

7. *And* after he *ſaid that this ſuit ought to be againſt the ſheriff himſelf*, & non allocatur; for the defendants made the diſceit, and not the ſheriff, and there it is agreed, that if *one makes the diſceit or treſpaſs by excitation of the other*, yet the ſuit lies againſt both, quod nota, and ſhall give the matter in evidence, as it ſeems; for there is no acceſſary in treſpaſs. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72.

8. *By which* he *ſaid, that after the delivery of the writ to him, and before the ſubſtraction, the ſheriff by N. his under-ſheriff, commanded him to retain the writ*, viz. at D. in the county of D. *by which he did it, which is the ſame ſubſtraction*, &c. *where the action was brought in Middleſex, and the tort ſuppoſed there*, and therefore no plea *without traverſing the tort in Middleſex*, by the beſt opinion. Br. Bille, pl. 9. cites 19 H. 6. 29. & 50. & 72.

9. Diſceit

Br. Decies Tantum, pl. 2. cites S. C.

9. Diſceit was brought, becauſe *in præcipe quod reddat* brought by the plaintiff againſt the *defendant* in bank at Weſtminſter in the county of Middleſex, he *caſt protection quia moratur*, &c. *where he was attending at his own buſineſs in the county of York.* Judgment was demanded of writ, becauſe it was *de placito de uno meſuagio, and* 40 *acres of land*, and *did not ſhew by what action*; and yet well, becauſe the *certainty of the land appeared.* Br. Diſceit, pl. 1. cites 20 H. 6. 10.

10. In writ upon the caſe, that the *defendant manucepit curare equum querentis de infirmitate*, and the defendant ita negligenter curam ſuam fecit quod equus interiit, &c. no *contra pacem* ſhall be in ſuch writ, and if there be it ſhall abate. Thel. Dig. 114. lib. 10. cap. 24. ſ. 11. cites 43 E. 3. 33. Trin. 17 E. 4. 2.

Show. 254. S. C. Holt Ch. J. ſaid the point was fit to be conſidered by all the judges. —— 2 Mod. 4. S. C. Holt Ch. J. ſaid that of late it is held, that caſe

11. Caſe, &c. *for proſecuting a plaint in London, when the cauſe of action did ariſe out of the juriſdiction.* It was moved in arreſt of judgment, that the plaintiff ought to have pleaded it to the juriſdiction, and if the plea had been refuſed, then a prohibition would have been granted. The court inclined to that opinion, and judgment was ſtayed till the plaintiff ſhould move it again. And afterwards the plaintiff moved for judgment, and the caſes in the * margin were cited to maintain the action; but the court was not ſatisfied with the action. Carth. 189. Temple v. Killingworth.

will not lie for proſecution in an inferior court, where the court has not juriſdiction; that the firſt caſe in point was at Huntingdon aſſiſes, and referred to C. B. and there adjudged that for ſuing one without any cauſe of action at all, no action lies, unleſs it appears to be with a malicious and vexatious deſign.

* Hob. 205. Cro. J. 667. Cro. E. 628. 836. —— Stat. 3 E. 1. cap. 38. Regiſter 98. F. N. B. 45. (F) 1 Saund. 221. Sid. 463. 4 Rep. 14. b. Kelw. 106. a. 10 Rep. Caſe of the Marſhalſea. Fitzh. Eſtoppel 18. 7 H. 6. 45. Vent. 369. Hudſon v. Cook, Trin. 27 Car. 2. Smith v. Fuller.

[598]

See (M. c)

(K. c) The Giſt of the Action.

† The original is miſprinted (ſue)

[1. IF a man *finds my goods, and does not deliver them upon demand*, an action upon the caſe lies for the non-delivery of them upon demand, per quod † I loſe ſo much of the profit of the goods, though this is only a non-feaſance. Paſch. 15 Jac. B. R. MOULD AND PYNN, adjudged in a writ of error.]

See (N. c) pl. 2. —— See tit. Toll (I) pl. 3. in the notes there.

[2. An action upon the caſe lies *for toll, ſhewing that ſuch* a body politic of a vill has *uſed, time whereof memory, &c. to repair certain walls, gates, and bridges* within the vill, *and* in conſideration thereof *have had time out of mind*, &c. de quolibet ſummagio braſii, ſcilicet, *of every horſe-load of malt* imported into the ſaid vill to be ſold *one half-penny, and that the defendant ſuch a day did import ſo many horſe-loads of malt to be ſold in the vill, per quod he ought to have paid ſo much* for toll, the *which he refuſed* to pay, licet requiſitus, &c. Though an action of debt lies, yet this action lies alſo, it being grounded upon a deceit. Mich. 11 Car. B. R. between SPROSLY AND EVANS, per curiam, ruled in a writ of error ‡ as to this point, upon a judgment given in the town of Ludlow, though reverſed for another matter.]

‡ Fol. 104.

[3. In an action upon the caſe, if the plaintiff *declares that the defendant pulled down and proſtrated one wall, which divided the houſe of the plaintiff and defendant, and* alſo *pulled off the tiles from the houſe of the plaintiff, per quod the water came into the plaintiff's houſe, and rotted the timber*, therefore the action lies; for though he might have an action of treſpaſs for pulling off the tiles, yet this action lies alſo, inaſmuch as it is alleged that by reaſon thereof the timber of the houſe is rotten. Mich. 10 Car. B. R. between BOOTH AND OLIVER, adjudged, this being moved in arreſt of judgment after a verdict for the plaintiff.]

(L. c) Caſe, not Aſſiſe.

See Nuſance (H).

[1. FOR *negligence in non-feaſance*, an action upon the caſe lies, and not an aſſiſe. 11 Hen. 4. 83.]

Br. Action ſur le Caſe, pl. 44. cites S. C. —— Br. Nuſance, pl. 31. cites S. C. per Thirn. and Hanke.

[2. *As* if he, who ought to repair a bridge, *does not repair it, per quod it falls*, an action upon the caſe lies for this. 11 H. 4. 83.]

Br. Action ſur le Caſe, pl. 44. cites S. C. and S. P.

[3. *So* if he, who ought to *ſcour a ditch*, does not ſcour it, *per quod my land is ſurrounded*, an action upon the caſe lies. 11 Hen. 4. 83.]

Br. Action ſur le Caſe, pl. 44. cites S. C. —— Br. Nuſance, pl. 31. cites S. C. per Thirn. and Hanke.

[599]

[4. But for the *miſ-feaſance* of a thing, no action upon the caſe lies, but an aſſiſe. 11 H. 4. 83.]

Br. Action ſur le Caſe, pl. 44. cites S. C. —— Br. Nuſance, pl. 31. cites S. C.

[5. *As* for the *making an hedge croſs the way*, no action upon the caſe lies. 11 Hen. 4. 83. D. 8 El. 250. 88. Contra Paſch. 15 Jac. B. R. adjudged.]

D. 256. b. pl. 88. Paſch. 8 Eliz. Yevance v. Holcome.

[6. If a man *ſtops my way totally*, though an aſſiſe lies for it, yet I may have an action upon the caſe at my election, as in SLADE's caſe, that *debt, or* an action upon the *caſe lies upon a contract*. Paſch. 15 Jac. B. R. adjudged, this matter being moved in arreſt of judgment. Paſch. 42 Eliz. B. R. between * CHURCH AND CANTEL adjudged, Trin. 11 Jac. B. R. between † COLLOCOTE AND TUCKER adjudged, Mich. 3 Jac. B. ‡ GAINSFORD's caſe, per curiam.]

* Noy 37. Cautwell v. Church, S. C. in a writ of error, and affirmed the judgment, for that the action on the caſe was well brought; and perhaps a ſtranger did it, and not the tertenant; or he that did it may be dead, and ſo no aſſiſe.

† See (N. c) pl. 38. S. C. and the note there.

‡ Noy 112. Gainsford v. Nightingale, S. C. adjudged the action well brought.

[7. If a man *ſtops my water-courſe, per quod my land* of which I am ſeiſed *in fee is ſurrounded*, though I may have an aſſiſe, yet I may

Le. 247. pl. 333. Sly v. Mordant,

may have an action upon the caſe at my election. Mich. 32 & 33 Eliz. B. R. between STYE AND MORDANT adjudged.]

S. C. adjudged accordingly. —S. C. cited Arg. 3 Mod. 50.

[8. If I have *common* in Black-acre, as *appendant* to certain *lands* whereof I am ſeiſed *in fee*, and the *tenant* of Black-acre *plows the land*, I may have an action upon the caſe againſt him for the diſturbance of my common, though I am ſeiſed in fee of the land to which the common is appendant. Mich. 32 & 33 Eliz. B. R. between LOVERET AND TOWNSEND adjudged.]

Cro. E. 198. pl. 19. S. C. held that he might have either caſe or aſſiſe.—2 Le. 184. pl. 229. S. C. held accordingly. ——3 Le. 263. pl. 354. S. C. in totidem verbis.

[9. If a man *diverts totum curſum aquæ* from my water-courſe to my mill, though I may have an aſſiſe for this, yet an action upon the caſe lies at my election. Mich. 10 Jac. B. R. KIRBY's caſe, per curiam.]

See 4 Rep. 86. Paſch. 43 Eliz. Lutterell's caſe, where action on the caſe was brought for breaking a bank, and diverting the water from his corn-mills erected in the place of ancient fulling-mills, and judgment for the plaintiff, and affirmed in error.

10. If the *lord approves* where I have common, and *ſtops my way appendant to it*, I ſhall have aſſiſe of *common*; and if my way appendant is ſtopped, I ſhall have aſſiſe of nuſance, but not where a *way in groſs* is ſtopped; for action upon the caſe lies there, and not aſſiſe; per Scotte and Hanke. Br. Aſſiſe, pl. 55. cites 11 H. 4. 25.

In the caſe of a *private office*, as in that of clerk of the Butchers' Company in London, if it be a freehold, either caſe or aſſiſe lies; per Holt Ch. J. 6 Mod. 18 Mich. 2 Ann. B. R. Anon.

11. In ſcire facias it was ſaid, that if a *man has an office*, and another diſturbs him, ſo that he *cannot have poſſeſſion to have aſſiſe*, there the party ſhall have an action upon the caſe. Br. Action ſur le Caſe, pl. 94. cites 6 E. 4. 9.

[600]

12. Upon a *contract* debt only lies, and not action on the caſe, becauſe defendant may wage his law. Mo. 433. pl. 596. Hill. 38 Eliz. B. R. Slade v. Morly.

Cro. J. 257. pl. 15. S. C. ſays, that if the lord cuts down all the thorns, the commoner may have aſſiſe. ——F. N. B. 58. (I) 59. S. P. that B. ſhall have aſſiſe. ——9 Rep. 112. b. it was held per cur. that if B. has common of eſtovers in fee or for life, and all the wood is cut down, B. ſhall have aſſiſe, becauſe it is a diſſeiſin of his common; but if he has only a *term* in them, he ſhall have action on the caſe; and cited S. P. adjudged Hill. 5 Jac. C. B. Buttolph v. Kipping. ——S. P. as to the fee or freehold, Hob. 48. by Hobart Ch. J. and ſays that the inheritance of the common of eſtovers remains, notwithſtanding there are no eſtovers, or elſe he could not have an aſſiſe wherein he muſt declare of his inheritance or freehold, at leaſt by grant or by preſcription; and he ſhall recover a ſeiſin of thoſe eſtovers which are not in being, whereof he is ſuppoſed to be diſſeiſed, and alſo damages, not according to what it now yields, but according to the value it yielded communibus annis, though it was uncertain.

13. If *B. claims reaſonable eſtovers in the ſoil of A. and A. cuts down all the wood*, B. ſhall have action of the caſe, and not aſſiſe; for when all is deſtroyed, he cannot be put in ſeiſin. Yelv. 188. Mich. 8 Jac. B. R. Per cur. in caſe of Dewclaſs v. Kendall.

END OF THE FIRST VOLUME.